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S. HRG. 110–1133

OVERSIGHT OF THE U.S. DEPARTMENT OF TRANSPORTATION'S CROSS-BORDER TRUCK PILOT PROGRAM

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

MARCH 11, 2008

Printed for the use of the Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE

74–617 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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OVERSIGHT OF THE U.S. DEPARTMENT OF TRANSPORTATION'S CROSS-BORDER TRUCK PILOT PROGRAM

TUESDAY, MARCH 11, 2008

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 2:34 p.m. in room SR–253, Russell Senate Office Building, Hon. Byron L. Dorgan, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. We will call the hearing to order on the U.S. Department of Transportation's Cross-Border Pilot Program, dealing with cross-border Mexican trucking.

Today's hearing will examine the decision by the Department of Transportation to continue with its Mexican trucking pilot program, despite what I—and a number of others in the Congress—feel is clear language from the U.S. Congress, prohibiting the use of appropriated funds for that purpose.

In my judgment, the intent of Congress is quite clear, the Department of Transportation is prohibited from using appropriated funds in this fiscal year to operate this pilot program.

Secretary Peters, you have testified previously on this subject, and have commented publicly by your agency that the Department of Transportation attorneys, your lawyers, are saying that there is some loophole in the language that would allow the Department to proceed with the pilot program.

Let me describe the sequence of events that brought us to this point. At 7:30 p.m. on September 6, 2007, the Department's Inspector General released a report finding problems with Mexico's record keeping, relating to accident reports, vehicle inspections or drivers' violations.

In fact, what the Inspector General who is here today said, is that there is no central repository of vehicle inspection records, driver's records, or accident reports. To the extent that we have any of those reports, they are voluntarily provided. Outside of that, they don't exist.

One hour after 7:30 p.m. on September 6, when the Inspector General released his report, before the ink on that report had dried, the Department of Transportation at 8:30 p.m. on September

6, announced it would begin to allow Mexican trucks to do long hauls into the United States as part of the pilot program.

On September 11, 2007, that's 5 days later—the U.S. Senate voted 74 to 24, for an amendment that I offered in the U.S. Senate to the Transportation Appropriations bill, prohibiting the Department of Transportation from proceeding with the pilot program. The House of Representatives had previously passed such an amendment.

Everyone involved, I believe, perfectly well understood what we were voting on. We were voting to cut off funding for the pilot program that had just begun. I said so on the floor of the Senate, many other Senators on both sides of the issue said so. The final vote was 74 to 24 in favor of cutting off funding for the pilot program.

A 74–24 vote is not considered a close vote in the U.S. Senate. It is an overwhelming expression of the Senate that this pilot program should not be funded.

I have a couple of charts I want to show. Senator McCain was on the floor of the Senate at that time, in fact, he opposed my amendment. John and I are good friends, and John used to chair this Committee. But friendship doesn't always result in the same voting, and John disagreed with me and he voted against me—he was on the losing end of the 74–24 vote.

But here's what John McCain said, on the floor of the Senate, "unfortunately, the Senate has voted 74–24 to prevent the pilot from going forward." He knew what the vote was, he understood what he was voting on.

The underlying bill provides funding for the Department of Transportation's 1-year pilot program that would allow a maximum of 100 Mexican trucks to enter and travel to a single destination in the United States this year. This pilot program is the result of planning and preparation over the past 14 years... It is now time to allow these two countries to move forward with this 1-year pilot program that will have numerous economic benefits for the two nations.. Unfortunately, the Senate has voted 74 to 24 to prevent the pilot from going forward. As such, we continue to fall short of abiding by the obligations we committed to when we approved NAFTA.

SENATOR JOHN MCCAIN

Remarks on floor of U.S. Senate, September 11, 2007

Senator DORGAN. And I simply use Senator McCain's statement on the floor to say that this was not ambiguous, in any way. The

Senate language was eventually incorporated into the omnibus appropriations bill, and when the Conference Report was issued, the conferees noted that the Senate and the House had approved similar provisions.

Again, there was no question that the Congress was prohibiting the Administration from proceeding with its pilot program.

But on January 4, 2008, the Administration announced it intended to proceed with the program anyway. The Administration took the position that the omnibus language prohibited on the creation of some future pilot program, and not the current program.

Well, I have a letter from the Legislative Council that drafted this particular provision, and that letter says, "The amendment was 'intended to preclude the carrying out of any demonstration program, including the pilot program put into effect, September 2007.'" That is from the Senate legislative council staff that drafted the amendment. That was the intent of the amendment, that's the way it was drafted.

I have two letters from distinguished professors at law schools, both of these scholars are Harvard-trained lawyers, both senior positions in the U.S. Justice Department in their previous lives, both experts in Administrative Law, and both say that the omnibus Appropriations bill flatly prohibits the Department of Transportation from proceeding with the pilot program.

Yet, the Administration has paid no heed to any of this. They have found attorneys to justify almost everything, they have found attorneys to say that torture is legal, and now they find attorneys to say that the Cross-Border Mexican Trucking Program that Congress has explicitly prohibited funding for, is legal, as well.

Let me just mention, I want to go through a couple of charts, if I might.

First of all, as we go through them, I want to point out that, for me, if we had equivalent standards between American trucking and Mexican trucking, I wouldn't be here, at this hearing. I wouldn't raise questions about a cross-border trucking pilot, or otherwise. I'd say, if we have equivalent standards, with respect to driver's records, vehicle records, accident reports and so on, if we felt the trucking situation in Mexico was equivalent to ours, you'd find no objection from me. But that is not the case.

Now, I believe that the Administration has said because there is a requirement in NAFTA, we have to proceed, notwithstanding other issues. The other issue, for me, is when the Inspector General tells me what I generally already knew, and that is, there is no central repository in Mexico of the type of information we generally have in this country, with respect to driver's records, accidents reports, and vehicle inspections.

The absence of such criteria, in my judgment, should render us unwilling to proceed with cross-border long-haul trucking, until such circumstances exist.

The Administration, I believe, has always intended to decide to do what it wanted to do, notwithstanding what the Congress told it to do.

This quote is from December 19, 2007, and it's a news article in the *Congress Daily,* "Mexico might limit imports of pork and rice in retaliation for," et cetera, et cetera, and in this article it says,

"The Bush Administration might find a way to continue the pilot program, regardless of whether Congress cuts its funding." A spokesman for the Federal Motor Carrier Safety Administration said, "It will review its options."

CongressDaily

Lobbyists Warn Of Mexican Retaliation Over Trucking Issue

December 19, 2007

Mexico might limit imports of U.S. pork and rice in retaliation for lan in the FY08 omnibus spending bill cuttin Mexican comme lobbyis the spe languag truck p environ operato progra rigorou operati has not of the f

supposed to stand on their own merit, not serve as a form of retaliation." In 2001, Mexico went through a process that allowed it to retaliate due to broader tes was not meeting its Mexico has never kesman for Mexico's U.S. The Mexican he bill is enacted. We are ilable to use under

Mexico might limit imports of U.S. pork and rice in retaliation for language in the FY08 omnibus spending bill cutting off funding for Mexican commercial trucks to operate in the United States, lobbyists are warning.

"This would potentially start a huge trade war between Mexico and the U.S.," said Nick Giordano, vice president and counsel for international trade policy at the Nat would go way be has not gone con Giordano said. " was a double-edg spokesman for th comment, saying how things will

Senate Agricultu statement that "a should be kept to interfering with a American Free Trade Agreement and World Trade Organization rules "were intended to avoid this kind of tit-for-tat. Trade actions can be taken, but they are

erce heard late last week going through exercises nate the implications of hoky, the Chamber's director of transportation infrastructure. "We took that as a signal that they are serious about possible retaliation." Chamber officials then contacted the pork and rice producers and key congressional aides, use of the way the was little ovision removed," pposed to cutting off nd a way to continue Congress cuts e Federal Motor will review its n trying to nths that there are trucks. But critics say problems include a lack of a Mexican facility for drug and alcohol testing for drivers.

"The Bush administration might find a way to continue the pilot program regardless of whether Congress cuts off its funding. A spokeswoman for the Federal Motor Carrier Safety Administration said it will review its options."

Senator DORGAN. I think before there was an announcement in January, the Administration was trying to make a decision, "We're going to do what we want to do, it doesn't matter so much what the Congress thinks."

This is from a September 11 article—"the day the Senate voted, 74–24 vote, the Senate approved a proposal by Senator Byron Dorgan prohibiting the Transportation Department from spending money on the North American Free Trade Agreement pilot program giving Mexican trucks greater access to U.S. highways." Obviously, that reporter knew what we had passed, or at least thought that reporter knew that was what we had passed.

And then it says, "John Hill, head of the Federal Motor Carrier Safety Administration decried the vote, saying that it is a sad victory for the politics of fear and protectionism." My guessing is, that Mr. Hill decried the vote because he thought we were shutting off the pilot program.

USA TODAY

SENATE VOTES TO BAN MEXICAN TRUCKS

September 11, 2007

WASHINGTON (AP) — The Senate voted Tuesday to ban Mexican trucks from U.S. roadways, rekindling a more than decade-old trade dispute with Mexico.

By a 74-24 vote, the Senate approved a proposal by Sen. Byron Dorgan, D-N.D., [illegible]hibiting the Transportation Department from spen[illegible]ey on a North American Free Trade Agreem[illegible] giving Mexican trucks[illegible]

By a 74-24 vote, the Senate approved a proposal by Sen. Byron Dorgan, D-N.D., prohibiting the Transportation Department from spending money on a North American Free Trade Agreement pilot program giving Mexican trucks greater access to U.S. highways.

The p[illegible] housi[illegible] later t[illegible] to Do[illegible] transp[illegible]

Suppo[illegible] not y[illegible] tough[illegible] trucks[illegible]

Until [illegible] commercial border zone stretching about 20 miles inside the United States, except in Arizona, where it extended 75 miles. One truck has traveled deep into the U.S. [illegible] as part of the pilot program.

Blocking the trucks would help Democrats curry [illegible] with organized labor, an important ally for the 20[illegible] presidential elections.

"Why the urgency? Why not stand up for the (tru[illegible] standards that we've created and developed in thi[illegible] country?" Dorgan asked.

Sen. John Cornyn, R-Texas, who drafted a Republican alternative to Dorgan's amendment, said the attempt to block the trucks appeared to be about limiting competition and may amount to discrimination against Mexico.

"I would never allow an unsafe truck on our highways, particularly Texas highways," said Cornyn, whose amendment failed.

Under NAFTA, Mexico can seek retaliation against the [illegible] adhere to the treaty's requirements, [illegible]g tariffs on goods that the treaty [illegible]idney Weintraub, a professor emeritus at [illegible] Texas LBJ School of Public Affairs in [illegible]

[illegible] the Federal Motor Carrier Safety [illegible]ecried the vote saying it is "a sad victory [illegible] fear and protectionism."

[illegible]neral president Jim Hoffa, whose union [illegible]he trucks, [illegible]ered the decision. "We [illegible]e our hig[illegible] with dangerous trucks [illegible]offa said.

The trucking program al[illegible] Mexican carriers [illegible]

John Hill, head of the Federal Motor Carrier Safety Administration, decried the vote saying it is "a sad victory for the politics of fear and protectionism."

[illegible] the

One of the carrier's trucks crossed the border in Laredo, Texas last week and delivered its cargo in North Carolina on Monday and was expected to return to Mexico late this week after a stop in Decatur, Ala.

Senator DORGAN. This has been before a circuit court, a 3-judge court. One of the judges, during the hearing said the following: Judge Dorothy Nelson, February 12, 2008, said, "The Congressional intent is unambiguous. The intention was to halt the pilot program." That, from the bench of a Federal court, and we'll see what the 3-judge court decides, but at least one of the judges, during the hearing, seemed to feel that the intent of Congress was unambiguous.

And finally, I've quoted the DOT Inspector General report, it says, "While the DOT officials inspecting Mexican truck companies took steps to verify the onsite data, we noted that certain information was not available to them, specifically, information pertaining to vehicle inspections, accident reports, and driver violations maintained by Mexican authorities was not available to the DOT authorities, unless such information was included in company records.

Senator DORGAN. The DOT official stated that, either such information was not available from Mexican authorities, or the databases containing such information were still under development.

I would say that I don't want to make a Federal case out of this, but I guess that's why we're here. The fact is, the U.S. Congress passes Appropriations bills, we fund the Department of Transportation, we fully expect the Department of Transportation to comply with our funding requirements. In this case, we have a long-haul Mexican trucking pilot program, now underway, despite the fact the U.S. Congress has cut the funding for that program, and explicitly indicated it can not continue.

Secretary Peters, the last time you were here, I said that I supported your nomination, was happy to do so, and now I regret it. And I regret it because I think you have both been given bad advice, and willingly taken bad advice. I think that there is an arrogance here, with respect to Federal agencies—it's not just yours, there are other examples that I could use today, but you're here, and we're talking about this agency and this issue.

There would not be a hearing if the Department of Transportation had complied with Congressional intent. Congress has explicitly said you may not proceed with the pilot program.

The Congress didn't say that because it wants to punish your pilot program, or because it wants to punish you, or because it doesn't believe in NAFTA, or because it doesn't believe in good relationships with our southern neighbors, the Congress took this action because we know—and now all of us know—that there are not equivalencies with respect to safety circumstances in Mexican long-haul trucking, and American trucking.

You can certify one truck, you can certify one company—you can certify 10 or 100, if you like—and inspect every nut and bolt and every gasket, but the fact is, that still does not justify a decision that suggests that there is some sort of equivalency with respect to safety standards between Mexican trucking and American trucking. That does not exist. And because it doesn't exist, the U.S. Senate—by a 74–24 vote—said you can not continue with the pilot program. And yet, you continue to do that.

I appreciate the fact that you've come to this hearing, I intend to ask a series of questions, as you might expect.

We are going to hear from you, Secretary Peters, you are accompanied by your counsel, D.J. Gribbin, from the Department. Mr. Calvin Scovel, the Inspector General for the Department of Transportation is here.

Mr. Scovel, let me say about you, I think our Inspectors General do a terrific job, I sometimes agree with what they come out with, sometimes disagree with them. But, I generally understand that they put a lot of work into these issues, and I particularly benefit from them, and I appreciate your being here.

Jackie Gillan in the second panel, who's Vice President of Advocates for Highway and Auto Safety, and Mr. Paul Cullen, General Counsel of Owner-Operator Independent Drivers Association will also testify.

Secretary Peters, I appreciate your coming today, and I will recognize you for a statement.

STATEMENT OF HON. MARY E. PETERS, SECRETARY, U.S. DEPARTMENT OF TRANSPORTATION; ACCOMPANIED BY HON. DAVID JAMES GRIBBIN IV, GENERAL COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION

Secretary PETERS. Chairman Dorgan, thank you so much for the opportunity to appear before you today to discuss the Department's Cross-Border Trucking Demonstration Program. It is entirely fitting that we are having this conversation at a time when some had begun to question the equity and the benefits of our existing trade relationships.

This demonstration program should serve as an example of how trade can be used to create new opportunity, new revenue, and new success for U.S. workers, and for U.S. companies. That is because the project was designed to right a decades-old wrong that has prevented American drivers and trucking businesses from earning a single cent off of the hundreds of billions of dollars worth of goods that are shipped by truck across the U.S.-Mexico border every year.

Mexican trucking companies currently have the ability—separate and apart from the demonstration project—to operate within our borders. Since 1982, trucks from Mexico have been allowed to operate within the U.S., in the commercial zones that include cities such as Brownsville, El Paso, Nogales and San Diego.

An additional 800 trucking companies from Mexico continue to have the right that was granted to them by the Interstate Commerce Commission and DOT, to operate anywhere in the United States.

In comparison, U.S. trucks have never had the authority from the Mexican federal government to operate south of the border. This means that, before the start of this demonstration program, not one single American driver has profited from a cross-border trade that is valued at over $260 billion every year.

This means that not one single U.S. trucking company has reaped the rewards of a vast and fast-growing surface trade with one of our biggest and closest trading partners. And this means that the United States—the world's most aggressive proponent of breaking down trade barriers as the best way to improve domestic and international prosperity—has been locked out of one of the few markets where our truckers actually have a real opportunity to compete and to succeed.

It was this imbalance that Presidents Bush, H.W. Bush, and Bill Clinton sought to end, when they negotiated NAFTA's trucking provisions. It was this inequity that Congress so boldly voted to end when it passed NAFTA, and it was this one-sided market that this Administration pledged to end with the establishment, last September, of our Cross-Border Trucking Demonstration Project.

So, when an employee of El Paso-based Stage Coach Cartage and Distribution became the first-ever U.S. driver to haul goods into Mexico last September, he did more than turn a profit—he made history. And he signaled the start of a new era, in which our drivers, our trucks, and our businesses can actually share in the profits that exist in the cross-border trade.

That driver may have been the first, but he was hardly the last. Indeed, U.S. truckers are now taking advantage of this project at a rate of more than 2–1, compared to truckers from Mexico. As of

March 3, U.S. drivers have made more than 680 trips into Mexico. Meanwhile, drivers from Mexico have made fewer than 325 trips beyond the commercial zones as part of this project.

We are achieving this remarkable advantage in our trade, while maintaining absolute safety of our highways. Our onsite audits in Mexico, our rigorous standards for admissions into this program, and our commitment to inspecting every truck, every time, have delivered a safety performance record that is without compare.

To date, the out-of-service rate for trucks in this program, for example, is less than half that of the U.S. trucking fleet, and we have not experienced a single safety incident.

In short, this project supports fair trade. This project levels the playing field for U.S. workers. This project allows American businesses to benefit from our trade relationships, and this project—I respectfully submit, sir—maintains the safety of our highways, which is my highest priority.

Yet, there are those who reason that the cross-border trucking will hurt the domestic shipping industry. How we return to the days when U.S. trucks were prohibited from moving a single dollar's-worth of goods across the U.S.-Mexico border would serve American companies better, is beyond comprehension.

There are also those who argue that this project is somehow unsafe. Yet, the safety record of the participating trucks is actually better than the record of the U.S. trucking fleet. And our self-imposed requirement that trucks be equipped with GPS monitoring devices, allows us to monitor the location, and the duration, of every participating vehicle's trip.

Others have suggested that this project might compromise our homeland security. Given the fact that thousands of Mexican trucks safely enter our country every day outside of this project, it is ensured that this implication must be that U.S. trucks now using our border crossings, will engage in unsavory activities. Needless to say, I do not agree.

And some have suggested that we are not following the "law of the land." They argue, because last December, Congress told us not to establish a Cross-Border Trucking Demonstration Project that we should have dismantled an existing program that is working significantly in favor of United States truckers.

I know that Congress understands that "to establish" means "to set up or create something new." That is why, when it sought to end an existing Departmental program designed to require local communities to pay a small portion of the cost of Essential Air Service, it used the phrase "to establish or implement." And that is why, when Congress sought to end an existing rule that allowed Chinese poultry products into the U.S., it also used the phrase "to establish or implement."

When Congress chose, instead, to use narrower language last December, and rejected the use of the words "to implement," we heeded its wish—we will not establish a new demonstration program. Yes, we also know that this body would never knowingly shut the door on U.S. workers' access to business opportunities and profits, including an Ohio trucking company that just last week, received authority to operate south of the border.

So, as we engage in today's conversation, I ask that you consider the following questions. Do you think the best way to help our workers is to deny them access to new markets? Do you think that our truckers should sit idle, while other companies profit from our thriving cross-border trade? Do you think our trade relationship with Mexico should be balanced against us? Or, do you feel that U.S. drivers should have an opportunity to succeed in other markets? Do you think this country should fulfill its international obligations—especially when there are many potential benefits to our economy?

I know where I stand on these issues, and while I certainly appreciate and respect that some of you may not agree, I proudly support safer roads, more opportunity for our workers, more earnings for our businesses, and more success for our economy, and I am pleased to report that many others do, as well.

Chairman Dorgan, thank you so much for the opportunity to testify before you today, I would be happy to answer any questions that you may have. Thank you.

[The prepared statement of Secretary Peters follows:]

PREPARED STATEMENT OF HON. MARY E. PETERS, SECRETARY, U.S. DEPARTMENT OF TRANSPORTATION

Introduction

Chairman Lautenberg and Members of the Committee, thank you for inviting me today to discuss the Department of Transportation's (DOT's) demonstration project to implement the long-delayed trucking provisions of the North American Free Trade Agreement (NAFTA). I am pleased to describe to you what the Department has done to implement Section 350 of the Fiscal Year 2002 Department of Transportation and Related Agencies Appropriations Act (P.L. 107–87; 115 Stat. 833, 864–868); Section 6901 of the U.S. Troop Readiness, Veteran's Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007 (P.L. 110–28; 121 Stat. 112, 183–185); and the additional steps we have taken to ensure that we safeguard the security of our transportation network even as we strengthen trade with a close neighbor and important partner.

Fifteen years ago, the United States pledged to allow the free flow of commerce across the North American continent. Three U.S. Presidents and Congress have considered and ultimately supported NAFTA's trucking provisions and the Supreme Court has rejected unanimously a challenge to the Department's implementation of those provisions, allowing us to make that pledge a reality. Unfortunately, the delay in fully implementing NAFTA's long-haul trucking provisions has impeded the efficient movement of goods to the markets on both sides of the southern border to the detriment of the Nation's economy. This demonstration project started a process to remove this impediment, creating new opportunities, new hope, and new jobs north and south of the border.

Background

In 1992, President George H.W. Bush signed NAFTA. It was then enacted by Congress and signed into law by President William J. Clinton in 1993, and it became effective on January 1, 1994. Now, 14 years after we began implementing the agreement, its economic benefits are clear. U.S. merchandise exports to NAFTA partners have grown more rapidly than our exports to the rest of the world. Real Gross National Product Growth for NAFTA partners for the period 1993 to 2006 has been 50 percent for the United States, 54 percent for Canada, and 46 percent for Mexico.

Americans are reaping the benefits of this success. Each day, nearly $2.5 billion in trade flows among the United States, Mexico, and Canada, offering consumers greater choices and strengthening trade and investment ties with two democratic nations and longtime allies. U.S. employment has increased substantially as well, rising from 112.2 million jobs in December 1993 to 137.2 million in December 2006, an increase of 25 million jobs, or 22 percent. The jobs these exports support are particularly valuable to American workers, as they pay between 13 and 18 percent more than the U.S. national average. All of this helps to explain why, between 1993

and 2006, the Nation's real Gross Domestic Product has nearly doubled. This record demonstrates that we must move forward to fully implement NAFTA.

One of the agreement's last remaining provisions to be implemented fully is the cross-border trucking provision. Originally planned to commence in December 1995 with transportation between Mexico and the four Border States (Arizona, California, New Mexico, and Texas), it was to have been implemented fully by January 1, 2000. In December 1995, Transportation Secretary Peña announced an indefinite delay in opening the border to long-haul Mexican commercial trucks to address legitimate concerns about the safety of Mexican trucks that would be traveling on our highways.

Twelve years later these concerns have been addressed. With safety and security programs now in place, the time has come to move forward on a long-standing commitment with Mexico and Canada by proceeding with the trucking provisions of NAFTA.

Demonstration Project

Over the last thirteen years, there has been an ongoing conversation about safety, security, environmental, and economic issues involved with allowing trucks from Mexico to operate in the U.S. beyond the border zones. This conversation has occurred between DOT and Mexico's Secretariat of Communications and Transport; it has occurred between the Presidents of our nations; it has occurred in the U.S. House and U.S. Senate chambers; it has occurred in the media; and it has occurred in front of a NAFTA dispute settlement panel, a U.S. Court of Appeals, and even the U.S. Supreme Court. These conversations made clear that there were a number of important and difficult issues that had to be addressed—and have been addressed—before moving forward with a graduated border opening.

For that reason, the Administration has implemented a one-year demonstration project to authorize up to 100 Mexican trucking companies to perform long-haul operations within the U.S. These companies are limited to transporting international freight and are not authorized to make domestic deliveries between U.S. cities. Likewise, under this program, Mexico will grant authority to an equivalent number of U.S. companies to make deliveries between the U.S. and Mexico. This marks the first time that American trucks have been allowed to make deliveries in Mexico in accordance with NAFTA.

Three entities are providing oversight for the demonstration project. The first, a binational group with representatives from both the U.S. and Mexico, provides continuous monitoring of the project and identifies and resolves any implementation issues as they arise. The second, an independent evaluation panel appointed by the Secretary and composed of experts knowledgeable of the issue, has been tasked with measuring and evaluating the demonstration project. Finally, we welcome the ongoing involvement of the Department's Inspector General and any ideas he may have to improve the program's effectiveness. We believe that this combination of close tracking and oversight provides both the means for addressing implementation issues in a timely fashion and also an independent means for an objective evaluation of the project.

By granting authority to a limited number of Mexican carriers and monitoring them closely throughout the duration of the project, we are able to monitor and evaluate the adequacy of the safety systems we have developed to address the concerns raised since 1995.

There are no exceptions to safety regulations for trucks or drivers from Mexico. They must meet all U.S. safety requirements when they cross the border now, and before they will be allowed to drive beyond the border zones. All drivers must have a valid commercial driver's license, proof of medical fitness, and documentation of compliance with hours-of-services rules. They must be able to understand and respond in English to questions and directions from U.S. inspectors. They also must undergo drug and alcohol testing. In addition, all trucks must be insured by a U.S. licensed insurance company and meet U.S. safety standards.

Let me put the magnitude of this demonstration project in context. Today, more than 700,000 interstate and approximately 400,000 intrastate companies are registered to operate in the U.S., with over 8 million large trucks registered here. Meanwhile, the 63 Mexican trucking companies that have passed the pre-authority safety audit at this time plan to operate only 304 trucks in the U.S. and employ 257 drivers. As it currently stands, 18 Mexican trucking companies have secured the U.S.-based insurance required by the program and are currently operating as part of the demonstration project. These companies are operating 62 vehicles. However, only 7 percent of their deliveries in the U.S. have gone beyond the border commercial zones.

It also is important to note that the demonstration project will not involve hazardous materials transportation, bus transportation of passengers, or operation of longer combination vehicles by Mexican carriers.

Safety

Safety is at the heart of all we do at DOT and it has been foremost in our thoughts as we prepared to change the way trucks from Mexico operate in the U.S. Development of our safety programs has been guided by, but not limited to, the 22 requirements that Congress included in Section 350 of the 2002 Act. The Inspector General's September 6, 2007, report states that the Federal Motor Carrier Safety Administration (FMCSA) has addressed each of these requirements. I have attached a table of these requirements to the written testimony and the actions FMCSA has taken to satisfy them.

Just over a year ago, I traveled to Monterrey, Mexico, to visit a Mexican trucking company. There, I witnessed FMCSA personnel conducting a pre-authorization safety audit on the motor carrier as required by Section 350. Under the law, at least 50 percent of such audits must take place at the carrier's place of business in Mexico. For this demonstration project, FMCSA has committed to and is conducting 100 percent of pre-authority safety audits in Mexico. These audits ensure that Mexican carriers wishing to operate in the U.S. beyond the border zones have systems in place to comply with all DOT regulations, including driver qualification, drug and alcohol testing, hours-of-service, vehicle maintenance, and insurance.

During the pre-authority safety audit, FMCSA inspectors also conduct vehicle inspections of the trucks a company wishes to use in the U.S. The Inspector General's September 6, 2007, report indicated the FMCSA was only inspecting "available" vehicles. FMCSA has changed this policy and is now inspecting all vehicles the carrier states it will operate in the U.S. when it conducts the pre-authority safety audit.

The inspection is a comprehensive 37-step process that involves checking the vehicle from front to back and top to bottom. At the conclusion of this inspection, if no defects are discovered, the vehicle is issued a 90-day Commercial Vehicle Safety Alliance (CVSA) safety decal. All trucks operating in the test program are required to display a current decal at all times while operating in the U.S., which means they will be inspected at least once every 90 days.

This safety audit is merely the beginning of FMCSA's oversight. All Mexican trucks operating beyond the border zones have a unique identifier, an "X" at the end of the DOT number marked on the vehicle. This is easily visible to FMCSA and State inspectors. When these trucks reach the border, they are subjected to additional vehicle inspections and license checks. Under Section 350, FMCSA is required to check the validity of licenses for at least 50 percent of the drivers entering the country. However, FMCSA is working to check 100 percent of drivers and vehicles, each time they enter the country to: (1) verify the vehicles have the proper safety decals; (2) verify the driver has a valid license; and (3) ensure the driver can speak English.

FMCSA uses a satellite-based Global Positioning System (GPS) to track and monitor the vehicles in the demonstration project. The system locates the vehicle every 30 minutes and records those locations for future reference. FMCSA is using this information to monitor when the Mexican vehicles are in the U.S. and measure how many miles they travel. In addition, FMCSA can use reports from the system to identify possible hours-of-service violations, verify driver records of duty status, and identify possible cabotage violations. FMCSA will follow up possible violations with targeted investigations or complete compliance reviews as needed.

Since 1995, Congress has appropriated and FMCSA has spent more than $500 million to improve border inspection stations and hire more than 600 new State and Federal inspectors to enforce truck safety on the border. We have deployed 125 FMCSA inspectors and an additional 149 auditors and investigators along the southern border at all truck crossings. Our State partners in Arizona, California, New Mexico, and Texas have deployed an additional 349 inspectors. These safety professionals oversee the safety of Mexican trucks providing transportation in the existing border commercial zones and have made noteworthy progress in establishing the safety foundation for this demonstration project. These inspectors conducted more than 210,000 driver and vehicle inspections of Mexico-domiciled carriers in the commercial zone during Fiscal Year 2006 and performed more than 240,000 automated, real-time, checks of Mexican drivers' licenses. Their efforts are paying off. Ten years ago, the out-of-service rate for Mexican trucks was 59 percent. Since the increased enforcement that resulted from hiring additional FMCSA and State staff, the rate has dropped to 21 percent last year, which is comparable to the out-of-service rate we typically observe when we select U.S. trucks for inspection.

I want to highlight that while these inspectors have been effective and are helping the Department satisfy its Congressional requirements, we are looking toward more comprehensive and effective screening methods for the future. FMCSA is working with the Department of Homeland Security's (DHS) Customs and Border Protection (CBP) to have motor carrier safety integrated into the International Trade Data System, or ITDS, which is part of the Automated Commercial Environment development effort. When this initiative becomes fully operational later this year, every Mexican trucking company will have its authority and insurance checked and every Mexican truck driver will have his or her license verified each time the driver crosses the border, whether the vehicle is operating within the commercial zone or involved in long-haul transportation. Since these computer checks occur prior to a truck's arrival at the southern border, if a problem is discovered, notice will be sent back to the company or broker entering the information so issues can be addressed before the truck even reaches border points of entry. If the truck arrives at the border, the CBP Officer will receive notice that there is an issue with the truck and direct it for further inspection by FMCSA or State inspectors.

While in the U.S., the performance of these Mexican carriers will be closely monitored. We have established, through rulemaking, a list of seven safety problems related to driver licensing, operating unsafe vehicles, drug and alcohol testing, and insurance, which would lead to action by FMCSA up to and including revocation of a carrier's provisional authority if not addressed promptly.

FMCSA has worked with State and local law enforcement officials so they can assist in ensuring Mexican trucks operate safely and within the limits of their authority. In 2002, FMCSA established regulations prohibiting all carriers from operating beyond the scope of their authority and requiring that vehicles operated by non-compliant carriers be placed out of service. Since that time, every State has adopted and begun enforcing these provisions. The CVSA has incorporated this violation into its Out-of-Service criteria, meaning that a Mexican truck discovered operating beyond the scope of its authority will not be allowed to continue. We have incorporated these new regulations into training given to all commercial vehicle inspectors.

FMCSA and the International Association of Chiefs of Police have developed a commercial motor vehicle awareness training program. We have trained more than 200 law enforcement officers to instruct other law enforcement officials on how to identify a Mexican motor carrier, how to verify the validity of a Mexican driver's commercial license, how to determine whether the carrier is operating within its authority, and where to call if they need additional assistance with truck-specific issues. Through this program, we have developed and implemented a training program that provides State and local law enforcement officers in the U.S. detailed information on cabotage regulations and enforcement procedures.

In addition to the Federal safety requirements, the Mexican trucks operated in this demonstration project will be required to adhere to the same State requirements as U.S. trucks, including size and weight requirements and paying the applicable fuel taxes and registration fees. In preparation for this project, FMCSA has worked with the four Border States to develop the capability for these States to register Mexican trucks in the International Registration Plan and International Fuel Tax Agreement.

Despite the steps I have outlined above, some argue that the demonstration project is still unsafe. The current safety record of the participating trucks in the demonstration program is better than that of the U.S. trucking fleet. Our requirement that trucks be equipped with GPS monitoring devices—a provision that goes beyond what Congress has directed—allows us to monitor constantly and pinpoint the location and duration of every participating vehicle's trip.

While we have come a long way since the days when Mexico-domiciled trucks' out-of-service rate was 59 percent, some still maintain that, because Mexico does not have a regulatory scheme identical to that of the U.S., Mexican trucks will not operate safely in this country. Yet, this assertion is not made with respect to what takes place on our northern border. Canada, for instance, does not require that its commercial drivers be drug tested randomly. However, when these drivers operate in the U.S., they must participate in a random drug testing program. No one is suggesting that because Canada does not test drivers randomly we should prohibit Canadian trucking companies from operating in the U.S. However, that is what opponents of the demonstration program would have us do with Mexican drivers.

Some have suggested that we are not following the law of the land. They argue that because Congress told us last December not to establish a cross-border motor carrier demonstration program that we should have dismantled a previously-established program that is working significantly in favor of U.S. truckers. U.S. trucks have made more than twice as many trips into Mexico as Mexican carriers have made into the interior of the U.S. under this demonstration program.

The Administration has looked very closely at the 2008 DOT Appropriations Act, particularly section 136. By prohibiting the use of funds "to establish" a cross-border motor carrier demonstration program, section 136 does not prohibit spending to continue to implement the ongoing cross-border demonstration project, which was established in September 2007—well before enactment of the current Appropriations Act. Consistent with the Appropriations Act prohibition, FMCSA will not establish any new cross-border demonstration programs involving Mexican motor carriers. In addition, we will continue to ensure that previously enacted legislative mandates are followed, including sections 350 and 6901, as required by section 135 of the Consolidated Appropriations Act, 2008.

The appropriations bill passed by the House of Representatives last July (H.R. 3074, 110 Cong. § 410 (2007)) would have barred spending "to establish or implement" a cross-border demonstration project. However, the enacted version of the bill is drafted more narrowly and prohibits only use of funds "to establish" such a project.

Security and Environment

While safety is the highest priority, the issues involved in this demonstration project are not limited to safety. For this reason, the Department has coordinated closely with other Executive Branch agencies, particularly with the Department of Homeland Security (DHS) on border security matters and with the Environmental Protection Agency (EPA) to address environmental issues. While these agencies can address better the details of their programs, let me share with you an overview of what is being done to address these areas.

The majority of vehicles Mexican trucking companies will use for long-haul operations have been manufactured to meet both U.S. and Mexican emission standards. In fact, most commercial motor vehicles now entering the U.S. from Mexico were manufactured in the U.S. or Canada, meaning that they were manufactured to U.S. emissions standards. As breakdowns are costly for both carriers and shippers, we expect that the fleet of trucks used for long-haul cross-border transportation will be newer and cleaner. We anticipate that Mexican companies will maintain or expand their use of equipment that is manufactured to meet U.S. standards. Additionally, Mexico also has upgraded its domestic vehicle emission requirements in the last 3 years and now has regulations similar to those currently in effect in the U.S. EPA is working with the Mexican government to encourage full adoption of new U.S. truck and fuel standards.

On a yearly basis, CBP processes about 4.5 million trucks through the U.S.-Mexico Border. It is estimated that the maximum of 100 carriers permitted to participate in this demonstration project will account for approximately 1,000 trucks, a very small percentage of the CBP workload. As I indicated earlier, currently, there are 18 Mexican carriers operating 62 trucks. Clearly, implementing this demonstration project will not change our border security or immigration security posture.

Current Processing

All commercial truck cross-border traffic must stop at a designated border crossing. As required by statute and regulation, each truck is processed at the border, using automated systems to assist in determining whether the cargo, truck, and driver are admissible and whether any of the elements pose a security, immigration, agriculture, or smuggling risk.

If the CBP Officer determines that further inspection is necessary, the driver, truck, and cargo are referred for a secondary inspection. In a secondary inspection, CBP officers have many inspection tools at their disposal, including access to commercial, criminal and law enforcement databases, forensic document equipment, agricultural experts, and large-scale scanning systems.

If the CBP Officer performing primary or secondary inspections determines that the driver, truck, and cargo are admissible and do not pose a risk, then the driver is allowed to proceed into the United States. The Mexican carrier is then able to deliver the cargo to a location within the commercial border zone, which can range up to 25 miles from the border (or 75 miles from the border within Arizona). The cargo remains within the commercial zone until it can be picked up by a U.S. driver and truck.

Current CBP inspections are in addition to and separate from motor carrier inspections. The current CBP inspections and the current motor carrier inspections will continue under the demonstration project.

Demonstration Project

Under the demonstration project, processing of Mexican nationals and commercial trucks is in accordance with CBP guidelines. All cross-border commercial truck traffic is required to stop at a designated border crossing. Mexican drivers are required

to present an entry document, and if traveling outside the 25-mile commercial zone (or 75-mile limit within the State of Arizona), the drivers are issued a Form 1–94 pursuant to regulations, and follow CBP inspection procedures that include US VISIT (United States Visitor and Immigrant Status Indicator Technology) biometric vetting, and other security requirements.

CBP processing of drivers, cargo, and conveyances for security screening and trade enforcement remains consistent for truck carriers participating in this demonstration project. Participants continue to provide advanced cargo information as required under the Trade Act of 2002. Participants remain subject to immigration entry requirements for the driver and crew and to the import requirements of other government agencies in order to gain entry into U.S. commerce.

After the CBP check, all participating demonstration project carriers from Mexico proceed to FMCSA's inspection checkpoint—where every truck and every driver are checked every time they cross the border.

DOT and DHS continue to partner in this effort to ensure safety and security requirements are completely addressed and satisfied prior to a carrier being allowed to proceed to an interior location in the United States.

Conclusion

Trucks from Mexico have always been allowed to cross the U.S. border. Until 1982, they could travel anywhere in the United States. For the last 25 years they have been restricted to specific border areas in Arizona, California, New Mexico, and Texas. Every day, thousands of trucks from Mexico enter the United States. Every day, drivers from Mexico operate safely on roads in major U.S. cities like San Diego, El Paso, Laredo, and Brownsville. And every day, Federal and State inspectors ensure trucks are safe to travel on our roads.

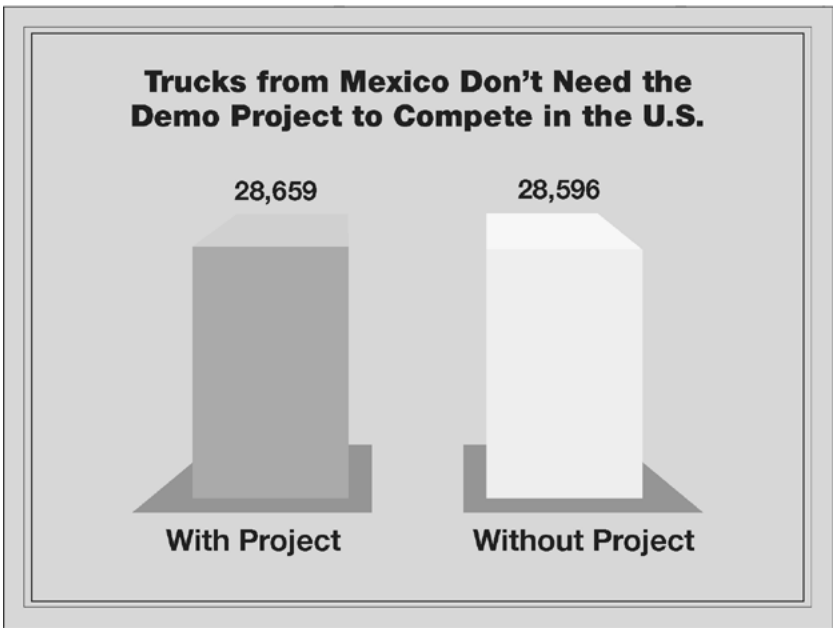
We have developed this limited program to demonstrate the effectiveness of the systems we have deployed to satisfy Section 350 of the 2002 Appropriations Act and Section 6901 of the 2007 U.S. Troop Readiness Appropriations Act and to ensure the safety of the U.S. traveling public.

Thank you for the opportunity to appear before you today. I look forward to working with this Committee and the transportation community to ensure a safe transportation system for the citizens of the United States and to strengthen our trade with Mexico.

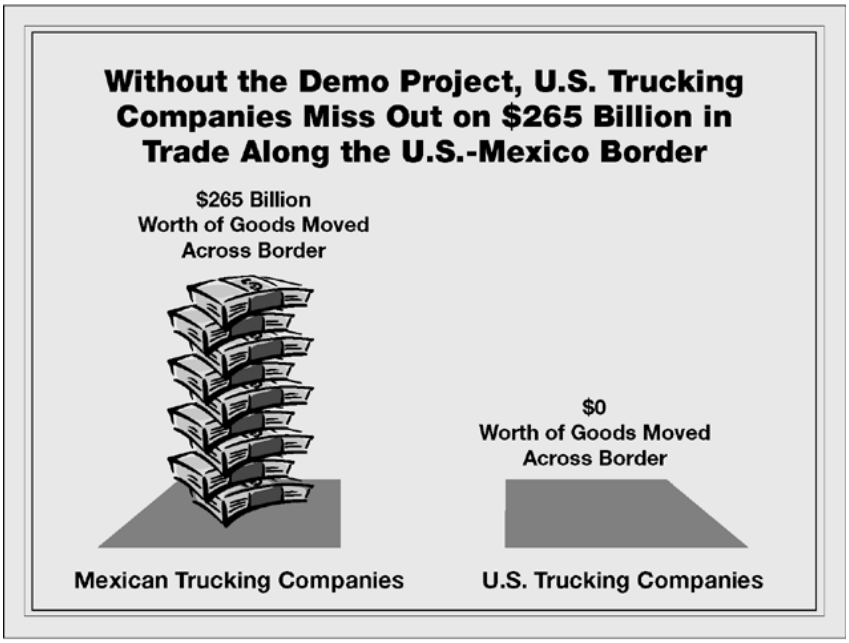
APPENDIX 1

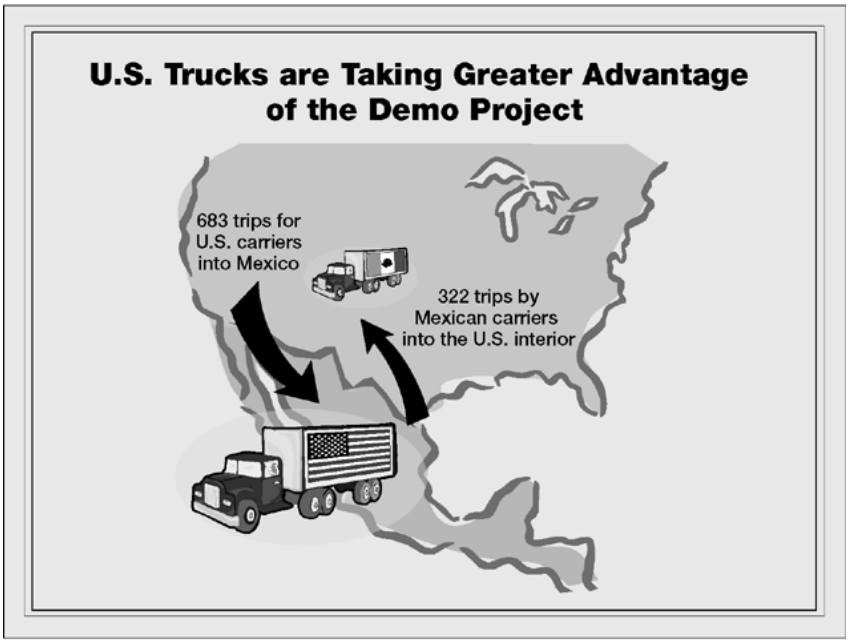
All 22 Congressional Safety Mandates Have Been Met

- ☑ Established mandatory pre-authority safety audits.
- ☑ Conducted at least ~~50~~ 100 percent of the safety audits on-site in Mexico.
- ☑ Issued permanent operating authority only to Mexican trucking companies who pass safety compliance review.
- ☑ Conducted at least ~~50~~ 100 percent of the compliance reviews on-site in Mexico - including any who did not receive an on-site pre-authority audit.
- ☑ Checked the validity of the driver's license every time a truck crossed the border.
- ☑ Assigned Mexican truck companies a distinct DOT number.
- ☑ Ensured that all trucks from Mexico displayed a CVSA decal. DOT Validated the decal with a check of all trucks from Mexico that do not display a current CVSA decal.
- ☑ Had state inspectors in the border states report any violations of safety regulations by trucks from Mexico to the U.S. federal authorities.
- ☑ Equiped all U.S.-Mexico commercial border crossings with weight scales - including weigh-in-motion (WIM) systems at 5 of the 10 busiest crossings.
- ☑ Studied the need for weigh-in-motion (WIM) systems at all other border crossings.
- ☑ Collected proof of insurance by a U.S. certified insurance carrier from Mexican companies who want to operate beyond the border zone.
- ☑ Limited trucks from Mexico operating beyond the border zone to cross the border only where a certified federal or state inspector is on duty.
- ☑ Limited trucks from Mexico operating beyond the border zone to cross the border only where there is capacity to conduct inspections and park out of service vehicles.
- ☑ Ensured compliance of all U.S. safety regulations by Mexican operators who wish to go beyond border zones.
- ☑ Improved training and certification for border inspectors and auditors.
- ☑ Studied needed staffing along the border.
- ☑ Prohibited Mexican trucking companies from leasing vehicles from other companies when they are suspended, restricted, or limited from their right to operate in the United States.
- ☑ Forbade foreign motor carriers from operating in the United States if they have been found to have operated illegally in the United States.
- ☑ Worked with all state inspectors to take enforcement action or notify U.S. DOT authorities when they discover safety violations.
- ☑ Applied the same U.S. hazardous materials driver requirements to drivers from Mexico hauling hazardous materials.
- ☑ Provided $54 million in Border Infrastructure Grants for border improvements and construction.
- ☑ Conducted a comprehensive Inspector General's review – to be certified by the Secretary - that determines if border operations meet requirements.
- ☑ *DOT self-imposed mandate to install GPS devices on all participating trucks from Mexico.*


Trucks from Mexico Don't Need the Demo Project to Compete in the U.S.
28,659
28,596
With Project
Without Project

U.S. Trucks Need the Demo Project to Compete in Mexico
56
0
With Project
Without Project

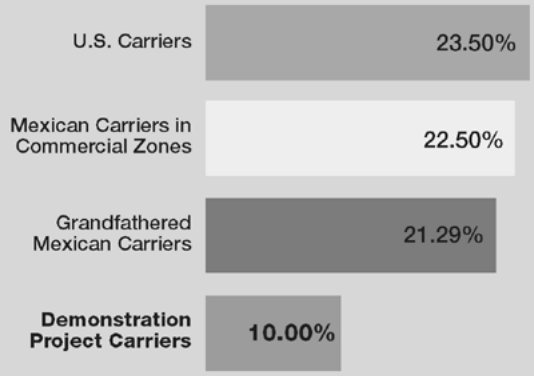

Without the Demo Project, U.S. Trucking Companies Miss Out on $265 Billion in Trade Along the U.S.-Mexico Border
$265 Billion Worth of Goods Moved Across Border
$0 Worth of Goods Moved Across Border
Mexican Trucking Companies
U.S. Trucking Companies


U.S. Trucks are Taking Greater Advantage of the Demo Project
683 trips for U.S. carriers into Mexico
322 trips by Mexican carriers into the U.S. interior

Tougher Requirements for Mexican Trucking Companies Operating in the U.S.

Requirement	United States	Mexico
Preauthorization Safety Audits	No	**Yes**
CVSA Decals	No	**Yes**
Medical Exams by MDs	No	**Yes**
Immigration Requirements	N/A	**Yes**
Customs Requirements	N/A	**Yes**
Cabotage Ban	N/A	**Yes**
Drug and Alcohol Testing	Yes	**Yes**
Medical Qualifications	Yes	**Yes**
English Language Proficiency	Yes	**Yes**
Hours of Service	Yes	**Yes**
Driver's Qualification Files	Yes	**Yes**
Vehicle Maintenance	Yes	**Yes**
Size and Weight	Yes	**Yes**
EPA/Emissions Standards	Yes	**Yes**
Fuel Tax	Yes	**Yes**
State Registration Fees	Yes	**Yes**

Participating Vehicles Have Better Safety Records



Vehicle Out-of-Service Rates

Consolidated Appropriations Act, 2008

SEC. 733. None of the funds made available in this Act may be used to ***establish or implement*** *a rule allowing poultry products to be imported into the United States from the People's Republic of China.*

Consolidated Appropriations Act, 2008

SEC. 103. None of the funds made available under this Act may be obligated or expended to ***establish or implement*** *a program under which essential air service communities are required to assume subsidy costs commonly referred to as the EAS local participation program.*

Consolidated Appropriations Act, 2008

SEC. 136. None of the funds made available under this Act may be used to ***establish*** *a cross-border motor carrier demonstration program to allow Mexico-domiciled motor carriers to operate the commercial zones along the international border between the United States and Mexico.*

Widespread Support for Cross Border Trucking

San Francisco Chronicle The New York Times Washington Post
Wall Street Journal Chicago Tribune Investor's Business Daily
Dallas Morning News San Diego Union-Tribune Arizona Republic
San Antonio Express-News The Seattle Times The Patriot News
The Daily News (Longview, Wash.) The Albuquerque Tribune Ventura County Star
East Valley Tribune Orlando Sentinel The Herald (Monterey County, Calif.)
Amarillo Globe-News (Texas) The Kansas City Star The Washington Times
Arizona Daily Star The Cincinnati Post Waco-Tribune The Herald Zeitung
(New Braunfels, Texas) Portland Press Herald/Maine Sunday Telegram
Scripps News Waco Tribune International Herald Tribune Lufkin Daily News
Waco Tribune Detroit News Star-Telegram San Antonio Business Journal
Denver Post Tucson Citizen

Widespread Support for Cross Border Trucking

American Apparel & Footwear Association (AAFA) American Bakers Association American Cotton Shippers Association
American Farm Bureau Federation American Feed Industry Association American Frozen Food Institute
American Meat Institute American Seed Trade Association American Soybean Association American Trucking
Associations Business Roundtable Cargill, Incorporated Caterpillar Cessna Aircraft Company
Chicago Sweeteners, Inc. Coalition of Service Industries Commodity Markets Council ConAgra Foods, Inc.
Consumer Electronics Association Corn Refiners Association Distilled Spirits Council of the United States
Eastman Kodak Company Emergency Committee for American Trade (ECAT) The Fertilizer Institute
Grocery Manufacturers Association Hormel Foods Corporation International Dairy Foods Association
Mars Incorporated National Association of Manufacturers (NAM) National Chicken Council National Cotton Council
National Council of Farmer Cooperatives National Foreign Trade Council National Grain and Feed Association
National Milk Producers Federation National Oilseed Processors Association National Pork Producers Council
National Potato Council National Turkey Federation Nestle USA North American Equipment Dealers Association
North American Export Grain Association North American Millers' Association Northwest Fruit Exporters
Northwest Horticultural Council Pet Food Institute Phillip Jennings Turf Farms, LLC Smithfield Foods
Sweetener Users Association Transportation, Elevator & Grain Merchants Association Travel Goods Association
Tyson Foods, Inc. U.S. Apple Association United States Association of Importers of Textiles & Apparel
U.S. Chamber of Commerce U.S. Dairy Export Council U.S. Meat Export Federation U.S. Wheat Associates
United Egg Association United Egg Producers United States Dry Bean Council
United States - Mexico Chamber of Commerce US Hides, Skins and Leather Association USA Poultry & Egg Export Council
USA Rice Federation Washington Apple Commission National Association of Wheat Growers
Nestle Purina PetCare Company International Textile Group

Senator DORGAN. Secretary Peters, I of course will have questions, but let me call first on the Inspector General Scovel.

We appreciate your being here, you may proceed.

STATEMENT OF HON. CALVIN L. SCOVEL III, INSPECTOR GENERAL, U.S. DEPARTMENT OF TRANSPORTATION

Mr. SCOVEL. Chairman Dorgan, I appreciate the opportunity to testify today on our ongoing work regarding the Department's demonstration project for Mexican trucks.

Over the past decade, we have issued over a dozen reports and testimonies on this issue, and we are pleased to provide our interim observations, as the Committee reviews the demonstration project's operation, to date.

Our last report, issued in September, described how FMCSA had prepared for the demonstration project. We verified that FMCSA was conducting onsite reviews at applicants' places of business in Mexico and that safety mechanisms—such as truck inspections at border crossings—remained in place.

We also raised key issues that the Department needed to address before initiating the project, such as ensuring adequate plans to carry out the Department's commitment to check every demonstration project truck, every time it crossed the border into the United States, ensuring readiness on the part of State officials, to enforce demonstration project rules, and addressing slight differences between the policies, rules and regulations implemented by FMCSA, and the specific language of Congressional requirements.

Before initiating the project, the Department was required, by law, to address the concerns we raised. After we issued our report,

the Department provided a response to Congress, detailing actions to be taken on each item, and then immediately initiated the demonstration project.

Yesterday, we issued the report from which this testimony is drawn. Today I will discuss three interim observations, based on the demonstration project's first 6 months of operation.

First, while FMCSA has implemented plans to help ensure every participating truck is checked, every time it crosses the border, it has yet to implement a key quality control to ensure that all checks are being done, even though it committed to do so in its September 6, 2007 report to Congress.

FMCSA provided us with records to show that nearly 3,700 checks of safety inspection decals, driver's licenses and English language proficiency were made since the demonstration project began in September.

However, the agency has not implemented a quality control measure, a cross-check with Customs and Border Protection information that is important for ensuring the reliability and completeness of this information. Without this quality control procedure, we do not know whether all of the key safety checks have been done, or how much confidence can be placed in the information used to evaluate the demonstration project.

Second, fewer carriers and vehicles have participated in the project than expected, and over 90 percent of the 3,700 trips recorded by FMCSA for the participants are inside the commercial zones, that is, within a few miles of the border. As a result, we do not have enough information to draw meaningful conclusions about safety performance.

As of March 6, 2008, only 19 Mexican carriers have participated in the project, instead of the 100 anticipated. While FMCSA advises that more are likely to participate, after 6 months of the project, the number of carriers and the number of vehicles are far less than needed for statistically reliable projections about safety.

We will not be able to tell, for example, whether any significant difference exists between the crash records and safety performance of U.S. and Mexican trucks.

Third, as the demonstration project proceeds, we continue to review FMCSA's actions to monitor and enforce safety rules and project requirements. For example, FMCSA has provided support and data to an independent evaluation panel, charged with measuring any adverse safety impacts from the project. The panel shares our concern about not having enough data to draw meaningful conclusions at the project's end.

FMCSA also has issued guidance and provided training for State enforcement officials. In September, we reported that officials in 5 States did not consider themselves ready to enforce demonstration project rules. Officials in those same 5 States now report being ready, citing training and guidance provided by FMCSA.

Our work, to date, has also verified that participants' insurance information, maintained in FMCSA's records, is valid; that FMCSA has systems for monitoring Mexican carriers and driver convictions; and that FMCSA has placed global positioning devices on some U.S. and Mexican trucks that are participating in the project.

We will continue to review these areas as the demonstration project progresses.

This completes my statement, I would be happy to answer any questions you might have.

[The prepared statement of Mr. Scovel follows:]

PREPARED STATEMENT OF HON. CALVIN L. SCOVEL III, INSPECTOR GENERAL, U.S. DEPARTMENT OF TRANSPORTATION

Chairman Inouye, Vice Chairman Stevens, and Members of the Committee:

Thank you for the opportunity to testify today on our ongoing work regarding the Department of Transportation's (DOT) demonstration project for Mexican trucks. Over the past decade, we have issued over a dozen reports and testimonies on this highly charged topic. Our interim report on the demonstration project, from which this testimony is drawn, was issued on March 10, 2008.[1] We are to provide our final report 60 days after the conclusion of the project.

As you know, in February 2007, the Secretary of Transportation announced her intention to start a 1-year demonstration project to allow up to 100 Mexico-domiciled carriers to operate throughout the United States. Shortly afterward, in May 2007, Congress, set requirements[2] to be met before the project could actually start. One key requirement mandated that the Department, prior to initiating the project, take action to address any issues raised in an initial report required by our office, and report to Congress detailing such actions.

Our initial report on September 6, 2007,[3] described how the Federal Motor Carrier Safety Administration (FMCSA) had implemented significant initiatives in preparation for the demonstration project. Through direct observations and analyses, our work verified that FMCSA was conducting promised on-site reviews at applicants' places of business in Mexico. Additionally, we reported that safety mechanisms, such as truck inspections at border crossings, remained in place. Further, our interviews with key state enforcement personnel showed FMCSA's general readiness to enforce safety rules during the demonstration project, although officials in five states said they were not yet ready.

Our initial report emphasized three issues that the Department needed to address to Congress before initiating the project. These were:

- Ensuring that adequate plans were in place to carry out the Department's commitment to check every participating truck every time it crossed the border into the United States (including a quality control plan to ensure the system is effective).
- Ensuring that state enforcement officials understood how to implement guidance on the demonstration project and that training initiatives filtered down to roadside inspectors.
- Addressing our determination that FMCSA had implemented policies, rules, and regulations that differed slightly from the language in 3 of 34 specific Congressional requirements. For this third area, the most significant variation was limiting inspections during on-site safety reviews to those trucks that were available at the site at the time of the inspection, rather than all vehicles planned for use in the United States. We did not identify any safety impacts arising from this difference as long as the commitment to *check every participating truck every time* it crossed the border was fulfilled.

To address our issues, the Department included, in its response to Congress, Commercial Truck Border Crossing Implementation Plans for 25 U.S.-Mexico Border Crossings. The plans were designed to ensure that every participating truck is checked every time it crosses the border into the United States. The response also provided FMCSA's outreach plan designed to ensure that state enforcement personnel have the information needed to oversee the safety of trucks participating in the demonstration project. Finally, FMCSA agreed to address the three areas that

[1] OIG Report Number MH–2008–040, "Interim Report on NAFTA Cross-Border Trucking Demonstration Project," March 10, 2008. OIG reports and testimonies can be found on our website: *www.oig.dot.gov*.

[2] Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (Public Law 110–28).

[3] OIG Report Number MH–2007–065, "Issues Pertaining to the Proposed NAFTA Cross-Border Trucking Demonstration Project," September 6, 2007.

differed slightly from the Congressional requirements, including instituting a policy of reviewing all vehicles planned for use in the United States.

As required by the May legislation, our ongoing audit is verifying the degree to which these actions are being carried out. We are specifically charged with examining mechanisms established to determine whether the demonstration project is adversely affecting motor carrier safety, reviewing Federal and state monitoring and enforcement activities, and assessing the degree to which the demonstration project consists of a representative and adequate sample of Mexico-domiciled carriers likely to engage in long-haul operations.

While our mandate is to address those specific issues required by Congress, we are mindful of the legal questions currently before the 9th Circuit Court of Appeals. Among those is the question of the legal effect of the language contained in the FY 2008 Appropriations Act[4]—"None of the funds made available under this Act may be used to establish a cross-border motor carrier demonstration program. . . ." In my view, after reading the Senate floor debate from early September, it is clear that the sponsors of the amendment to the Senate Fiscal Year 2008 Transportation and Housing Appropriations bill in September 2007 wanted to halt the project by denying funding. The parties to the court action in the 9th Circuit have briefed and orally argued the interpretation of the language in the underlying Consolidated Appropriations Act itself. Given that this matter is joined before the 9th Circuit and is outside my mandate, I will respectfully defer to that body's judgment.

Given our legislative requirements to review and monitor the demonstration project, our ongoing audit will continue. Accordingly, as the year-long demonstration project reaches its 6-month point, today we make the following three interim observations.

First, FMCSA has implemented plans to ensure every truck is checked every time it crosses the border, but it has not implemented a key quality control to ensure that checks are being done, despite a commitment to do so. As stated in our September 2007 report, these checks are important because they review the driver's license to ensure that the vehicle is driven by a licensed driver and verify that the truck has an inspection decal issued by the Commercial Vehicle Safety Alliance (CVSA). We verified that FMCSA had developed 25 site-specific border-crossing plans in conjunction with U.S. Customs and Border Protection (CBP) personnel to carry out these checks at the border, and FMCSA's records showed about 3,700 checks were done since the demonstration project began in September. However, FMCSA has not implemented a quality control measure that is important for ensuring the reliability and completeness of this information, even though FMCSA committed to do so in its September 6, 2007, letter report to Congress.[5]

In the report, FMCSA stated that it would acquire crossing data from CBP and perform a monthly analysis of a random sample of the data to document the extent to which FMCSA was meeting its goal of checking every truck every time it crossed the border. Further, if issues were identified, it would develop strategies to address them. *At this time, FMCSA has not implemented this process.* According to a FMCSA official, FMCSA is still gathering information for this control. Until FMCSA implements a quality control check using CBP, or another valid source of data, to establish a baseline for the number of crossings, FMCSA will not have assurance that all checks are being conducted as required. Further, to the degree that others use this information to develop conclusions about the demonstration project, errors and omissions in crossing data would adversely affect the analysis. We will give this issue greater scrutiny as our audit continues.

Second, the limited data available at this time means we cannot draw any meaningful conclusions about the safety performance of the demonstration project participants. Far fewer carriers and vehicles have participated in the project than expected, and over 90 percent of recorded trips by participants are inside the commercial zones. As of March 6, 2008, 19 Mexican carriers had been granted authority for the project instead of the 100 anticipated, and 1 of those has recently withdrawn. The number of vehicles that had been involved as of February 25, 2008, is also significantly lower than anticipated, about 13 percent of the number estimated before the project began. Also, as of that same date, only 247 trips beyond the commercial zone were recorded on FMCSA's records, and almost 90 percent of those trips were reportedly going to one state—California.

Our analysis of the small group of participating carriers shows that they are representative of certain characteristics of prior Mexican applicants, such as the number of vehicles. Although no crashes involving a participant had been recorded on

[4] Consolidated Appropriations Act, 2008, Public Law 110–161, Division K, Title I, Section 136, (2007).

[5] Enclosure 4 of the Department's September 6, 2007, letter report to Congress.

FMCSA's records from the project's initiation through March 1, 2008, the limited number of participants and limited safety-related data will prevent FMCSA from drawing any meaningful conclusions at this time.

Third, FMCSA has taken actions to establish and enhance mechanisms for assessing adverse safety impacts from the project and for monitoring and enforcing safety rules for project participants. These actions include establishing and providing information to an independent panel[6] charged with determining whether the safety performance of participating Mexican carriers differs from the safety performance of U.S. carriers. However, the independent panel has also expressed concerns that the low number of participants will affect its ability to draw meaningful conclusions from the data about the safety performance of the demonstration project participants.

FMCSA's actions have also included providing guidance and training to state officials. In five states where officials had previously told us they were not ready to enforce the rules of the demonstration project, officials advised that they were now ready, citing the additional training and guidance received from FMCSA. FMCSA is also recording insurance information from participant carriers, contracting for a GPS tracking system for participating vehicles, taking steps to improve data on Mexican driver convictions in the United States, and monitoring Mexican carrier records. We will continue to monitor and review these areas as the audit continues.

The balance of my statement discusses these issues in further detail.

FMCSA Has Not Implemented a Key Quality Control for Ensuring That Checks of Drivers and Vehicles Crossing the Border Occur as Planned, Despite a Commitment To Do So

FMCSA's policy requires that CVSA decals, driver's licenses, and proficiency in the English language be checked for project participants at each border crossing regardless of whether the truck is staying within the commercial zone or traveling beyond. This has been referred to as "checking every truck every time." We verified that FMCSA had developed 25 site-specific border crossing plans in conjunction with CBP personnel to carry out these checks at the border, and FMCSA's records as of February 25, 2008, showed that 3,680 checks were conducted. However, a key quality control for ensuring the reliability and completeness of this information has not been implemented even though FMCSA had committed to do so in its September 6, 2007, letter report to Congress.[7]

FMCSA reported to Congress that it would acquire crossing data from CBP and perform a monthly analysis of a random 10 percent sample of the data to reconcile CBP data against FMCSA's records. A monthly report of the results would provide details on each border crossing and identify any issues related to checking every vehicle every time as well as including strategies to address those issues. The overall purpose of the quality control plan was to document the extent to which FMCSA was meeting its goal of checking every truck every time it crossed the border. However, according to a FMCSA official, FMCSA is still gathering information for this control. Until FMCSA implements a quality control check using CBP, or another valid source of data, to establish a baseline for the number of crossings, FMCSA will not have assurance that all checks are being conducted as required.

In addition to ensuring that all vehicles and drivers are checked, it is also important that accurate information be recorded during the checks to facilitate the evaluation of the project. We examined FMCSA's records for about 2,000 truck crossings for participants that occurred through January 5, 2008. To date, we have identified 44 FMCSA crossing records that had unclear or incomplete responses, such as stating "not applicable" for recording a primary CVSA decal number or leaving blank the space for English proficiency testing. To the degree that the Independent Evaluation Panel uses this information for its work, errors and omissions in crossing data would adversely affect the panel's analysis. We will obtain updated data and conduct additional analyses as the project continues.

The Limited Data Available at This Time Means We Cannot Draw Any Meaningful Conclusions About the Safety Performance of the Demonstration Project Participants

Immediately after issuing its report to Congress on September 6, 2007, the Department initiated the demonstration project by granting provisional authority to the first Mexico-domiciled carrier. However, far fewer carriers than anticipated are

[6] The panel includes former U.S. Representative, Jim Kolbe; former Department of Transportation (DOT) Deputy Secretary, Mortimer Downey; and former DOT Inspector General, Kenneth Mead.

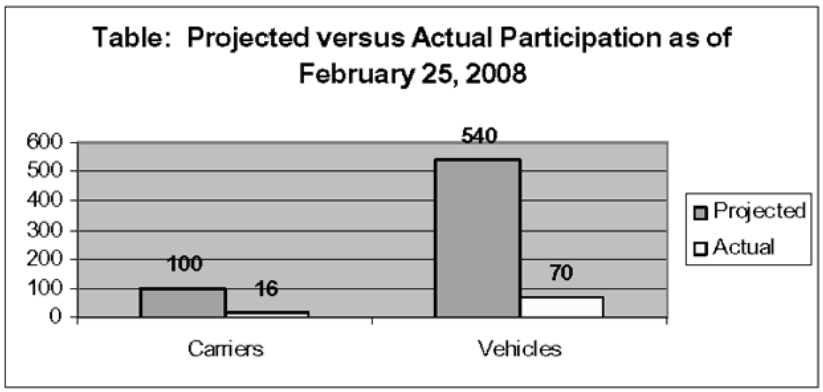
[7] Enclosure 4 of the Department's September 6, 2007, letter report to Congress.

participating in the demonstration project. As of March 6 of this year, 19 Mexican carriers have been granted provisional authority, one of which withdrew[8] on February 1, 2008. By contrast, in April 2007, the Department had anticipated granting provisional authority to 25 carriers each month, until the number reached 100.

According to FMCSA records, an additional 28 carriers have qualified for the program, but they have not filed the required proof of insurance. Even if those carriers were to file the required insurance proof and were granted provisional authority, the total number of Mexican carriers would reach only 47—just under half of the 100 carriers originally envisioned.

FMCSA records also show that fewer vehicles than originally estimated are involved in the project and only a small number of trips are going beyond the commercial zones. In August 2007, FMCSA estimated that, based on the number of vehicles approved at that time, 540 vehicles would be participating in the project if 100 Mexican carriers eventually received provisional authority. By contrast, as of February 25, 2008, only 70 vehicles were identified by the 16 Mexican carriers[9] who had participated up to that point, including the carrier that dropped out. FMCSA's records, as of February 25, 2008, showed 3,680 crossings into the United States by project participants, with 247 or 6.7 percent listing destinations beyond the commercial zones. About 90 percent of the recorded trips beyond the commercial zones were going to a single state—California.

The table below compares the projected and actual carrier and vehicle participation.



Source: OIG Analysis of FMCSA data. Data are for carriers granted provisional authority as of February 25, 2008.

Although we have not independently verified the information, according to FMCSA officials and press reports, factors such as the additional costs of insurance, the uncertainty of the project, and the burdens associated with increased reviews at the border may have played a role in the limited participation of Mexican carriers.

The current number of participants is not adequate to make statistically reliable projections or estimates of some important characteristics, including safety characteristics such as the number of crashes that could be expected involving long-haul Mexican carriers. The carriers currently[10] participating in the project represent about 2 percent of the 723 original applications for the long-haul authority that FMCSA provided us. Nonetheless, our analysis of the first 16 carriers that participated in the demonstration project shows that for certain other characteristics, such as number of vehicles reported, the demonstration project participants appear to be

[8] The carrier that withdrew, Trinity Industries de Mexico S de R L de CV, had identified 16 vehicles for use in the project, the largest number of all demonstration project participants at the time it withdrew.

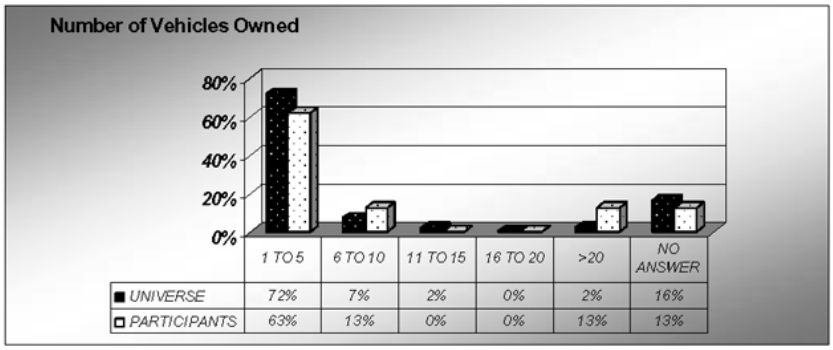
[9] According to FMCSA data, 19 carriers had received provisional authority as of March 6, 2008. We limited our analyses to the 16 Mexican carriers that had received authority as of February 25, 2008, including the carrier that withdrew from the project on February 1, 2008. We did not include in our analysis data related to the three carriers admitted to the project after February 25, 2008.

[10] As of March 6, 2008.

representative of a larger group of Mexican carriers that have applied for long-haul authority in the United States over the past 10 years.

For example, the figure below compares the number of vehicles operated by demonstration project participants and the universe of the 723 long-haul applicants. This figure is based on answers supplied by the 723 applicants in their application packages to FMCSA and on the answers the demonstration project participants supplied on their individual applications.

Figure: Comparison of Number of Vehicles for Project Participants to Universe of 723 Prior Long-Haul Applicants



Source: OIG Analysis of FMCSA data.

We Will Continue To Review and Monitor FMCSA Actions To Establish and Enhance Mechanisms for Assessing Adverse Safety Impacts From the Project and for Monitoring and Enforcing Safety Rules for Project Participants

To its credit, FMCSA has taken actions to help ensure that participants comply with safety regulations and project requirements. Based on our interim observations as the year-long demonstration project reaches its 6-month point, we plan future work in the following areas.

Guidance for and Training of State Enforcement Officials. FMCSA has provided guidance and training for state enforcement officials. We obtained information showing that 421 state officials received further training on issues related to foreign motor carriers before and after the project was initiated. To assess the impact of these efforts, we followed up on the results of our September 6, 2007, report where we noted that officials in five states were of the opinion that they were not ready to enforce the requirements of the demonstration project. For this review, we re-contacted officials in those five states, and all now indicate that they are ready to enforce demonstration project requirements for Mexican carriers. Those officials cited completion of adequate training and receipt of FMCSA guidance as the primary reasons for their current readiness to enforce demonstration project requirements. We will continue to monitor FMCSA's training efforts as the project continues.

Insurance Requirements. FMCSA has recorded insurance information from project participants in an established database. Our independent examination of FMCSA's Licensing and Insurance System and our direct contact with the insurance companies showed that all Mexican carriers who were issued provisional authority as of February 4, 2008, had the required $750,000 in bodily injury and property damage liability insurance We will continue to verify that insurance is maintained by the participants as the demonstration project continues.

Mexican Conviction Database. FMCSA has established a Mexican Conviction Database to track traffic convictions of Mexican drivers occurring in the United States. FMCSA has provided us with data indicating that problems we identified in August 2007,[11] with the Mexican Conviction Database (formerly known as the 52nd State System) have been corrected by the states. We also verified that a report to help identify inconsistencies in the database was issued in January 2008. We will conduct further testing at the states as the audit continues.

[11] OIG Report Number MH–2007–062, "Follow-up Audit on the Implementation of the North American Free Trade Agreement's Cross-Border Trucking Provisions," August 6, 2007.

Global Positioning System (GPS). FMCSA has contracted with a company to place global positioning devices on all U.S. and Mexican trucks participating in the project; and FMCSA demonstrated to us how the system can identify the position of a particular truck. Data provided by FMCSA showed that as of February 21, 2008, 82 GPS units had been installed (38 on Mexican trucks and 44 on U.S. trucks) and plans were being finalized to install an additional 19 units (on 14 Mexican trucks and 5 U.S. trucks). As the demonstration project continues we plan to monitor the installation and use of GPS technology, particularly as it relates to cabotage and hours-of-service violations.

Mexican Carrier Monitoring System. Our previous audit work confirmed the establishment of a system for monitoring compliance of Mexican carriers operating in the United States. We obtained reports from this system for demonstration project participants, and we will continue to review these as the audit continues.

In closing, let me assure you that we will continue to closely monitor and review this demonstration project and to scrutinize other critical issues regarding the cross-border trucking provisions of the North American Free Trade Agreement (NAFTA), as required by Congress. The exhibit to our testimony provides a summary of our September 6, 2007, report on issues pertaining to the demonstration project and a list of our other prior reports and testimonies.

Mr. Chairman, this concludes my statement. I would be happy to answer any questions that you or other members of the Committee may have at this time.

Exhibit. Prior OIG Reports and Testimonies on Cross-border Trucking Issues

Summary of our Latest Report

OIG Report No. MH–2007–065, "Issues Pertaining to the Proposed NAFTA Cross-Border Trucking Demonstration Project," September 6, 2007.

We identified three issues pertaining to the proposed demonstration project.

First, FMCSA had not developed and implemented complete, coordinated plans for checking trucks and drivers participating in the demonstration project as they cross the border. Without having site-specific border crossing plans in place and fully coordinated with CBP and the state, the Department's commitment to check every demonstration project truck every time it crosses the border into the United States is at risk. We also stated that these plans should include quality control measures to ensure that FMCSA's system for checking each demonstration project truck is effective. These checks are important because they review the driver's license to ensure that the vehicle is driven by a licensed driver and verify that the truck has a current inspection decal issued by the CVSA. This decal shows that the vehicle received a safety inspection in the previous 3 months.

Second, we reported that a considerable number (26 of 50) of state officials, responsible for coordinating motor carrier safety programs, expressed one or more concerns about the demonstration project, and officials in 5 states indicated they were not ready to enforce demonstration project requirements. Despite issuing guidance and brochures on assessing English language proficiency; detailing cabotage rules, regulations, and procedures; and initiating a train-the-trainer program, state concerns indicated that FMCSA should develop a feedback mechanism to ensure that critical information reaches the roadside inspectors who enforce Federal safety rules.

Third, we found that FMCSA implemented 3 of 34 provisions in Section 350(a) of the FY 2002 Appropriations Act using language that differed slightly from what Congress had specified. The differences related to which trucks should be inspected during pre-authorization safety audits, which drivers should undergo electronic license checks at border crossings, and the inclusion of newer safety rules applicable to Mexican motor carriers.

Other Prior Reports and Testimonies

OIG Report No. MH–2007–062, "Follow-up Audit on the Implementation of the North American Free Trade Agreement's Cross-Border Trucking Provisions," August 6, 2007.

OIG Testimony, CC–2007–029, "Status of Safety Requirements for Cross-Border Trucking With Mexico Under NAFTA," March 13, 2007.

OIG Testimony, CC–2007–026, "Status of Safety Requirements for Cross-Border Trucking With Mexico Under NAFTA," March 8, 2007.

OIG Report No. MH–2005–032, "Follow-up Audit of the Implementation of the North American Free Trade Agreement's (NAFTA) Cross-Border Trucking Provisions," January 3, 2005.

OIG Report No. MH–2003–041, "Follow-up Audit on the Implementation of Commercial Vehicle Safety Requirements at the U.S.-Mexico Border," May 16, 2003.

OIG Testimony, CC–2002–179, "Implementation of Commercial Motor Carrier Safety Requirements at the U.S.-Mexico Border," June 27, 2002.

OIG Report No. MH–2002–094, "Implementation of Commercial Vehicle Safety Requirements at the U.S.-Mexico Border," June 25, 2002.

OIG Report No. MH–2001–096, "Motor Carrier Safety at the U.S.-Mexico Border," September 21, 2001.

OIG Testimony, CC–2001–244, "Motor Carrier Safety at the U.S.-Mexico Border," July 18, 2001.

OIG Report No. MH–2001–059, "Interim Report on Status of Implementing the North American Free Trade Agreement's Cross-Border Trucking Provisions," May 8, 2001.

OIG Report No. TR–2000–013, "Mexico-Domiciled Motor Carriers," November 4, 1999.

OIG Report No. TR–1999–034, "Motor Carrier Safety Program for Commercial Trucks at U.S. Borders," December 28, 1998.

OIG reports, testimonies, and correspondence can be accessed on the OIG website at *www.oig.dot.gov*.

Senator DORGAN. Mr. Scovel, thank you very much for your testimony.

Secretary Peters, you continue to talk about NAFTA, and this is not a hearing about NAFTA, but I don't want to observe in this issue opportunities possible because of NAFTA, that prior to NAFTA's enactment, we had a $1.5 billion trade surplus in Mexico. In the past year, we had a $74 billion deficit. It went from a $1.5 billion surplus, to a $74 billion deficit. So, when we talk about opportunities, I want to talk about the opportunities to begin providing some balance, and restore some opportunities for this country.

But, having said that, you—I believe—are telling me that your attorneys have advised you that you have a right, given the way you read the statute passed by the U.S. Congress—to interpret it as prohibiting some future pilot project, but nonetheless a provision that is unrelated to the current pilot project, is that your testimony?

Secretary PETERS. Chairman Dorgan, it is.

I do have with me, D.J. Gribbin, who is General Counsel of the agency, and certainly can respond to that question.

But, sir, the Administration looked very closely at the 2008 DOT Appropriation Act. By prohibiting the use of funds to establish a cross-border motor carrier demonstration program, we do interpret that the Appropriations Act does not prohibit spending funding to continue to implement the ongoing demonstration project, which was established in September 2007.

Senator DORGAN. Mr. Gribbin, have you advised the Secretary that this language allows the current pilot project to continue?

Mr. GRIBBIN. Yes, Senator. When the language passed, the Secretary asked for a legal opinion on the effect the language would have on the Department's cross-border program. Understanding the context in which this language was passed, we took our traditional, sort of, statutory interpretation approach, and looked at the plain meaning of the text, applied the "every word given effect" principle, statutory construction, and the need to read the statute as a whole.

And as the Secretary mentioned in her statement, in the Act that was passed, several times Congress uses "establish or implement." The statutory principle of "every word giving effect" requires us to

have a look at why Congress would say, under one section "establish," versus in a different section say "establish or implement."

But, to be honest, actually before we even got to that, we applied the plain meaning rule, and the plain meaning of "establish" is "to begin," "to start," "to do something new."

Now the petitioners in the 9th Circuit have argued that the "establish" has a slightly broader meaning, "to introduce and cause to grow and multiply." But even to introduce, you have to start with an introduction, which is a beginning, and so, I think it's clear just under the plain meaning rule, that establish, in this context, means to start a new program.

Senator DORGAN. Mr. Gribbin, why did the FMCSA have such an apoplectic seizure when Congress passed this? Your agency said, "This is awful. This is awful," because they interpreted it to cut off your program, until you got a chance to see if you could figure out how to interpret these words yourself—did you talk to FMCSA about why they felt this amendment was going to be destructive and awful?

Mr. GRIBBIN. I have not. I assume at that point in time we hadn't had time to fully analyze the impact of the language itself.

Senator DORGAN. Do you analyze Congressional intent, at all?

Mr. GRIBBIN. Well, the way statutory construction works is, you start with the plain meaning, does it make sense on its face? In this case, clearly establish means begin, so in effect we could stop there.

Now, I know that in the letters that you received from Professors Segal and Smith, they said there's a problem with reading this, "establish" as just a beginning, because there are no other beginnings to come. I'm not sure that they're familiar with section 6901 subsection D—in which Congress passed just last May, which talks about the establishment of cross-border trucking programs for coaches, motor coaches, and hazardous materials.

One of the reasons we were comfortable in finding "establish" meaning "beginning," is because actually Congress had already talked about future demonstrations that might occur.

Senator DORGAN. But—I'm sorry, you know better than that. You know why Senator McCain said what he said. He was very upset after the vote. He understood what the intent of this was. You just—ignore that? And you ignore what the Legislative Counsel who drafted it determined these words to mean? You ignore that whole body of evidence? I don't understand that, I mean——

Mr. GRIBBIN. Well—I'm sorry, sir, I didn't mean to interrupt you.

Senator DORGAN. The consequences are not yours, apparently. As you know, we've sent a letter asking to see whether you are violating the Antideficiency Act. We now have a 3-judge panel that will rule on this. What if the 3-judge panel rules, as the one judge suggests, that this is unambiguous on its face—you're wrong. And what if the letter comes back saying, "You've violated the Antideficiency Act," have you just hung the Secretary up here by some banister someplace, because the attorney says, "We'll I've found a creative way to read a word in a different way," but of course everybody disagrees with you. What are the consequences for you?

Secretary PETERS. Let me take that—Senator, if I may, let me speak first to those two questions, and then I—I'm not an attorney, I don't even play an attorney on TV, so I will not try to attempt to answer anything that I'm not qualified to do so, and our General Counsel is here.

Sir, if the 9th Circuit Court of Appeals rules against us, we would want to explore, first, our options for appeal, but we would certainly obey an order of the court.

As to the alleged violation of the Antideficiency Act, we certainly do not believe that our continuing the cross-border trucking demonstration is a violation of that Act.

We look forward to cooperating with GAO as they investigate this incident, this circumstance, and should GAO determine that our actions do constitute a violation, I would want to consult, again, with our attorneys as to the specific basis for that determination, prior to making any decisions.

Mr. GRIBBIN. But, Senator, I don't think we're anywhere close to even getting there at this point in time. Again, we have applied rules of statutory interpretation the Supreme Court has applied since the early 1800s. I mean, I have been involved in a fair number of close calls, on what does this word mean, and to be honest with you, I don't think this is even a close call.

Establish, as a dictionary definition, clearly means to begin. Then you look at the statutory construct it is in. If we were to read establish as meaning "establish or implement," in section 136, in effect, section 135 would have no impact whatsoever. Section 135 lays out a whole series of restrictions on the cross-border program. If Section 136 eliminated section 135, why would you have section 135?

Senator DORGAN. I'm obviously not a Constitutional lawyer, either, I don't intend to debate you with respect to the law. Let me read the letter from the Legislative Counsel, they drafted this at the instruction of myself and Senator Specter. It was passed with two cosponsors in the House, two cosponsors in the Senate, passed 74–24 in the U.S. Senate.

Here's what the Legislative Counsel that drafted the provision said. "The phrase 'and implement' was not included because it was felt the phrase 'establish' was to be construed in its broadest context, and such a broad construction would include implementation. In fact, the legislative history in the Senate indicates it was intended to preclude the carrying out of any demonstration program, including the pilot program put into effect in September 2007."

Now, I go back to my point. This is not a hearing in which we're having a couple of lawyers debate a word. I think there's an arrogance here that is all-too-common in this Administration. The arrogance of saying, "We've found a way to deal with this."

They found a way to deal with torture, in fact. Just write a memo, and say "Torture's fine." Write a memo and say "Cross-border trucking is fine," despite the fact that Congress said you can't use money for that purpose. There will be consequences for this. There will be consequences.

So, let me ask a couple of other questions if I might.

Mr. Scovel, we have had the Secretary tell us that a substantial amount of work has been done to make sure that we have equiva-

lent standards, and we have safety that has been ensured. "Every truck, every time," I think was your statement. Mr. Scovel, can you confirm that every truck, every time has been inspected, as the Secretary has suggested.

Mr. SCOVEL. Senator Dorgan, we don't know that every truck has been checked every time.

Just to recap, very briefly, the development of that. When the Secretary announced her intention in February 2007 to initiate the demonstration project or pilot program, the Department set as a goal to check every truck, every time. In fact, it was a commitment at that time.

In May 2007, the Congress passed the Iraq supplemental, instructing my office to review the Department's preparations for the pilot program, to issue a report to which the Department would then respond. We thought it was fair, and our work over the summer to examine the Department's plans to make good on its commitment to check every truck, every time.

One pitfall that we noted in our September 6 report was the absence of site-specific plans. That is, for each of the 25 main commercial vehicle crossings between the United States and Mexico—specific plans coordinated between FMCSA officials, and Customs and Border Protection Service officials, so that those FMCSA officials would have a reasonable chance of identifying demonstration project trucks coming up from Mexico, singling them out for inspection.

We also identified the need for a quality control measure, on top of that, so that there would be some assurance that those trucks checked by FMCSA officials were all of the trucks: every truck, every time.

FMCSA, in response to our report in September, issued site-specific plans, and incorporated them into their response to Congress. The Department identified as a quality control measure, a plan to draw from Customs and Border Protection, a data set of demonstration project trucks that had come through a particular border crossing point, and then to cross-check that—a sample of 10 percent of CBP data, would be cross-checked against FMCSA data.

And, we reviewed that methodology, we thought it was reasonable at the time. Recently, when we were completing our interim report, we checked again with FMCSA. Again, we thought it would be fair to ask how they were doing on the quality control, and we learned that it was not in place.

Therefore, what we have, sir, is a situation where the Department has made the commitment to check every truck, every time, but we just don't know if that's been accomplished yet.

We have records, as of February 25, indicating that there have been 3,680 crossings by project participant trucks. We've reviewed many of FMCSA's records documenting those, but again, we don't know whether that's the entire set of Mexican trucks that have crossed the border under the demonstration project since September.

Senator DORGAN. Mr. Scovel, because this issue is about the equivalency of standards—or lack of equivalency—let me ask you with safety here as a backdrop. And the reason I ask the question is if you were coming up to a four-way stop sign tomorrow at some

place in this country, and an 18-wheeler that is on a long-haul mission from Mexico, you would want to know that that truck, that driver, that company, is operating in a manner that is as safe as a domestic carrier—driver's records, vehicle inspection, accident reports—so that we know, we certify that vehicle, that driver, that your safety at that intersection, and the safety of your family is equivalent with respect to the meaning of a U.S. truck.

Can you describe the extent to which the Department of Transportation is ensuring that drivers have basic English proficiency when they come into this country?

Mr. SCOVEL. When FMCSA officials are checking trucks that are coming through each of the commercial border-crossing points, they are required to check with the driver, ask a series of basic questions, and determine English language proficiency at that time.

Senator DORGAN. Isn't it the case that the proficiency test, initially, didn't include any test of whether drivers understood highway signs?

Mr. SCOVEL. That's my understanding, sir. It's my understanding also that at this time, the test does include a method to test Mexican drivers' familiarity with highway signs in this country.

Senator DORGAN. I understand that's the case. They now are asking them to at least understand highway signs, but didn't initially.

Isn't it true that when they show drivers pictures of highway signs, that marking the driver as English-proficient is what they do, even if the driver's answer is in Spanish?

Mr. SCOVEL. I'm not familiar with that particular scenario, sir.

Senator DORGAN. Is there anyone on your staff that's familiar with that?

Let me tell you what I understand.

Mr. SCOVEL. Sure.

Senator DORGAN. My understanding is, if a Mexican driver is shown a picture of a stop sign, and the driver responds that the sign means "alto," the Spanish word for "stop," DOT considers that driver to be English proficient.

Mr. SCOVEL. If I may have a moment, sir.

Senator DORGAN. Sure.

Mr. SCOVEL. To partially address your question, this is a question involving the completeness and accuracy of FMCSA's records during the border check. In early January, we pulled 2,000 border-crossing records from FMCSA and reviewed them to see whether they appeared to us to be accurate and complete. That's a fairly large sample. We identified 44 among them, however, that were incomplete in some regard. Some of the answers involved—some of the incompleteness—involved English language proficiency, as well as notations as to driver's license number checks, and CVSA decals. That's—44 out of 2,000 is not a large number, but it does indicate some minor problem, at least, with the preparation of FMCSA's records concerning data crossings—border crossings, excuse me.

Senator DORGAN. Mr. Scovel, while you're checking on that, I would like to know the answer to that. If we have now required that drivers of long-haul Mexican trucks identify highway signs, but respond to them in a foreign language, it raises the question of English proficiency, which is part of the safety issues and safety considerations that I and others are concerned about.

So, if you would check on that, my understanding is that a driver responding to a stop sign by identifying it as "alto" is described as English-proficient by the Department of Transportation.

Mr. SCOVEL. I do have an answer to your question, I was just handed a document by a member of my staff, it's a memorandum prepared by the Federal Motor Carrier Safety Administration dated February 1, 2008.

In the section describing English-language proficiency tests, there's a notation that, an instruction to the inspector to ask the driver to explain the meaning of any four selected highway signs, with a parenthetical note that the driver's explanation may be in any language, provided the inspector is able to understand the driver's explanation.

Senator DORGAN. So, if the inspector understands Spanish, and the driver doesn't speak English, the driver is determined to be English proficient?

Mr. SCOVEL. The section that I quoted, sir, would be one component of the English-language proficiency check.

Senator DORGAN. And my question would be, what was happening January 31, if this was a February 1 document? Do you have any notion of that?

Mr. SCOVEL. I do not.

Senator DORGAN. And I'll tell you why I'm asking you these questions. The reason I'm asking these questions is, I think safety is at the root of this issue. As I said when I started this hearing, if there were no safety questions, if there was equivalency with respect to the condition of vehicles, the records of drivers, and so on, and the basic safety conditions of understanding the language, understanding the highway signs, there wouldn't be a hearing. I wouldn't be contesting this, I wouldn't be upset. I mean, we wouldn't have had the amendment in the first place. But, I'm just trying to understand what's going on.

Madam Secretary, you took 1 hour on a Thursday night to issue your rule initiating this cross-border trucking program after the Inspector General issued the report. I think the report was issued at 7:30 p.m., and at 8:30 p.m., you announced the cross-border trucking project.

Now, I'm going to ask you a question about that, but first I want to ask the Inspector General—in that submission that evening—and I don't have the date right here—but on that evening when you submitted the Inspector General's report, September 6, 7:30 p.m., last year, you released a report. In the report, you said the following. You said, "While the DOT officials inspecting Mexican truck companies took steps to verify onsite data, we noted certain information was not available to them. Specifically, information pertaining to vehicle inspections, accident reports, and driver violations maintained by Mexican authorities was not available to the Department of Transportation officials, unless such information was included in the companies' records."

Do you stand by that statement?

Mr. SCOVEL. We do, sir. In fact, if I may elaborate, very briefly—accident reports, inspections records, driver violations are not readily available to FMCSA inspectors when they are onsite, in Mexico, conducting a pre-authority safety audit. They are required by sec-

tion 350 of the 2002 Appropriations Act, to review available information. And that's what they do when they're onsite in Mexico and are reviewing company records.

The one major database, Mexican national database, that FMCSA officials have access to is called LIFIS, and that's the Mexicans' database that records operator authority for their commercial truck drivers. And it will indicate whether there is a valid commercial drivers license issued to a particular individual, whether that individual is required to remain within Mexico, or whether he's authorized by the Mexican government to engage in cross-border operations.

Senator DORGAN. But the only information the Department of Transportation would have about the companies themselves or the employees of those companies—for the most part—would be if that information was voluntarily disclosed by the companies, is that correct?

Mr. SCOVEL. That's correct, apart from what is available through the LIFIS system. Yes, sir.

Senator DORGAN. That is nothing comparable to what we have in this country?

Mr. SCOVEL. No, it's not.

Senator DORGAN. My understanding is that one of the largest Mexican carriers who was to originally be involved in the program was dropped by the Department of Transportation when it was found that the company had a record of over 100 safety violations per truck. And the Department of Transportation then acted as if, well, it was never intended to be part of the program, but—even under those circumstances, the only information we have, because there's no central repository of information in Mexico on these key issues—accident reports, vehicle inspections, driver's records—is information you obtain voluntarily. And my guess is that we don't have massive numbers of inspectors determining whether the voluntarily provided information is even accurate.

But let me get back this question of 8:30 p.m. on September 6, 2007, Secretary Peters—the Inspector General at 7:30 that evening, said that the Mexican government does not have a central repository of records. It seems to me, of things that would be key to know—how are these drivers doing, what's the condition of the truck, how many accidents have happened with this driver on a truck—without that information, 1 hour later, in the evening you rushed forward and started the pilot project. It was, as if you were waiting at the starting gate, didn't matter much what the Inspector General had to say. So, what was the rush? And it seems to me that whole attitude now confirms itself with your counsel saying, "Yes, we're doing this. We don't care. We'll parse words, we'll go to court and debate, we don't care very much—we're going to be creative," and arrogant, in my judgment.

Secretary PETERS. Senator, let me give you a couple of answers. First of all, the U.S. has commitments to fulfill under an international obligation, to the NAFTA trade agreement. So, we do feel that we need to move forward with this program if we have the authority to do so.

The Inspector General's report that you referred to—as is customary—a draft copy of that report had been shared with us, prior

to writing the final report, so we did know what questions the Inspector General were going to have. And the three issues, in fact, the three requirements that he addressed, in that report.

First, ensuring that adequate plans are in place to carry out the Department's commitment to check every truck, every time. Sir, as you're aware, the law required only a 50 percent check. But, because I felt that this demonstration program was important enough to do so, I personally said that we would inspect every truck, every time, as it crosses the border—we will check that it has a safety decal, we will check that they have a valid driver's license—which is verifiable in the Mexican commercial driver's license database—and that they have English proficiency.

So, English proficiency is not a matter of holding up a shaped sign and asking the driver if they can discern—whether in Spanish or English—what that sign means. But, the inspector has a conversation with the driver—where are you going? What load are you carrying, what's your name? Where did you originate, how long have you been driving? Those kind of questions are asked of the drivers as they approach the border before they're allowed to cross.

Senator DORGAN. Madam Secretary, I apologize for interrupting, but did you just hear the Inspector General, just a moment ago?

Secretary PETERS. Yes, sir, I did.

Senator DORGAN. He asks the driver three or four questions and the driver answers in Spanish correctly, that's English proficient?

Secretary PETERS. Sir——

Senator DORGAN. Did you just hear that?

Secretary PETERS.—sir, I did hear that. If the driver answers in English or Spanish when they are showing them the shape of a sign, they can answer, and that is what the memo addresses.

Senator DORGAN. Would you consider someone who answers in Spanish, unable to answer in English, as English proficient? Is that what you believe?

Secretary PETERS. What I'm telling you, sir, is that there are other tests for determining English proficiency, and this is a conversation that the inspector has with the drivers, and asks a series of questions, as I indicated. Where did you originate? How long have you been driving? What load are you carrying? What is your destination? Those kind of question are asked of the drivers to determine their English proficiency.

Senator DORGAN. Madam Secretary, we just heard—and I have learned, as well—that a driver answering the questions accurately with respect to highway signs, answering in Spanish, if they answer correctly, are determining to be fluent in English?

Secretary PETERS. Sir, with all——

Senator DORGAN. Proficient in English.

Secretary PETERS.—yes, sir, with all due respect, that memo addresses the recognition of signs, it does not address, overall, the issue of English proficiency.

The second issue that the Inspector General referred to in his September 6 report was ensuring that State enforcement officials understand how to implement the recent guidance on the demonstration project and that training initiatives have filtered down to roadside inspectors. As the Inspector General indicated, that has been verified.

And third, addressing our determination that Federal Motor Carrier Safety Administration has implemented the policies, the rules, and the regulations that differ slightly from the language in 3 of the 34 specific Congressional requirements. Those were the three issues that the Inspector General addressed in his September report.

Sir. The quality control check with Customs and Border Protection, this language issue—these are exactly the type of things that a demonstration program is designed to identify, and the Inspector General's report has been very instructive, in terms of, for example, identifying the best method, or methods, for quality control. We're using a layered approach for quality control, and when we learned, sir, that when the CBP data was not exactly able to be synched with ours—for example, a CBP identifier for a truck could be various trucks that are owned by a specific trucking company. So, there isn't the ability to relay a data point in their record, directly to a data point in ours.

In spite of that fact, preliminary numbers are very favorable, with FMCSA verifying border checks for 95 percent of the crossings noted for CBP which, these unique carriers can be identified. The remaining 5 percent of the records are still being investigated.

We also, sir, have started a process to put a GPS device on every truck—I'm sorry—on trucks that are participating in the demonstration program, and continue with CBP to access the data that they have, in a format that will provide the type of quality control to verify inspections of every truck, every time.

We are also working with CBP to have motor carrier safety integrated into the international trade data system, which is part of the Automated Commercial Environment Development Effort, so these efforts are continuing.

And finally, sir, we do have—Mexico does have—a central repository, as the Inspector General indicated, the Licensia Federale Informacione System—LIFIS—for all commercial drivers, license checks can be conducted between that system, and CDLS/ILS system that we have in the United States.

Sir, what the law requires us to do is to recognize each other's CDL, as long as there are reasonable assurances that we have a program that we consider safe.

Canadian drivers, for example, are not subjected to random drug and alcohol tests, and yet we allow Canadian drivers, and we allow the Canadian CDL program to be used as part of this NAFTA Treaty provision.

Senator DORGAN. Madam Secretary, there is nothing in NAFTA that requires us to allow Mexican long-haul trucking into this country until it is safe. There is nothing under the trade agreement that requires that.

And I started by telling you—we started this trade agreement with Mexico with a $1.5 billion surplus, we now have a $74 billion deficit, and you're worried about what Mexico's going to do. The fact is, there is nothing that requires us to fail to stand up for our own interests and our own safety standards on American highways, so——

Secretary PETERS. Sir, if I might?

Senator DORGAN. Yes.

Secretary PETERS. Sir, I did neglect to make one other data point that staff has passed to me. Seventeen of the 19 Mexican carrier that are in the Mexican demonstration program were already operating within the commercial zone, and therefore we already had records for the inspections, and the crashes for those carriers and for those trucks.

Senator DORGAN. Madam Secretary, let me try once again—you've indicated you inspect every truck, every time. The Inspector General says there's no way to verify that, for any of us, at this point, because records have not been kept. You indicate that there is not a circumstance where someone being asked questions at the border in a Mexican truck, answering in Spanish, is not certified as English proficient, or proficient in the language.

I want to try to get at that, because as the Inspector General indicated, there was a notation with respect to that provision. Would you read the notation again, Mr. Inspector General?

Mr. SCOVEL. This is an instruction to the inspector onsite, sir. It reads, "The inspector will ask the driver to explain the meaning of four selected highway signs. (Note: The driver's explanation may be in any language, provided the inspector is able to understand the driver's explanation)." So, I believe my earlier testimony was that this was one factor among others that the inspector could consider in determining whether a Mexican driver had English language proficiency. By no means did I mean to say that it was the only factor.

Senator DORGAN. That's a fair point.

But, Madam Secretary, could you tell us why that notation exists? Why would there be a separate notation that says, "If we show highway signs to a Mexican driver, if they can answer what those highway signs are in Spanish, they'll be determined to be English proficient."

Secretary PETERS. Sir, the shapes of signs, road signs, a stop sign, yield sign, for example—these signs are international in shape, and generally in color, as well. I've driven extensively in Mexico, and I understand that an octagon, red, shaped sign, means "stop" or "alto" in Mexico.

What we were determining with this specific issue, and I would certainly have to ask the FMCSA Administrator to expand on that, beyond my personal language of it—but I have been to a border inspection station, I have watched this test be administered, and the shape of these signs is international, so if the driver recognizes that sign and that shape, that driver knows what to do.

But as the Inspector General just indicated, sir, that is not the limits of the English proficiency examination that is given to these drivers.

Senator DORGAN. Madam Secretary, I understood what you would come today to tell us, that you intend to do what you intend to do, you have lawyers that tell you what you can and what you can't do. I think you're making a very big mistake. And I used to run an agency, and I had lawyers. And, you know, the fact is, you can get a lawyer to tell you almost anything with respect to your counsel, I mean, I understand that he probably loves to debate these words.

We've got people in the legislative counsel, I'm sure there are going to be people in the circuit court that will love to debate these things, but I think—this is not rocket science. You understand exactly what the Congress was intending last year, you understand exactly what they did, so did Senator McCain, so did your agency in DOT when they were so upset with it, and yet you believe you found a loophole.

It's happening in so many agencies in this Administration, and frankly I'm just sick and tired of it, and so are so many others. You have a responsibility, and you will meet it one way or the other, because failure to meet your responsibility under the law will bear consequences.

My colleague from Arkansas is here, and I have taken a lot of time.

Senator Pryor, why don't you proceed?

STATEMENT OF HON. MARK PRYOR,
U.S. SENATOR FROM ARKANSAS

Senator PRYOR. Thank you, Mr. Chairman. I appreciate your attention to this.

Let me ask, if I may, Secretary Peters, first—just for a point of clarification, I'm sorry, I was a few minutes late getting over here—but you have a chart in front of the table there, that says, "All 22 Congressional safety mandates have been met." I understand that chart to mean, past-tense. In other words, you're saying, literally, all of the mandates that we've laid out in one of the appropriation bills has been met. Is that right?

Secretary PETERS. Senator Pryor, yes, that is correct. These requirements were laid out, I believe, in the 2002 Appropriation bill and there have been Inspector General reports verifying that all of those requirements have been met. In fact, Senator, exceeded, because instead of only investigating 50 percent, or checking 50 percent, we are checking 100 percent.

Senator PRYOR. And that is the 2002 Appropriations bill?

Secretary PETERS. That's correct, sir.

Senator PRYOR. And, I believe mostly what Senator Dorgan has been asking about is more recent legislation, mostly the bill that was signed in October 2006.

There was an amendment to that port security law that had to do with trucking security, in fact, some people might call that the Pryor amendment, and I wanted to ask about this.

It's Section 703, focused on improving domestic trucking safety by developing new regulations to determine legal status verification for all licensed U.S. commercial drivers, develop commercial driver's license anti-fraud programs, and assist Federal, State and local law enforcement officials on how to identify non-compliance.

What steps has the U.S. Department of Transportation taken to develop a program to meet these mandates?

Secretary PETERS. Sir, we have developed those requirements, if you'll give me just a moment, I'm going to talk to Administrator Hill to make sure that I answer you correctly.

Sir, I apologize for the delay. What Mr. Hill has shared with me is, we're incorporating these provisions in our CDL rule now. That

rule is being finalized, and we hope to issue that rule later this year.

Senator PRYOR. When you say "later this year," I believe the mandate, the law says, you're supposed to have it done by April of this year. Will you have it done by April of this year?

Secretary PETERS. Excuse me, sir.

Sir, I'm told that the rule is finalized in terms of DOT, it's at OMB right now awaiting approval, and sir, I give you my word that I will do everything possible to have that implemented by April of this year.

Senator PRYOR. OK, maybe I'm reading between the lines, and I shouldn't be, but I think what I'm hearing is it probably won't be done by April of this year.

Secretary PETERS. That's not what I'm saying, sir. I will do everything I can to make sure that that rule is implemented on time.

Senator PRYOR. OK, let me ask about Mexican truck drivers and Mexican carriers—they're required to register with the International Registration Planner, IRP, and pay a portion of registration fees to the States as our U.S. carriers pay.

Arkansas has an ad valorem tax, I'm not sure many States have an ad valorem tax, but U.S. truckers are required to pay that tax, as they are in many other States that have ad valorem. Will the Mexican trucking companies be treated the same as U.S. trucking companies, and do we have an assurance in our State that somehow these Mexican trucking companies will pay the same taxes that the U.S. companies pay?

Secretary PETERS. Senator, the drivers and the trucks that are involved in the pilot demonstration, or demonstration program have to meet every applicable State law when it comes to the taxes, as you mentioned, under IRP. I will get back to you very specifically about Arkansas, to make sure that we are addressing the ad valorem issue, but I do know that a requirement is that they meet all applicable State laws.

Senator PRYOR. One of the concerns I have as you follow up on that is, it's my understanding that right now, my State does not have the names of all Mexican carriers, their mileage through our State and their addresses, and if there is a non-payment issue, I don't think our State knows who's on the road and who's not. So, I would really appreciate it if you could get back with me and tell me how you all track that, and how you keep the States informed.

Secretary PETERS. We certainly will, sir. And one of those things that we have implemented now is a GPS locator device on the truck, so that will be able to help us track those trucks, and know, sir, for example when they go through Arkansas, how many miles, what time, et cetera.

Senator PRYOR. Now that you mention that, has that part of the plan been implemented? Do all of these Mexican trucks have the GPS device that U.S. DOT can monitor?

Secretary PETERS. I want to verify—I believe that we have most of them, I don't know if all, let me double-check that.

Sir, approximately 2 weeks after they join the program they are fitted with the device.

Senator PRYOR. OK, so that means every Mexican truck, except for the ones that have just entered in the last couple of weeks should have that device?

Secretary PETERS. And I don't believe they're allowed to cross, but I'm not sure.

Are they allowed to cross prior?

OK, they could cross the border prior to that, either in the commercial zone or beyond.

Senator PRYOR. Explain that again?

Secretary PETERS. They—in the first 2 weeks, after they are entered in the program and perhaps don't yet have the GPS locator device on the truck, they could be able to cross the border, and enter either the commercial zone or beyond the commercial zone. We will determine if that has happened, and again, get back to you on the record with that.

Senator PRYOR. OK, I know that various people, various groups have asked U.S. DOT for documents and information under the Federal Freedom of Information Act. As I understand it, the Department of Transportation takes the position that a Federal court decision is required before you all release those documents. Is that the Department of Transportation's position?

Secretary PETERS. Sir, I'm going to refer to our attorney on that particular issue, I do not know that.

Mr. GRIBBIN. We are continuing to gather and review documents in preparation to release them. Apparently there are over 80,000 documents that are touched on by that request.

Senator PRYOR. Well, do you take the position that you need some sort of Federal court decision to release those documents?

Mr. GRIBBIN. No, it's a FOIA request, so we don't need a court decision.

Senator PRYOR. Right.

Mr. GRIBBIN. But what happens, is a FOIA request came in for 80,000 documents——

Senator PRYOR. And how long ago did that come in?

Mr. GRIBBIN.—that came in, in October 2006.

Senator PRYOR. October 2006, this is March 2008. And 80,000 documents is a lot of documents, I understand that, believe me. But it's not that many documents. What's the hold-up on releasing those documents to the public?

Mr. GRIBBIN. Again, it just—FOIA requests are very exhaustive, they're very labor-intensive, there are a lot of documents involved. FOIA requests—we release documents, but they're subject to certain exemptions. So, we need to, actually need to go through the documents to make sure that all of the information we're releasing, for example, does not violate someone's privacy.

Senator PRYOR. But, here again, a year and a half has passed. And again, I understand 80,000 is a lot of documents, but a year and a half has passed, you're the lawyer for the agency, you have a legal team, you have people there that can do that, why is that taking so long?

Mr. GRIBBIN. Let me, with your permission, let me go back and find out exactly the status of this request, and report back to you.

Senator PRYOR. That would be good. And—not to compare apples to oranges, but in Arkansas the Freedom of Information Act, the

State Act allows the State 3 days to provide documents. Three days. In my experience in government, is the longer you give someone to produce documents, the longer they'll take. And I know that the Federal FOIA does not have a time requirement, but you should provide these in a reasonable time. And 80,000 documents—we're not talking about millions and millions of documents, here. Some FOIA requests do have millions and millions of documents. This one has 80,000 documents, according to your testimony, and you've had over a year and a half to process this. I just don't understand why it's taking you, at the Department of Transportation, so long—it sounds to me like you're purposely not releasing the documents. That's what it sounds, to me, like. You care to comment on that?

Mr. GRIBBIN. I wouldn't read that intent into it. Senator, apparently, originally there were 300,000 documents, now we've figured out that 80,000 are responsive.

But, I will—I note your frustration, and I will get back to you.

Senator PRYOR. Let me ask this—when did you hone it down to 80,000?

Mr. GRIBBIN. Over the course of the last quarter.

Senator PRYOR. OK, well, here again, I know if you've honed it down to 80,000, it seems to me you've had ample time, and you've basically admitted that you've reviewed the 80,000 documents. My strong recommendation is that you release those as quickly as possible, unless there's a provision under the Federal FOIA that says you shouldn't release those. But, as you and I both know, because we're both lawyers, you can redact information, et cetera, et cetera, so I would strongly suggest that you release that, and also I'd appreciate you getting back with the Committee on the status of that FOIA request.

Let me ask one last question, if I may, Secretary Peters, and Senator Dorgan, I'm sorry I'm impeding on your time, but as I understand the Department of Transportation's position—you are going ahead with this pilot project, even though there is a specific law, specific statutory provision that tells you not to—and we can fight about that and discuss that—I believe that when Congress says you shouldn't do this, you shouldn't do it. I've heard your testimony today, and I know your position on that today. But, here's my question, specifically. Do you believe that you have the legal authority right now to expand the pilot project beyond what you're doing today?

Secretary PETERS. Senator, I'm going to answer that briefly, and then ask our attorney to be very specific about that.

But, sir, we are in the first year of a demonstration program now. I will not make a decision until, toward the end of that year, when we have a chance to look at all of the data, to talk to the Inspector General, to look at the CBP data, talk to the independent evaluation panel, and determine whether we go forward with an additional year of the program, or not.

Again, let me make sure that the lawyer here gets me to get it right.

Mr. GRIBBIN. Thank you, Madam Secretary.

The—I'm sort of, to pull back just a second—the Department has reached the legal conclusion that based upon meaning of the terms

and the statutory context and other rules of statutory interpretation, that "establish" does not mean "begin," "establish" means—"establish" means "begin," it doesn't mean "and implement." And so we have, the Secretary has the legal authority to continue forward, that that language did not stop her.

And in fact, I don't think as you want—as a legislative branch, I don't think you want the Executive Branch looking past the clear language of a statute into what we deem to be Congressional intent. I mean, that's a very slippery slope, and pretty dangerous.

But, I would say right now, the Secretary's authority vis-à-vis the cross-border trucking program is constrained by Section 530, by Section 6901. So, she does not have the ability, currently, to expand the program.

Senator PRYOR. OK. Expand it beyond what exists today?

Mr. GRIBBIN. Exactly. Plus, she's constrained by the newly enacted Section 136, which does not allow her to establish a demonstration program. So, any expansion that would include buses, any expansion that would include hazardous materials, would clearly be establishing a new program. Section 136, as recently enacted, would prohibit that.

Senator PRYOR. That's all I have, Mr. Chairman.

Senator DORGAN. Mr. Gribbin, I understand you've given the Secretary advice, here. But it is true—we don't want you to look beyond the written law, and it's also true that we don't want you to ignore the law. And we don't want you to be creative enough, and arrogant enough, to decide the law doesn't apply to you, and that's what's happening here, I believe.

Let me ask both Secretary Peters, and also you, Mr. Gribbin, have you visited with the White House about your decision to ignore the statute passed by the Congress?

Mr. GRIBBIN. Senator, with all due respect, I don't think we're being either creative, or arrogant. What we're trying to do—similarly when we have appropriation—we have a series—during my time as Chief Counsel of the Federal Highway Administration, and as General Counsel, there are a series of times where Congress passes something with the intent of affecting a certain action, but the language they use doesn't get it there. And it's most—actually, most common in Appropriations bills, where there will be an Appropriation rider that will fund a specific project, a word will be left out, and we understand Congressional intent, we understand exactly what the sponsors meant to do, we know all of that. But without the appropriate legal language, we as a Department can't effectuate that change.

Senator DORGAN. Well, with due respect, Mr. Gribbin, I don't know your background, but with due respect, the people that write these legislative pieces for us are called the Legislative Counsel. They actually have a fair amount of experience, that's what they do for a living. And I have a letter from the Legislative Counsel telling us exactly what they intended with this language, and why. And it ought not be ambiguous to you. It ought not give you room to decide that the Secretary should ignore the law.

So, with due respect to your legal background, I would just tell you, the people who do this for a living wrote it, they knew exactly what was intended with it, and they would expect an attorney

working for the Secretary of Transportation to interpret it in a proper way, and that has not been done, in my judgment.

I ask the question once again, Secretary Peters, and Mr. Gribbin, have you discussed this with the White House?

Mr. GRIBBIN. Before I get there, I would note that the Legislative Counsel in her letter to you, in discussing what she was trying to effectuate, used the phrase "establish or implement." Had that phrase—same phrase—actually been reflected in the statute, it would not have been any discussion whatsoever about the effect of that.

In addition, she also, earlier, she mentions the phrase, I said, she used "establish," instead of adding "and implement," in effect, it should be "or implement."

So, this is a post-enactment, and courts, to be honest, have been highly dismissive of any post-enactment communications reflecting upon the intent of Congress.

Again, our job is to look at, what did the House pass? What did the Senate pass? What did the Conference Committee decide in conference, "or implement," what came out? Based on the legislative history, if we were to get to the legislative history, it's pretty clear that the language that was enacted, that was signed by the President, does not block the current demonstration program.

But, I'm sorry, I failed to answer your——

Senator DORGAN. No, no, the time is yours, Mr. Gribbin—that is a long and tortured trail to get to that ending point, but it's wrong. And, you know, you have the right to advise the Secretary.

I ask my question again, Madam Secretary and Mr. Gribbin, have you discussed these issues with the White House?

Mr. GRIBBIN. As part of, especially something that has the visibility of an issue like this, we routinely consult with the Justice Department and White House Counsel, and did so on this matter.

Senator DORGAN. And so, Madam Secretary, who did you discuss this with at the White House?

Secretary PETERS. Sir, I'm going to let Mr. Gribbin talk about the discussions with legal counsel at both the White House, and of course, the Department of Justice as well, because he conducted those discussions.

Senator DORGAN. And you've had no discussions with the folks at the White House on this subject?

Secretary PETERS. Sir, I am answering that part of the question right now, sir. The question that I asked after this Fiscal Year 2008 Consolidated Appropriations Act was passed, is whether or not it required that we shut down the demonstration program. And as Mr. Gribbin has indicated, Senator, that was not the interpretation.

I discussed with the White House, I specifically discussed with the Office of Legislative Affairs—I'm sorry, yes, Legislative Affairs—the U.S. commitment to fulfill our international obligations under the NAFTA trade agreement, and based on the interpretation of the law not requiring that we shut the program down, I made a decision not to shut the program down.

Senator DORGAN. Let me, if I might, without causing you discomfort, Mr. Scovel, in your release of March 11, that's yesterday, you indicate, "While our mandate is to address those specific issues re-

quired by Congress, we're mindful of the legal questions currently before the 9th Circuit Court of Appeals. Among those is the question of the legal effect of the language contained in the 2008 Appropriations Act, 'None of the funds made available under this Act may be used to establish a cross-border motor carrier demonstration program.' In my view, after reading the Senate floor debate from early September, it's clear the sponsors of this amendment—sponsors of the amendment to the Senate Fiscal Year 2008 Transportation and Housing Appropriations bill, wanted to halt the project by denying funding. The parties to the court action have briefed orally and argued the interpretation. Given that the matter is joined before the 9th Circuit, I'll respectfully defer to the body's judgment."

I, again, find it almost unbelievable that we're here listening to this. It's clear to me, it's clear exactly what the drafters meant, and they do that for a living, with all due respect to the Counsel at the Transportation Department. It's clear what the Congress meant, and Madam Secretary, the separation of powers in this government of ours requires each to be respectful of the other. I don't believe the current Transportation Department approach is respectful of the U.S. Congress, in this respect.

And, as I indicated, you will do what you will do, but I will tell you that there are consequences for that. And, you know, there will be other occasions where the Congress will address your issues, and in other ways, and I asked you to come to this hearing, because I wanted to try to understand exactly what it was you were trying to do here.

I think you are on very thin ice in describing a program that, number one, was not ready. You're suggesting, somehow, that Mr. Scovel's report gave you the green light. Mr. Scovel said some good things, and some things that were troubling in the Inspector General report that came out, 7:30 that evening. Mr. Scovel, I don't think you were giving them any light—you weren't necessarily giving them a green light, were you?

Mr. SCOVEL. It wasn't ours to give a light, sir. We wanted to point out facts for the consideration of policymakers on both sides of the debate.

Senator DORGAN. Well, that's important to understand, because the Department of Transportation has represented your report as giving them a green light.

Do you have any further questions of this panel, Senator Pryor?

Senator PRYOR. I do, Mr. Chairman. If I may, just ask a couple, I'll try to be very brief.

Madam Secretary, there's a company, a Mexican carrier called Trinity Industries de Mexico—they were participating in the pilot program, they were pulled out of the program last month, but they had over 1,000 safety violations, and 75 out-of-service orders during the 12 months from September 2006 to September 2007.

I'm a little puzzled when I learned about this, because I've heard you say here today, and on other occasions, that safety is your primary consideration. So, how do you explain how a company like this could be in the program in the first place? Did DOT not do a background inspection on this company? Did DOT miss, did DOT ignore? Was DOT not prepared to let this company through? Tell

the Committee, if you can, how this company was allowed to participate?

Secretary PETERS.—was advised that they were withdrawing because of the high level of scrutiny that their vehicles were subject to as a result of participation in the demonstration program.

This motor carrier has been operating in the Mexican economy for over 30 years, they have established business practice within the commercial zone. They ultimately did not feel that they would operate outside of the commercial zone, and so that was the reason for withdrawing this company.

This company did pass the pre-authority safety audit, sir, it did. But, as part of that requirement, and another step in the layered enforcement of this issue, was the inspection at the border each and every time they crossed the border, regardless of whether they were going into the commercial zone, or intended to go beyond. They did not go beyond the commercial zone during their participation in the project, though.

Trinity crossed the border a little over 1,100 times, never leaving the commercial zone, and at their request, their operating authority was withdrawn.

Senator PRYOR. Well, if I might just ask on that point, is it the case that this company has a record of over 100 safety violations per truck, and you're saying, "Well, maybe so, but they're only operating within 25 miles of the border."

Are you aware that they've had over 100 violations per truck?

Secretary PETERS. Senator, I am not at all excusing their behavior, and let me verify that fact, because I don't want to speak to that without ensuring that I know that's accurate.

Senator PRYOR. But—go ahead.

Secretary PETERS. Senator I apologize for the delay. What's been explained to me is that many of the times that Trinity crossed, they were bringing in new trailers, trailers that had not been inspected prior, and they were finding violations with those trailers.

We don't have verification with us now, but we'll get back to you in the record as to, if that was accurate in terms of hundreds of violations, per vehicle or per trailer.

Senator DORGAN. If this is a company that has 100 violations per vehicle, one would worry about the 25 miles inside our border that they are operating, and let alone, the long-haul trucking. So, if I were you, I would look aggressively, I mean, we wouldn't want that within 25 miles of the border, would we?

Senator Pryor?

Senator PRYOR. And also, Madam Secretary, just to make sure I understand your testimony a moment ago, you said this company voluntarily withdrew from the program, not DOT making this company withdraw, is that right?

Secretary PETERS. Senator, that is accurate, however they did know that we were concerned with their vehicles, and they did withdraw prior to the time that we did not—we said that they were not eligible to work in the program.

Senator PRYOR. So, how did they get in the program in the first place?

Secretary PETERS. Sir, they passed the required pre-authority safety audit, at which time——

Senator PRYOR. Whoa, whoa, whoa—how do you pass one of those if you have as many violations as this company has? How do you pass that?

Secretary PETERS.—Senator, I think what I tried to explain earlier, and perhaps not well enough, is that the vehicles that were inspected at the time they passed the pre-authority safety audit, were not the vehicles that they were subsequently—or the trailers, rather—that they were subsequently bringing across the border. So, when they were approved at the pre-authority safety audit, that would have meant the records on the drivers, the equipment—both the trucks and the trailers—at the site, that intended to be used in the program were inspected at that time.

Subsequently, they brought different trailers across the border, and we did find violations with those trailers.

Senator PRYOR. But isn't it a red flag when you see the chronic history of violations with this company? Isn't it a red flag that they should not be in this program?

Secretary PETERS. Senator, it certainly is with this company, however, I would stress the fact that of the 19 carriers, this was an anomaly. We have not had that record with the other carriers.

Senator PRYOR. OK. Well, nonetheless, Mr. Chairman, one of those things that concerns me about that is it's this company that had this chronic history of violations—they get through the DOT process, and then they voluntarily get out of the program—it's not the DOT that makes them get out, it's that the company has voluntarily asked to be let out of the program.

One last question, if I can, Mr. Chairman—and I appreciate your patience—but, I want to be very clear, I want to make sure I understand the Department of Transportation's position on this, and that is—does the U.S. Department of Transportation accept a Mexican CDL as equivalent to a U.S. CDL?

Secretary PETERS. Senator, we do, with some exceptions. For example, we do require that anyone who drives in the United States on a commercial driver's license, including Mexicans, pass, for example, a drug and alcohol test, that it is administered by a U.S.-certified laboratory. That is a requirement that we have, they have to abide by that requirement. You mentioned earlier, some other requirements about paying fuel taxes and things like that—every Mexican truck, every Mexican driver who drives into the United States has to comply with our laws, here in the United States.

Senator PRYOR. Well, I hear what you're saying, but my understanding of the Mexican CDL system, as compared to the U.S. CDL system, is that Mexico has some vague requirements, Mexico has some requirements that would probably not meet U.S. standards. And I think we are on very dangerous ground if we just carte blanche accept a Mexican CDL as an equivalent to the U.S. CDL, because it's not. It's not the same. The U.S. has stricter, tougher standards for our drivers than Mexico does. And I think we're on very dangerous ice when it comes to safety on our highways if we just give carte blanche to these Mexican truck companies to allow their drivers with Mexican CDLs to come into this country.

Secretary PETERS. Senator, the program does require us to recognize each other's CDLs. The Mexican CDL is somewhat different, but not substantively different than the American CDL.

And as I pointed out earlier, for example, Canadian drivers who participate and drive into the U.S. on a regular basis, are not required in Canada, to submit to random drug and alcohol tests. When they drive in the United States, they are subjected to that requirement, and that is the same thing that happens with Mexican drivers who come into the United States, have to meet our requirements, as well.

Senator DORGAN. Secretary Peters, there's nothing that requires us in any trade agreement to sign up to, or submit to something that we believe diminishes safety on American roads. I mean, you keep suggesting somehow, that we are required under NAFTA to do this now. That is not the case. I want to let you go, because we have another panel, but I do want to make this point—you said that the company that had 100 safety violations per truck—which is kind of sketchy information that we have, voluntarily withdrew. I mean, most of us from the outside observe that as an embarrassment to the Department of Transportation, and they quietly had them withdraw.

But, if they are still operating within 25 miles of the border, first of all, the question Senator Pryor asked is right on point—why would they have been voluntarily withdrawing, why would you not have kicked them out of the program immediately when discovering that information? And why are they still operating within 25 miles of the border?

Mr. Scovel, I wonder if you would—at the written request of Senator Pryor and myself—look at this narrow issue, with a company that apparently voluntarily withdrew, what kind of safety violations existed? What were the circumstances of the withdrawal? Would the Inspector General, if we put this in writing, and make a request of this committee, would you look at that narrow issue, so that we could understand it, a bit?

Mr. SCOVEL. Of course, sir. And I will add that, as part of our continuing study of the demonstration project, with a final report that's due within 60 days of the conclusion of the project, we are reviewing the safety records of the participants, and we will include this one, as well, sir.

Senator DORGAN. All right.

Secretary PETERS. Senator, if I may correct, sir. I did misread the statement that was handed to me about Trinity, and it said that their operating authority was withdrawn. Was taken away. So, it would infer to me that it was not voluntary, and so I misread that statement, and I do apologize.

Senator DORGAN. Well, we will get the full story of Trinity from the Inspector General's office.

Secretary PETERS. And, again, sir, to demonstrate the anomaly that this trucking company presents, the out-of-service rate for trucking companies that are participating in a demonstration program is 10 percent—well under, substantially under—the U.S. rate of service, or out-of-service trucks, or the rates for trucks that are participating out of Canada, as well. Ten percent, as opposed to about 25 percent.

Senator DORGAN. Well, let me at least talk about Trinity—100 violations per vehicle, and they're still operating in the first 25

miles without any obstruction by the Department of Transportation?

Secretary PETERS. Sir, I don't believe, when those trucks are taken out-of-service, or when those trailers are taken out-of-service, they are not allowed to come into the United States at all.

Senator DORGAN. Well, that would be the case if you inspected every truck, every time, which I believe is not the case. Certainly not the case with the whole universe of trucks in the 25-mile zone.

But let me try to understand, as I let you go—you've coordinated with the White House on this, you've talked to the counsel at the White House with respect to your policy, you—through your attorney—have taken a policy that says we have read what the Congress has passed, we've decided we don't agree with it, we don't agree with the way it's worded, we believe we have room to slither through the side here, someplace, and do what we want to do, and you believe that you have legal authority to ignore what Congress, I believe, clearly has intended.

As I said before, I think there will be consequences for that, my hope is that you would consult, once again, with the White House, and both decide that there are too many examples of this to add one more. And I hope, Madam Secretary, that you will think better.

I believe I've treated you respectfully, but I certainly don't respect the decision that you and the Department of Transportation have made.

I appreciate your coming to the Committee and explaining it. It angers me even more having had this discussion, because I believe that government works when people of good faith are doing what they believe to be right, and I believe that is not the case with the Department of Transportation. You may have the last word.

Secretary PETERS. Senator, I certainly give you that belief, and I would ask that you give us the belief that we are doing what we think is right, as well. There is no intent to disrespect you, or this Congress, sir.

Senator DORGAN. There are too many examples in this Administration, starting at the White House, down through the Department of Justice, and to the agencies with respect to torture and a dozen other issues, when this Administration has decided what the Congress has done matters little to them. And this appears to be one of them, regrettably.

Madam Secretary, I appreciate your appearing before the Committee. I will, with consent, send you additional inquiries, and we will wait for the Inspector General, as well, to give us some additional information.

Mr. Inspector General, again, thank you for your work, the Inspectors General, play a very significant role in our government, I appreciate the work you've given us.

Mr. Gribbin, thank you for accompanying the Secretary here, and we will excuse all of you. Thank you very much.

We have one additional panel, and I would like to call Jackie Gillan, Vice President of the Advocates for Highway and Auto Safety to come forward, and Mr. Paul Cullen, General Counsel, Owner Operator Independent Drivers Association to come forward.

And I would ask those who wish to visit prior to this panel leaving to go outside the room and visit outside the room.

Let me thank Jackie Gillan for coming today. Jackie is Vice President of Advocates for Highway & Auto Safety, she will speak as a safety advocate, and she'll talk about the testimony she's just heard today, and the review that she has made of the Department of Transportation.

Let me ask, if we can, to have the room be settled.

And, is Mr. Cullen present? Mr. Cullen, will be back in just a moment.

Ms. Gillan, why don't you proceed at this point, and we will then hear from Mr. Cullen.

Ms. Gillan?

STATEMENT OF JACQUELINE S. GILLAN, VICE PRESIDENT, ADVOCATES FOR HIGHWAY AND AUTO SAFETY; ACCOMPANIED BY HENRY JASNY AND SHERYL JENNINGS McGURK

Ms. GILLAN. Thank you, Senator Dorgan.

Good afternoon, my name is Jackie Gillan, and I am Vice President of Advocates for Highway and Auto Safety. I am accompanied today by Henry Jasny, our General Counsel, as well as Sheryl Jennings McGurk, who lost her parents and nephew in a crash involving an unsafe truck from Mexico.

Senator DORGAN. Thank you, proceed.

Ms. GILLAN. Today, I am here to talk about the cross-border truck pilot program. Although DOT portrays the program as a modest, even benign, initiative, on the contrary, it is an unsafe and illegal program that puts the motoring public at risk.

My written statement contains many details about why Advocates opposes the pilot program, but my oral testimony now will focus on three specific topics: One, DOT's unreliable screening process to keep unsafe carriers out of the pilot program; two, DOT's violation of Federal law and its own legal precedent in continuing to conduct the pilot program; and, three, why this pilot program amounts to junk science, because of the low number of participants, and the lack of data being collected, a concern shared by the DOT Inspector General in the report released yesterday.

Let me make it clear at the outset that Advocates' only interest in the issue of cross-border trucking is to ensure that trucks entering the United States from Mexico are equipped, driven and maintained at a high level of safety.

Each year, about 5,000 people are killed in truck crashes, and over 105,000 more are injured. Opening the border to unsafe trucks and drivers at the present time will only contribute to this unacceptable mortality and morbidity toll.

During the past 15 years, DOT's history of cross-border trucking with Mexico has been characterized by risky decisions, poor safety judgments, and keeping the public in the dark. Public safety was salvaged, only with the bipartisan intervention of Congress.

In 2007, Congress passed legislation directing DOT to publish the safety audits of all participants in the pilot program for public review before the program started. But only some safety audits were published beforehand, others were not divulged until after the pilot program was underway.

And as an example, the safety audit of Trinity Industries of Mexico, the company with the largest number of trucks in the program, was not revealed until October 2007.

I won't go into the details we've already discussed the fact that this motor carrier company had an extraordinarily high number of safety violations the previous year, and yet they were placed in the pilot program, risking the safety of all Americans on our highways.

DOT finally considered the program and the problem so bad that it permitted them to withdraw voluntarily.

We are very happy that you raised the same questions that safety groups have been thinking about ever since we found out about this problem with this company—how did they ever get into the pilot program? And, how do we know the real safety records of other companies participating in the pilot program, that DOT assures us are very safe?

And finally, as you stated, why is DOT allowing this company to continue operating in the United States in the commercial border zones?

It is exactly this pattern of safety lapses and bad decisions by the DOT that Congress anticipated when legislation was adopted with strong bipartisan support to cut off funding for the pilot program. The language of Section 136 of the Consolidated Appropriations Act of 2007, and the Senate debate that took place, clearly demonstrate that the word "establish" in the provision applies to the conduct of the pilot program itself, not just the act of setting up that program.

Even under DOT's mistaken view that the statute only prohibits the use of funds to establish the pilot program, DOT can still carry out the intent of Congress by applying the doctrine of equitable interpretation. My formal testimony discusses this legal doctrine in much more detail, but essentially, equitable interpretation holds that where the specific words used in a law would thwart the intent of Congress, agencies are permitted—indeed compelled—to implement the Congressional intent of the law.

The National Highway Traffic Safety Administration, NHTSA, another agency within DOT, invoked the doctrine of equitable interpretation just last month, in order to ensure that the wording of a statute does not frustrate Congressional intent to promote tire registration, and NHTSA cited a 1983 precedent within DOT for using the legal principle. By applying this legal doctrine, DOT can, indeed, implement the intent of Congress in Section 136.

Finally, the cross-border truck pilot program is junk science, and a waste of taxpayer dollars, because it will collect insufficient data to make valid safety decisions. The pilot program is already halfway over and only about 6 percent of the trucks originally planned for by DOT are even in the program.

The IG report states on page 8, "We are concerned that the low number of participants will affect the panel's ability to draw any meaningful conclusions from the data about the safety performance of the demonstration project participants." This tells us that there will not be enough data on which to base any objective safety findings.

Let me conclude by saying that the pilot program should be stopped immediately. It threatens public safety, it wastes taxpayer dollars, it will not yield valid findings, and in all likelihood, it will

be misused and mischaracterized by DOT to support a decision later this year to fully open the border to Mexican motor carriers to travel throughout the United States.

The American public will pay with their lives. Congress should not let this happen. Thank you very much.

[The prepared statement of Ms. Gillan follows:]

PREPARED STATEMENT OF JACQUELINE S. GILLAN, VICE PRESIDENT, ADVOCATES FOR HIGHWAY AND AUTO SAFETY

Introduction

Good afternoon, Mr. Chairman and Members of the Senate Committee on Commerce, Science, and Transportation. My name is Jacqueline Gillan, and I am the Vice President of Advocates for Highway and Auto Safety (Advocates) and am accompanied by Henry Jasny, General Counsel. Advocates is an alliance of consumer, health and safety organizations, and insurance companies and associations, working together make our roads and highways safer. Founded in 1989, Advocates encourages the adoption of Federal and state laws, policies and programs that save lives and reduce injuries. Our organization has worked closely with this Committee and has been integrally involved in many issues related to large truck safety, including the introduction of long-haul freight shipments that originate in Mexico but will be destined for all points in the United States. In particular, we appreciate the bi-partisan leadership of members of this Committee on a wide range of motor carrier safety initiatives including hours of service requirements, stronger enforcement of motor carrier rules and other issues affecting the health and safety everyday of commercial drivers and families on our roads and highways.

Today, I am here to testify about the incomplete, haphazard and unsafe policy that the U.S. Department of Transportation (DOT), through the Federal Motor Carrier Safety Administration (FMCSA), has taken toward the opening of the southern border to long-haul freight shipments by Mexican carriers throughout the United States. Because of Advocates' focus on highway and truck safety, we have been involved in the issue of the safety of trucks crossing into the U.S. for 15 years. Let me make clear from the outset that Advocates' focus and only interest in the issue of cross-border trucking is to ensure that commercial vehicles entering the U.S. from Mexico are equipped, driven and maintained at a high level of safety so that they do not contribute to an increased number of, and an already unacceptable level of truck-involved crashes and fatalities that occur each year in the U.S.

DOT portrays the Cross-Border Truck Pilot Program as a modest, even benign initiative that provides temporary operating authority to a limited number of motor carriers domiciled in Mexico and the United States to enable cross-border commercial freight operations. The agency also wants the American public to "trust" them that safety will not diminish in any way and that all safety rules and laws will be obeyed. The DOT Pilot Program is, in actuality, an inappropriate, unsafe and illegal program that opens yet another front in a safety battle to protect the motoring public from unnecessary risk and undue fatalities and injuries that already occur each year in truck-involved crashes.

Advocates is all too familiar with the grim statistics. About 5,000 people are killed annually on our highways in truck-involved crashes and over 105,000 more are injured. Even after the establishment of a modal administration—the FMCSA—within DOT that is dedicated entirely to improving truck safety there has been little, if any, improvement in this annual toll. Although large trucks represent only three (3) percent of all registered motor vehicles, they are involved in about 13 percent of fatalities on an annual basis. When a large truck has a fatal crash involvement with a passenger vehicle, 98 percent of the people who die are in the small vehicle.[1]

Nearly 10 years ago, in 1999, just before the FMCSA was established as a separate safety administration, the then-Secretary of Transportation set a goal of reducing the number of annual truck-involved fatalities by 50 percent. As we close in on the 10-year period for fulfillment of that goal, Mr. Chairman, DOT and FMCSA are nowhere near accomplishing that safety mission. Moreover, in the intervening years, DOT and FMCSA have failed to achieve any of the short or long-term safety goals they have set for themselves. Thus, when it comes to relying on these agencies for results or adherence to their commitments, we are cautious because they have a poor track record.

[1] *Fatality Facts,* Insurance Institute for Highway Safety (2005).

DOT Has Not Done Its Safety Job At the Border

It comes as no surprise to those of us that have been involved in truck safety issues for nearly twenty years that DOT and FMCSA have not made safety their highest priority. From its inception, FMCSA has not promoted the highest degree of safety in motor carrier and truck regulations. At almost every turn safety groups have had to oppose FMCSA because it either did not issue safety regulations, or when the agency did act its regulations were weak and ineffective. DOT and FMCSA have also not been forthright or forthcoming with the American public on issues and information regarding cross-border safety.

For example, as early as 1992, even before the North American Free Trade Agreement (NAFTA)[2] was signed, DOT agreed with Mexican transportation authorities that the U.S. commercial drivers' license (CDL) and the Mexican Licencia Federal de Conductor (LFC) were equivalent. Although, in fact, there were and remain many points of difference between the two licenses and the accompanying requirements, DOT issued its agreement with Mexican authorities as a Memorandum of Understanding (MOU),[3] forged in private and not made public until after the U.S. and Mexican governments had already concluded the agreement in secret. The U.S. public was not afforded any prior notice or any opportunity to provide comment and suggestions before the announcement of the MOU. In fact, neither DOT nor the Mexican transportation authorities has provided copies of the legal requirements of the LFC, in either Spanish or English, for public review.

There has been a series of such problems regarding DOT's efforts to open the border:

- In the late 1990s DOT asserted that the border could be opened even though no infrastructure improvements had been made, border inspection staffing was inadequate in many places, and other problems prevented safety inspections;
- DOT ignored the fact that state laws did not allow for the issuance of out-of-service orders (OOS) to foreign motor carriers for violations of their operating authority;
- DOT has failed repeatedly to provide the public with copies and translations of relevant Mexican motor carrier and motor vehicle laws and regulations;
- In 2002, FMCSA proposed an illegal two-year moratorium of the Federal law that requires motor vehicles, including commercial trucks and buses, that enter the U.S. to meet all Federal motor vehicle safety standards. Additionally, the agency still does not enforce this legal requirement for trucks crossing into the commercial zones along the U.S. border.

DOT's plans and activities to open the southern U.S. border to commercial vehicles from Mexico, has consistently lacked any adequate preparations for the potential increase in commercial vehicle traffic entering the U.S. and continuing beyond the existing border commercial zones. In 2001, even as DOT was poised to fully open the border, there were few border ports of entry that even had facilities capable of conducting full safety inspections on large trucks. Many border inspection facilities did not have weigh-in-motion (WIM) scales to enforce U.S. weight limits and those that existed were often not in working condition. Vehicle inspection staff was limited so truck safety inspections often could not be conducted at certain times of day and night at some crossing points, and there were no computerized databases for checking either truck credentials or drivers' licenses. The border inspection infrastructure was so ill-prepared to inspect the flow of commercial vehicles that Congress was forced to step in and enact benchmarks to ensure that DOT met its obligations to protect both public safety and security. As a result, Congress passed Section 350 of the 2002 DOT Appropriations Act[4] that imposed specific requirements for DOT to meet as a precondition to allowing Mexico-domiciled commercial vehicles to travel beyond the border zones.

A series of reports by the DOT Office of Inspector General (IG) were required over the years since to ensure that DOT complied with Section 350.[5] Each report documented the shortcomings of DOT's efforts and the reasons why it had not met the preconditions established for the opening of the border.[6] While some progress has

[2] North American Free Trade Agreement (NAFTA) (Dec. 1992) took effect in 1994.

[3] Commercial Driver's License Reciprocity With Mexico, 57 FR 31454 (July 16, 1992).

[4] Making Appropriations for the Department of Transportation and related agencies for the fiscal year ending September 30, 2002, and for other purposes, Pub. L. 107–87 (Dec. 18, 2001).

[5] Sec. 350(c)(1).

[6] *Implementation of Commercial Vehicle Safety Requirements at the U.S.-Mexico Border, Federal Motor Carrier Safety Administration,* DOT Office of Inspector General, Rpt. No. MH–2002–

been made in reaching those benchmarks, not all of the requirements of Section 350 have been fulfilled. Bus inspection facilities at major ports of entry are still not completed (§§ 350(a)(9) and (c)(1)(F)) and there is still no government-to-government agreement regarding the transportation of hazardous materials (§ 350(b)).[7]

DOT Has Not Provided Public Information On the Truck Pilot Program

From the very beginning of the Cross-Border Truck Pilot Program, DOT has followed the same pattern of misleading Congress and failing to inform the public. Even when the pilot program was still under development, DOT refused to acknowledge that it existed. In fact, at her confirmation hearing, Secretary Peters told this Committee that DOT had no immediate plans to operate a pilot program. In response to a question from Senator Pryor, regarding FMCSA consideration of a pilot program, the Secretary stated: "Sir, I have also heard that, Senator, and I have asked the question, and there are no immediate plans to do so."[8] Senator Pryor went on to say that "[I]f there are plans, I'd be curious about what statutory authority there is to do that. Do you know what statute might give the agency authority?" The Secretary responded: "Sir. I do not. And I understand your concern about the issue and, if confirmed, would look forward to getting to the bottom of the so-called rumors in addressing the issue."[9]

Secretary Peters was confirmed on September 30, 2006. On October 17, 2006, my organization, Advocates, filed a Freedom of Information Act (FOIA) request with FMCSA seeking records related to the development of the Pilot Program.[10] The agency advised us to wait and then, on December 30, 2006, further advised Advocates that although there were "hundreds, if not thousands, of potentially responsive documents," this would further delay the agency's response, and that while the request was not being denied, FMCSA would not release any Pilot Program records at that time.[11] The DOT Pilot Program was officially announced on February 23, 2007,[12] less than 5 months after the Secretary was confirmed and 4 months after Advocates had requested records pertaining to the program. Since DOT had provided no public information or disclosure about the pilot program, and had not given Advocates any indication that it would provide the relevant documents under FOIA,[13] Advocates was forced to file suit in Federal district court where the case is now pending.[14]

DOT's approach of denying information to the public and providing as little accurate information as possible has pervaded the entire effort regarding its attempts to open the border. As a result, Congress has twice required in legislation that DOT and FMCSA publish for public notice and comment basic regulations and policy information pertaining to truck safety and the application of domestic motor carrier safety rules to trucks crossing the U.S.-Mexico border. Section 350 of the 2002 Appropriations Act required DOT to publish five (5) separate sets of regulations and policies that DOT had not previously issued or made public.[15]

More recently, because DOT and FMCSA would not provide the public with information about the Pilot Program, Congress included in legislation enacted in 2007 a series of five (5) more publication requirements specifically linked to the Pilot Program. DOT was required to afford public notice and opportunity for public comment on:

- the results of DOT's pre-authorization safety audits (PASAs) conducted on Mexican motor carriers;

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094 (June 25, 2002) was the first in a series of reports documenting the actions of DOT and FMCSA compliance.

[7] Although passenger and hazardous materials transportation are explicitly excluded from the existing pilot program, 72 FR 46286, it is inevitable that this non-scientific, demonstration program for general freight will serve as a basis for conducting future similar initiatives to broaden cross-border access to commercial vehicles carrying passengers and hazardous materials shipments.

[8] Transcript of the Hearing of the Senate Commerce, Science, and Transportation Committee on the Nomination of Mary Peters, to be Secretary of the Department of Transportation, Sept. 20, 2006.

[9] *Id.*

[10] Freedom of Information Act (FOIA) request letter dated October 17, 2006, from Gerald A. Donaldson, Senior Research Director, Advocates for Highway and Auto Safety, to FOIA Office, FMCSA.

[11] Letter dated December 30, 2006, from Tiffanie C. Coleman. FOIA Officer, FMCSA, to Gerald A. Donaldson, Advocates for Highway and Auto Safety.

[12] 72 FR 23883, 23884 (May 1, 2007).

[13] FOIA requires agencies to provide a substantive response to requestors within 20 business days of receiving a request for agency records. 5 U.S.C. § 552(a)(6)(A)(i).

[14] *Advocates for Highway and Auto Safety* v. *FMCSA,* C.A. No. 07–00467 (D.D.C.).

[15] Sec. 350(a)(10)(A)–(E).

- specific measures to protect the health and safety of the public;
- DOT measures to ensure compliance with requirements that drivers have English language proficiency and restrictions on illegal shipment of domestic freight from point-to-point within the U.S. (*cabotage*);
- the standards DOT intends to use to evaluate the program and;
- a list of Mexican motor carrier safety laws and regulations that DOT considers equivalent to U.S. laws and regulations and which DOT will accept as comparable for enforcement purposes under the Pilot Program.[16]

While DOT has met some of these requirements, the problem is that DOT has not provided this information of its own accord, but has had to be ordered to cooperate and inform both Congress and the public through legislative direction. This, however, is not even the worst part of DOT's dysfunctional approach to opening the border. Unfortunately, DOT has chosen to openly flout Federal law in order to carry out the cross-border Pilot Program in defiance of Congress.

The Pilot Program Is Being Carried Out In Violation of Law

DOT has been both implacable and persistent in defying the legal requirements for allowing cross-border long-haul trucking. Despite the fact that Section 350 of the 2002 Appropriations Act prohibited "vehicles owned or leased by a Mexican motor carrier [. . .] to operate beyond the United States municipalities and commercial zones under conditional or permanent operating authority granted by the [FMCSA] until—" all the listed requirements are completed,[17] DOT has forged ahead even though all those conditions have not been entirely met.

Moreover, DOT has stubbornly pursued the Pilot Program policy in defiance of the compelling requirements included in the Iraq Accountability Act enacted into law in May, 2007. As mentioned, the Act required DOT to publish comprehensive data on the Mexican motor carrier safety audits or PASAs, that DOT conducted both before and after the law was enacted.[18] However, that law clearly states that the Secretary of Transportation shall publish that information "[p]rior to the initiation of the pilot program. . . ."[19] The fact is that DOT did not publish all of the PASA information about all the participating Mexican motor carriers prior to the start of the Pilot Program in September, 2007. DOT has only published information about some of the motor carriers and did not provide all such information before the Pilot Program began. Since DOT announced that it would add 25 participating motor carriers to the Pilot Program each month for the first four (4) months, it was fully anticipated that the agency would have completed the PASAs and published them for all 100 participating motor carriers prior to the start of the program.[20] Instead, DOT only published superficial pass/fail information on PASAs[21] that had been conducted prior to commencing the Pilot Program on September 6, 2007.[22] Although DOT subsequently updated the PASA list,[23] that information was not published until after the Pilot Program had already gotten underway. Equally important, DOT provided only the most superficial results of its safety audit but did not provide any information regarding the safety violations that were found.

The delay in providing information is not trivial and I want to explain why it is quite important to safety. The motor carrier, Trinity Industries de Mexico (DOT No. 610385) (Trinity Industries), was not included in the PASA information published by DOT before the Pilot Program started in September, 2007. The fact that Trinity Industries de Mexico had passed the safety audit was not made public until October 2007, by which time this motor carrier had already been given authority to operate 14 drivers and 16 trucks throughout the U.S.[24] Only after DOT had already granted operating authority to Trinity Industries and published the superficial information

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[16] Section 6901(b)(2)(B), U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007 (Iraq Accountability Act), Pub. L. 110–28 (May 30, 2007).

[17] Section 350(c).

[18] Section 6901(b)(2)(B)(i).

[19] *Id.* 6901(b).

[20] *See* discussion under One-Year Limit for the Demonstration Project, 72 FR 46270–71.

[21] 72 FR 31877 (June 8, 2007).

[22] *News Release,* FMCSA 05–07, U.S. DOT Office of Public Affairs (Sept. 6, 2007) available at: *http://www.fmcsa.dot.gov/about/news/news-releases/2007/090707.htm*.

[23] 72 FR 58929 (Oct. 17, 2007).

[24] *Id.* At 58933. Although Table 2, Column I only lists 16 trucks for Trinity Industries as "Vehicles Identified Who Motor Carrier Intends to Operate in the United States," two pages later, Table 4, Column Q lists 25 trucks as "Number U.S. Vehicles Inspected Which Carrier Intends to Operate in the U.S." for Trinity Industries.

showing that the company had passed all the Pilot Program safety requirements,[25] did an independent investigation of the company reveal the disturbing truth. In the year prior to obtaining authority to participate in the Pilot Program, Trinity Industries had a disgraceful record when operating in the commercial zones in the U.S. The investigation conducted by the Owner-Operator Independent Drivers Association (OOIDA) found that 10 trucks owned by Trinity Industries had accumulated 604 inspection violations and a total of 1,123 violations in all, including 74 out-of-service (OOS) orders for vehicles and one OOS for a driver.[26] Because DOT violated the law, the public did not have the opportunity to investigate this motor carrier before the Pilot Program began. Not only did Trinity Industries have operating authority to transport freight throughout the U.S. for a period of several months, but even after the company withdrew from the Pilot Program it has still been allowed to operate in the commercial border zones despite its record of over 1,100 violations.

The poor safety record for Trinity Industries arguably placed the American people at increased risk of death and injury from potential crashes involving their trucks and motor carrier operations. Even DOT considered the problem so bad that it permitted Trinity Industries to withdraw from the Pilot Program as of February 1, 2008. However, DOT made no public announcement of Trinity Industries safety problems or of the company's withdrawal from the Pilot Program. And, as usual, no public announcement or press release from DOT, only a footnote on an FMCSA website, documents this sordid case.[27]

The real issue that Congress needs to investigate immediately, given Trinity Industries poor safety record, is how and why did DOT "pass" Trinity Industries as a safe motor carrier, grant operating authority and allow it to participate in the Pilot Program? The public also needs to know if there are other such companies that DOT has accepted as "safe" even though their operating record contains serious and dangerous safety violations and overall does not reflect a high standard for safety. Because DOT did not provide that information to the public before the Pilot Program began, the extent of the threat to the safety of the American people remains unknown.

DOT Determined to Conduct Pilot Program Despite Intent of Congress

This review shows that the decision of the Secretary of Transportation to defy Congress and ignore the funding ban contained in the current year's appropriations law[28] is just the latest link in a long chain of events in which DOT, at nearly every juncture, has sought to open the U.S. southern border to long-haul trucks before the border was ready or the trucks and drivers were proven safe.

Section 136 of the Consolidated Appropriations Act clearly prohibits DOT from using Fiscal Year 2008 funds to continue the Pilot Program. By restricting funds "to establish" the Pilot Program, the language includes a prohibition on the use of those funds to carry out the program as well, since carrying out the program is contingent upon the establishment of the program. If DOT could not use the funds to establish the program, then it also cannot use the funds to continue the program since that subsequent act flows directly from the action that is specifically prohibited. This makes perfect sense from a policy perspective because agencies should not be encouraged to outmaneuver Congressional legislation simply by taking action before a law can be enacted. As a matter of policy, Federal agencies should not be able to circumvent the will of Congress through pre-emptive unilateral action.

Beyond the policy question, DOT is parsing the statutory language in order to distill a highly technical and narrow reading of the word "establish." By artificially disconnecting the act of establishing the Pilot Program from the implementation of the program, DOT hopes to cloak its continuation of the pilot program as a legal act. But DOT's narrow, legalistic interpretation of Section 136 cannot stand in the face of the legislative history of the provision and DOT's own precedents.

First, DOT cannot read the word "establish" in such a narrow manner because the clear legislative history of the discussions in both the Senate, where Section 136 originated, and in the House, which passed similar language, make it abundantly

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[25] *Id.* At 58934. ("*—This motor carrier is an additional successful applicant which has passed the Pre-Authority Safety Audit after the June 8, 2007, *Federal Register* Notice.").

[26] Declaration of Catherine O'Mara, Exhibit 1, filed in *Owner-Operator Independent Drivers Association, Inc.* v. *United States Department of Transportation, et al.,* Dec. 3, 2007, No. 07–73987 (9th Cir.); *see also* companion Declaration of Rick Craig filed in same case for specific violations of truck safety requirements.

[27] The only public notice of Trinity Industries' withdrawal from the Pilot Program is a note to FMCSA's list of participating motor carriers available at: *http://www.fmcsa.dot.gov/cross-border/cross-border-carriers.htm*.

[28] Consolidated Appropriations Act, 2008, Title I, Division K, § 136, Pub. L. 110–161 (Dec. 26, 2007).

clear that the provision was intended to cut off funds not just for the startup of the program or for the formal announcement of its commencement, but to "prohibit the use of funds to continue this pilot project."[29] Such statements were made repeatedly in the U.S. Senate and make clear that Congress knew and intended that the language, *i.e.,* the term "establish," when enacted would result in a complete cessation of pilot program activities.[30] Senator Dorgan, the sponsor of this language, stated "the U.S. House of Representatives has already passed by voice vote a provision that says 'no money in this appropriation bill shall or can be used to *continue* this pilot project.' . . . I propose we do exactly the same thing. *This amendment is identical to that which the House has passed.*"[31] Senators who opposed the language also clearly understood it would prevent DOT from continuing to fund the Pilot Program.[32]

Moreover, the Senate language that was enacted as Section 136 was originally adopted after the House had already passed its version of the funding prohibition. Although the House used the term "establish or implement" in its bill to cut off funding for the Pilot Program, the Senate sponsors made it amply clear in the legislative discussion that the Senate language was intended to have the identical effect as the House language. Thus, even if the wording was not identical, the intent of the two houses of Congress was the same.

Second, it should be pointed out that the Senate acted *after* DOT had already "established" the Pilot Program by granting operating authority to the first Mexican motor carrier on September 6, 2007. The Senate had actual knowledge that the Pilot Program had already been "established" at the time the Senate debate took place. Senator Dorgan specifically referred to initiation of the Pilot Program that had taken place several days before.[33] DOT's view that the word "establish" refers only to an act that had already transpired renders Section 136 meaningless. However, since Acts of Congress are to be interpreted to have meaning and be given a reasonable construction, adopting DOT's position is untenable, especially where another interpretation exists that would make Section 136 meaningful. The legislative history provides a clear and reasonable interpretation that gives meaning to the provision, that is, that Congress intended to prohibit funding for the continuation of the Pilot Program, not just its commencement.

Finally, even if DOT's strained interpretation of Section 136 was plausible, DOT should invoke the legal doctrine of equitable interpretation of statutory language in order to implement the intent of Congress. According to the well-known doctrine of equitable interpretation, "a statutory requirement need not be literally applied in instances in which the underlying Congressional intent is otherwise satisfied."[34] This principle ensures that the language of a statute will not be used to thwart Congressional intent.

Under equitable interpretation, where the specific words used in the law thwart or interfere with the intent of Congress, agencies are permitted, indeed compelled, to ignore the statutory language in order to carry out Congressional intent. In this situation, since DOT's interpretation of the word "establish" in Section 136 would stand in the way of the express intent of Congress to prohibit continued funding for the cross-border Pilot Program, invoking equitable interpretation allows DOT to look past the words and implement the intent.

Since "One DOT" is the motto of the department, it is clear that what is an acceptable legal practice for one administration in DOT should also be appropriate for the other branches of DOT. We need not look far for precedent in applying the doctrine of equitable interpretation. Within DOT one of its own modal administrations, the National Highway Traffic Safety Administration (NHTSA), has applied the doc-

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[29] Sen. Byron Dorgan, 153 Cong. Rec. S11299 (Sept. 10, 2007).

[30] *See also, e.g.,* 153 Cong. Rec. S11307 (Sept. 10, 2007) (Sen. Specter: "it seems to me this program ought not to go forward, and the amendment which Senator Dorgan has advanced is very sound.").

[31] 153 Cong. Rec. S11308–309 (Sept. 10, 2007) (emphases added); *see also id.* at S11389 (Sen. Dorgan: "So I offer on behalf of myself and Senator Specter an amendment . . . that says *let's stop this pilot program.* It should not have been initiated last Thursday.) (emphasis added); and, *id.* at S11391 (Sen. Dorgan: "It is why Senator Specter, I, and others *have offered an amendment to stop this pilot project.*") (emphasis added).

[32] 153 Cong. Rec. 11315 (Sept. 10, 2007) (Sen. Lott: "But we should defeat the Dorgan amendment. We should allow the pilot program to go forward . . ."); *id.* at S11468 (Sept. 12, 2007) (Sen. McCain: "Unfortunately, the Senate has voted 74 to 24 *to prevent the pilot program from going forward.*") (emphasis added).

[33] *See* 153 Cong. Rec. S11389 (Sen. Dorgan: "[the Pilot Program] should not have been initiated last Thursday.").

[34] Tire Registration and Recordkeeping, notice of proposed rulemaking, 73 FR 4157, 4159 (Jan. 24, 2008). (Copy of notice attached).

trine of equitable interpretation in very similar circumstances explicitly to fulfill Congressional intent.

Just over 1 month ago, the NHTSA invoked the doctrine of equitable interpretation in order to ensure that the wording of a statute does not frustrate Congressional intent to promote tire registration. The agency was acting on a long-standing precedent because in 1983 the NHTSA Administrator stated that "[u]nder the principles of equitable interpretation, the language of the amendments need not be applied in instances where it is clearly contrary to the underlying Congressional intent."[35] The same legal approach can be taken to Section 136 and the Pilot Program.

DOT and FMCSA interpret the language of Section 136 to apply only to actions that "establish" the Pilot Program. Yet, the legislative debate shows that the wording of the Senate amendment was intended to "stop" the Pilot Program. The legislative history and universal understanding of the action was to prevent the Pilot Program from proceeding, not only to prevent it from being established (an event that had already taken place). As the NHTSA precedent points out, DOT agencies can look past the specific wording of a law if they are concerned that it stands in the way of carrying out the intent of Congress. Since NHTSA has twice invoked the doctrine of equitable interpretation, there appears no reason for DOT not to invoke that doctrine in the current circumstances. DOT should apply the doctrine of equitable interpretation and implement the clearly stated intent of Congress in Section 136.

The Pilot Program Is Junk Science

Finally, it has become evident that the cross-border truck Pilot Program announced with such fanfare just over a year ago, and "established" just six (6) months ago, is a failure. Although up to 100 companies and as many as 1,000 trucks were supposed to participate, there are currently only 16 Mexican motor carriers and a total of only 55 trucks that are authorized to participate.[36] DOT has claimed that "100 out of 989 carriers, or about 10 percent . . . will generate enough data for a meaningful safety analysis."[37] But the current participation is a far cry from the numbers that DOT originally estimated, and the 55 trucks are less than a third of the 155 trucks that DOT had identified as intended for use in the U.S. during its initial round of safety audits.[38]

When first announced, it was evident that DOT did not intend that the Pilot Program would be a serious scientific test of the safety of Mexican long-haul trucks in the U.S., and thus, the program did not have to meet the requirements for scientifically conducted pilot programs. That is one reason why Congress stepped in to require DOT to comply with the existing Federal statute governing commercial motor vehicle pilot programs, 49 U.S.C. § 31315(c).[39] The purpose of the pilot program statute is to ensure that when new methods and alternative regulations are being tested that a basic level of scientific methodology is used in the collection of data to ensure that the pilot programs yield scientifically valid results.

Although Advocates opposes cross-border long-haul trucking at this time because not all safety measures have been addressed, if DOT is going to operate the Pilot Program it should follow scientific methods and have a plan that includes collecting sufficiently objective and credible data. In fact, the Pilot Program law requires DOT to do exactly that. As it exists today, however, the Pilot Program has absolutely no chance of meeting this minimal scientific goal and legal requirement.

The data that DOT needs to collect consists of border and roadside inspection results, including inspection violations and out-of-service (OOS) orders for serious safety violations, records of other non-inspection stops and violations, as well as crash, injury and fatality data. Scientifically valid determinations about safety can only be made if a sufficient amount of data is collected during the test period. As FMCSA stated, "[i]n addition to the number of participants, the volume of the data depends on the frequency with which the participating carriers operate in the United States."[40] Since Federal border inspections are based on the number of crossings, fewer trucks mean less data. Also, state roadside inspections are based not just on the number of trips but the length and route of the trips and how many roadside inspection facilities a truck encounters, again, fewer trucks mean fewer inspections and insufficient data.

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[35] Letter from Diane K. Steed to the Hon. Timothy E. Wirth, dated February, 1983, available at: *http://isearch.nhtsa.gov/gm/83/1983-1.12.html.* (Copy of letter attached).

[36] Information available at: *http://www.fmcsa.dot.gov/cross-border/cross-border-carriers.htm.*

[37] 72 FR 46263, 46271 (Aug. 17, 2997).

[38] 72 FR 31877, 31888 (June 8, 2007).

[39] Iraq Accountability Act, § 6901(a)(2).

[40] 72 FR 46271.

Finally, truck crash, injury and fatality data is analyzed based on exposure measures of total distance of travel. For cars, the exposure measure used by DOT is 100 million vehicle miles of travel and for trucks the exposure measure is *100 million truck vehicle miles of travel* (100 MTVMT). Thus, in order for the Pilot Program to collect a sufficient amount of objective data, trucks in the Pilot Program must travel millions upon millions upon millions of miles in the U.S. While this may have been possible with 100 carriers and 1,000 trucks, since only 16 motor carriers and 55 trucks are participating, and now that half the allotted one-year Pilot Program time has already expired, there is no possibility that the Pilot Program has the "reasonable number of participants necessary to yield statistically valid findings."[41]

DOT originally claimed that the Pilot Program would consist of up to 100 motor carriers, about 10 percent of the motor carriers that had applied for U.S. operating authority,[42] but less than 2 percent of Mexican carriers that applied for operating authority are currently participating in the program. More important, only a fraction of the 1,000 trucks that DOT expected would participate in the Pilot Program actually entered, and the largest single participating truck fleet dropped out when Trinity Industries withdrew from the Pilot Program.[43] As a result, only 5.5 percent of the 1,000 trucks DOT originally planned for are involved in the Pilot Program. This small number of participating vehicles cannot provide the exposure needed to produce credible data or that will result in valid findings.

In summary, Mr. Chairman, the Pilot Program should be stopped and stopped now, not only because DOT is legally obligated to do so, but also because the Pilot Program cannot provide statistically valid findings regarding the safety of the participating motor carriers. The Pilot Program is an extreme example of junk science that threatens safety and wastes American tax dollars on a faulty and dangerous experiment using the motoring public as guinea pigs. Safety groups are concerned that in September, DOT will once again jeopardize highway safety by using this "junk science" to justify a bad decision that leads to opening borders for all Mexican motor carriers wishing to travel anywhere throughout the United States.

That concludes my testimony and I will gladly answer any questions you and members of the Committee may have.

ATTACHMENT 1

Mexican Border and DOT Pilot Program Chronology

Mar. 11, 2008	Senate Commerce, Science, and Transportation Committee holds hearing on DOT Cross-Border Pilot Program.
Mar. 5, 2008	After six (6) months, half way through the one-year Pilot Program, only 16 Mexican trucking companies with a total of 55 trucks are participating in the Pilot Program. The small number of participating trucks is only 5.5 percent of the 1,000 trucks that DOT expected might participate in the Pilot Program. DOT said that it needed about 100 companies, or 10 percent of the 989 Mexican trucking companies that applied for U.S. operating authority, to participate in order to collect enough data to evaluate the safety of the program. The 16 companies represent less than 2 percent of the applicant companies and less than one-fifth of the participation that DOT said was needed to collect sufficient data.
Feb. 12, 2008	Oral argument is held in U.S. 9th Circuit Court of Appeals on cases brought by Public Citizen, Teamsters, Sierra Club and OOIDA challenging DOT Pilot Program as illegal.
Feb. 1, 2008	Trinity Industries de Mexico, the Mexican company with largest number of trucks in the Pilot Program withdraws from the program following revelation that company amassed of over 1,100 violations in previous year for trucks operating in the commercial zones along the U.S. border. Despite withdrawal from the long-haul Pilot Program, DOT continues to allow Trinity to operate in the commercial zones.
Dec. 26, 2007:	DOT is prohibited from funding cross-border Pilot Program by Section 136 of Title I, Division K, of the Consolidated Appropriations Act, 2008, Pub. L. 110–161 (Dec. 26, 2007). DOT asserts that the language in Section 136 does not bar the continuation of the Pilot Program.
Sept. 10, 2007:	U.S. Senate adopts an amendment on a vote of 75 to 23 offered by Senators Dorgan (D–ND) and Specter (R–PA) to the FY 2008 DOT Appropriations bill to block funding for cross-border long-haul trucking pilot program and to continue to limit operations by Mexico-domiciled motor carriers to commercial zones inside the U.S. Amendment is nearly identical to provision passed by House on July 24, 2007.

[41] 49 U.S.C. § 31315(c)(2)(C).
[42] 72 FR 46271.
[43] As discussed, Trinity Industries, the company that had the most trucks eligible for participation, *see infra* note 24, withdrew from the Pilot Program as of Feb. 1, 2008.

Mexican Border and DOT Pilot Program Chronology—Continued

Sept. 7, 2007:	The Owner-Operator Independent Drivers Association (OOIDA) files lawsuit in U.S. Court of Appeals (D.C. Circuit) challenging legality of DOT Pilot Program and emergency motion to stay DOT action. Motion is denied and case is transferred to 9th Circuit and joined with case filed by Public Citizen, Teamsters and Sierra Club.
Sept. 6, 2007:	Department of Transportation (DOT) Office of Inspector General (OIG) files report required by Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, detailing DOT compliance with actions required under Section 350 of the FY 2002 DOT Appropriations Act. OIG report details specific areas in which DOT has not completed required safety actions.
	DOT files letter with Congress responding to DOT OIG report and provides additional information purporting to address shortcomings in border preparation that OIG report identified as not meeting Congressional requirements in Section 350 of the FY 2002 DOT Appropriations Act.
	DOT holds press conference to announce start of cross-border pilot program and announce grant of preliminary operating authority to first Mexico-domiciled long-haul motor carrier.
Aug. 29, 2007:	Public Citizen, Int'l Brotherhood of Teamsters, Sierra Club and others file lawsuit in U.S. Court of Appeals (9th Circuit) challenging legality of DOT pilot program and file emergency motion to stay DOT action. The court denies the motion for a stay on August 31, 2007.
Aug. 17, 2007:	Federal Motor Carrier Safety Administration (FMCSA) publishes response to public comments and states that after final OIG report is submitted as required by Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, and DOT takes action to respond to OIG report, DOT will commence granting preliminary operating authority to Mexico-domiciled motor carriers to travel beyond commercial zones on U.S.-Mexico border.
Aug. 6, 2007:	DOT OIG issues latest follow-up audit report required under Section 350 of the FY 2002 DOT Appropriations Act. Report still finds that several outstanding issues remain incomplete, including the sufficiency and quality of information in Mexican and U.S. license databases, the availability of bus inspection facilities, compliance of Mexican commercial vehicles with U.S. safety standards and compliance with U.S. drug and alcohol testing requirements. Prior OIG audit reports were issued on Dec. 28, 1998, Nov. 4, 1999; May 8, 2001; Sept. 21, 2001; June 25, 2002; May 16, 2003; and Jan. 3, 2005.
July 24, 2007:	House votes to amend FY 2008 DOT Appropriations bill (H.R. 3074) to block funding for cross-border long-haul trucking pilot program and to continue to limit operations by Mexico-domiciled motor carriers to commercial zones inside the U.S.
June 8, 2007:	FMCSA publishes notice responding to Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, but agency fails to provide specific information that meets either letter or spirit of the law. FMCSA provides only 20 days for public comment.
May 25, 2007:	Congress requires DOT to comply with existing laws regarding the safety of cross-border trucking and pilot programs, and directs DOT to provide further information on the pilot program under Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. 110–28 (May 25, 2007).
May 16, 2007:	House passes Safe American Roads Act of 2007, H.R. 1773, by 411–3 vote, indicating strong bipartisan support for measures to ensure that opening of the U.S. border to long-haul, Mexico-domiciled interstate operators does not diminish safety on U.S. highways and roads.
May 1, 2007:	FMCSA publishes initial notice on pilot program providing no new information and which does not mention either the safety requirements included in Section 350 of the FY 2002 DOT Appropriations Act (2001), or the procedures required for the conduct of pilot programs enacted in the Transportation Equity Act for the 21st Century (TEA–21) (1998). The public is given 30 days to comment.
Mar. 13, 2007:	House Subcommittee on Highways and Transit, Transportation and Infrastructure Committee, holds hearing on DOT pilot program.
Mar. 8, 2007:	Senate Subcommittee on Transportation and Housing and Urban Development & Related Agencies, Committee on Appropriations, holds hearing on DOT pilot program. Reveals document dated September 2006, indicating agreement between U.S. and Mexican authorities on how to proceed and that full opening of U.S. border will follow pilot program.
Feb. 13, 2007:	DOT Secretary Peters announces that U.S. and Mexico have agreed to on- site inspections of Mexico-domiciled motor carriers to conduct pre-authorization safety audits and, therefore, cross border pilot program with 100 participating Mexico-domiciled motor carriers can commence within 60 days. Document on DOT website states that planning for pilot program began in June 2004.
Oct. 17, 2006:	Advocates for Highway and Auto Safety files request for pilot program records with FMCSA under the Freedom of Information Act (FOIA).
Sept. 26, 2006:	At Senate confirmation hearing, Secretary of Transportation-designate Mary Peters testifies that no plans to conduct a pilot program to permit Mexican-domiciled trucks to operate throughout the U.S. exist and that she will notify Congress if such a plan is developed by DOT.

Mexican Border and DOT Pilot Program Chronology—Continued

Jan. 3, 2005:	DOT OIG issues follow-up audit report that indicates several problems remain to be resolved under Section 350. This is latest OIG audit report on serious safety deficiencies of U.S. Federal and state oversight of the safety of Mexico-domiciled trucks and buses entering the U.S.
2003–2006:	U.S. and Mexican authorities negotiate over Section 350 requirement that pre-authorization safety audits of Mexican-domiciled motor carriers take place on-site in Mexico.
Nov. 22, 2002:	DOT Secretary certifies that section 350(a) requirements have been met.
Dec. 21, 2001:	The Government Accounting Office (GAO) issues latest report finding that the U.S. is not prepared to meet the safety oversight needs of growing commercial traffic from Mexico.
Dec. 18, 2001:	Enactment of FY 2002 DOT Appropriations Act includes Section 350 imposing requirements on DOT regarding the Safety of Cross-Border Trucking. DOT OIG required to issue reports to verify progress of DOT in meeting requirements.
Feb. 6, 2001:	North American Free Trade Agreement (NAFTA) Arbitral Panel issues ruling requiring U.S. to open border but permits the U.S. to adopt safety requirements for Mexico-domiciled motor carriers that are different from those for U.S.-domiciled motor carriers. DOT states that it will open border to Mexico-domiciled commercial vehicles by January 2002.
Mar. 3, 2000:	GAO issues a report finding that there is insufficient coordination of resources between Federal and state motor carrier safety personnel to address increased commercial traffic from Mexico entering the U.S.
Nov. 9, 1999:	DOT OIG issues follow-up audit report finding that there are numerous, illegal operations of Mexico-domiciled motor carriers operating outside the restricted boundaries of the southern commercial zones in 20 states; many Mexican trucks and buses have no insurance, drivers have no valid licenses, U.S. Federal databases are incomplete and inaccurate on Mexican truck and bus registrations; and many Mexican vehicles have serious safety violations.
Dec. 28, 1998:	DOT OIG issues first oversight audit report.
Aug. 8, 1997:	GAO issues another NAFTA-related report on safety deficiencies of U.S. border inspection efforts of Mexico-domiciled commercial buses and vans entering the U.S. to operate in the southern commercial zones.
April 9, 1997:	GAO issues another oversight report on NAFTA-related issues of Mexico-domiciled motor carrier safety. GAO documents U.S. Federal funds provided to Mexico from 1991–1995 to strengthen the use of Mexican motor carrier inspection resources in Mexico and the essential failure of the effort by 1996.
Feb. 29, 1996:	U.S. GAO releases reports reviewing concerns about safety of Mexico-domiciled motor carriers in the U.S. including the lack of motor carrier safety oversight in Mexico and the lack of any Mexican commercial driver hours of service limits.
Dec. 18, 1995:	President Clinton postpones implementation of NAFTA cross-border trucking provision based on safety and environmental concerns.
Nov. 1993:	Congress approves NAFTA.
Dec. 1992:	Representatives of U.S., Canada and Mexico finalize NAFTA to include allowing Mexico-domiciled motor carriers to conduct interstate operations throughout U.S. by Dec. 18, 1995.
July 16, 1992:	U.S. DOT declares equivalence of U.S. Commercial Driver License (CDL) with Mexican Licencia Federal de Conductor (LFC) in Memorandum of Understanding published without prior notice or opportunity for public comment. 57 FR 31454 (July 16, 1992). Actual provisions of the LFC are not made public.
1982:	President Reagan lifts moratorium for Canadian trucking. 47 FR 54053 (1982).
Sept. 20, 1982:	Congress bans interstate transportation by trucks and buses domiciled in Mexico and Canada. Legislation provides the President with the authority to modify the moratorium. Bus Regulatory Reform Act of 1982, Pub. L. 97–261 (Sept. 20, 1982).

ATTACHMENT 2

Federal Register/Vol. 73, No. 16/Thursday, January 24, 2008/Proposed Rules

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 574

[Docket No. NHTSA–2008–0014]

RIN 2127–AK11

Tire Registration and Recordkeeping

Agency: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

Action: Notice of proposed rulemaking (NPRM).

Summary: Our regulation for tire identification and recordkeeping requires manufacturer owned tire distributors and dealers to register the names and addresses of the people to whom they sell or lease new tires, and specifies the use of standard-

ized paper forms for this purpose. It also requires independent distributors and dealers to provide purchasers with standardized registration forms they can complete and mail to the manufacturer or its designee.

We propose to amend the regulation by codifying existing interpretations regarding opportunities under the regulation for electronic registration of tire sales and leases and by creating new opportunities. The names and addresses of purchasers and lessees are used by a tire manufacturer to contact those people in the event that the manufacturer must conduct a campaign to recall and remedy tires that either fail to comply with an applicable Federal motor vehicle safety standard or have a safety-related defect.

Dates: Comments must be received on or before March 24, 2008.

Addresses: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* DOT Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2551.

Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket Management Facility at 202–366–9826.

Privacy Act: Please see the Privacy Act heading under Rulemaking Analyses and Notices.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to: *http://www.regulations.gov*, including any personal information provided.

For Further Information Contact: For non-legal issues, Mr. Jeff Woods, Vehicle Dynamics Division, Office of Vehicle Safety Standards (Telephone: 202–366–6206) (Fax: 202–366–7002). Mr. Woods' mailing address is National Highway Traffic Safety Administration, NVS–122, 1200 New Jersey Avenue, SE., Washington, DC 20590.

For legal issues, Ms. Dorothy Nakama, Office of the Chief Counsel (Telephone: 202–366–2992) (Fax: 202–366–3820). Ms. Nakama's mailing address is National Highway Traffic Safety Administration, NCC–112, 1200 New Jersey Avenue, SE., Washington, DC 20590.

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I. Background

A. Tire Registration Requirements

As originally enacted, the National Traffic and Motor Vehicle Safety Act of 1966 (now codified at Title 49 U.S.C. Chapter 301 *Motor Vehicle Safety*) did not include a requirement for tire registration. However, in May 1970, Congress amended the law to mandate that every tire manufacturer shall maintain records of the names and addresses of the first purchaser of tires produced by that manufacturer.[1] NHTSA was given the authority to establish procedures to be followed by manufacturers in establishing and maintaining such records, including procedures to be followed by distributors and dealers to assist manufacturers in securing the names and addresses of first purchasers.

Pursuant to this authority, in a final rule published in the *Federal Register* (35 FR 17257) on November 10, 1970, NHTSA established the initial tire identification and recordkeeping requirements of 49 CFR part 574. The rule required all tire dealers to record the name and address of the purchaser to whom they sold the tire, along with the dealer's name and address, and forward that information to the tire manufacturer.

However, under the Motor Vehicle Safety and Cost Savings Authorization Act of 1982 (Pub. L. 97–331), Congress amended the Safety Act to mandate that the obligations of independent distributors and dealers be limited to giving "a registration form (containing the tire identification number) to the first purchaser." The tire purchaser could then mail the form to the tire manufacturer. Congress also mandated that NHTSA should prescribe a standardized registration form and that tire manufacturers had to ensure that they gave sufficient copies of these forms to their dealers.

Congress adopted these amendments after the House Committee on Energy and Commerce found in its report on the 1982 amendments that tire dealers whose business was owned or controlled by a tire manufacturer (these dealers accounted for just under ⅓ of tire sales) registered between 80 and 90 percent of the tires they sold.[2] However, independent tire dealers, which accounted for more than ⅔ of tire sales, registered only 20 percent of the tires they sold.

The changes mandated by the 1982 amendments were established in an interim final rule published on May 19, 1983 (48 CFR 22572). The regulation required tire manufacturers to provide both independent and non-independent distributors and dealers with standardized tire registration forms. The regulation specified the exact content of the forms given to independent distributors and dealers. No other information may appear on the forms.[3] When an independent distributor or dealer sells or leases a tire to a consumer, the distributor or dealer must fill in the tire identification number and its name and address on a registration form and give the form to the consumer. The consumer may then fill in his or her name and address, add a stamp and mail the form to the manufacturer or its designee. In a follow-up final rule published on February 8, 1984 (49 FR 4755), the agency made slight revisions to the tire registration form to improve its clarity and also reduced the size of the form so that it could be mailed using post card postage.

As part of the agency's implementation of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act (Pub. L. 106–414) that was enacted on November 1, 2000, the agency increased the tire registration record retention requirements for tire manufacturers from 3 years to 5 years. The record retention period was extended in a final rule published in the Federal Register (67 FR 45822) on July 10, 2002.

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[1] Pub. L. 91–265.
[2] H.R. Rep. No. 576, 97th Cong. 2d Sess. 8–9 (1982).
[3] July 18, 2003 letter from Jacqueline Glassman to Ann Wilson of RMA. Letter is available at: *http://isearch.nhtsa.gov/files/onlinetireregistration.html.*

B. Rate of Tire Registration

In the Motor Vehicle Safety and Cost Savings Authorization Act of 1982, Congress directed NHTSA to conduct an evaluation after 2 years of voluntary registration to determine the extent to which the voluntary registration procedures for independent dealers were successful in increasing the registration of tires.[4] NHTSA was also charged with determining the extent to which independent dealers have encouraged purchasers to register their tires and the extent to which independent dealers have complied with the new procedures. Finally, NHTSA was charged with deciding whether to impose any additional requirements to "significantly increase" registration of tires sold by independent dealers.

Per that Congressional directive, NHTSA reported on its evaluation of voluntary tire registration by independent dealers in 1985 and 1987.[5] We found that:

1. Registration rates for independent dealers declined by half, from 18.1 percent under previous law to 9.3 percent under voluntary registration.
2. Registration rates for company stores had remained steady at 86 percent during this same period.
3. Tire manufacturers had provided plenty of registration forms.
4. There were no records of any tire registrations for more than 70 percent of the independent dealers.

From this, NHTSA reached the conclusion that many independent dealers did not routinely give registration forms to tire purchasers. NHTSA stated that we did not think it would be the best use of our enforcement resources to bring compliance actions against independent tire dealers. Instead, NHTSA proposed in 1986[6] four potential steps to improve tire registration by independent dealers:

1. Require prepaid postage on the registration form; and/or
2. Undertake a public education campaign and a brief explanation of the tire registration process in tire information pamphlets; and/or
3. A central clearinghouse for all registration forms distributed to consumers by independent dealers; or
4. Rescind the tire registration requirements and allow tire manufacturers to devise their own contractual ways of ensuring they meet the statutory obligation for tire manufacturers to "establish and maintain records of the names and addresses of first purchasers."

After reviewing the pubic comments, NHTSA published a termination of rulemaking notice in November 1988[7] announcing that none of the four suggestions had been demonstrated to likely significantly increase the level of tire registration by independent dealers under voluntary registration. NHTSA also noted that the agency would continue to rely on media and public announcements to alert the public of tire recalls, so public safety would not be jeopardized by the low registration rate for tires sold by independent dealers.

Although the agency has not conducted a subsequent evaluation, it believes that the registration rate for tires sold or leased by independent distributors and dealers remains largely unchanged. In a submission sent to the agency earlier this year, the Rubber Manufacturers Association (RMA) indicated that the return rate for the mail-in registration cards is no more than 10 percent.[8]

C. Increasing the Effectiveness and Reducing the Cost of Tire Registration Through Electronic Registration

1. 1984 Interpretation to Representative Wirth

In 1984, Representatives Wirth and Rinaldo wrote a letter to the agency expressing several concerns. First, they noted that the agency had stated in a recent rulemaking that the Vehicle Safety Act did not permit independent dealers to return the mail-in registration cards directly to the manufacturer without first providing the form to the purchaser with the required information filled in by the dealer. Second, they expressed support for computerized tire registration and argued that the 1982 amendments to the Vehicle Safety Act should be interpreted as permitting independent dealers to give the purchaser a mail-in registration form on which they

[4] See Motor Vehicle Safety and Cost Authorization Act of 1982, Pub. L. 97–331.
[5] For a discussion of NHTSA's Evaluation Reports on Voluntary Tire Registration, see 53 FR 44632–33, November 4, 1988.
[6] Advance notice of proposed rulemaking; 51 FR 45916; December 23, 1986.
[7] Termination of rulemaking; 53 FR 44621, November 4, 1988.
[8] Docket NHTSA–2006–26554–3.

had not filled in any of the required information if they attached to the form a copy of the computerized invoice bearing that information.

In its response, the agency stated while a literal interpretation of the 1982 amendments would not permit independent dealers to do that, under an equitable interpretation, they would be.[9] Under the principles of equitable interpretation, a statutory requirement need not be literally applied in instances in which the underlying Congressional intent is otherwise satisfied. The agency stated:

> Based on the principles of equitable interpretation, we believe that an independent tire dealer or distributor who
>
> (1) Registers tires by computer;
>
> (2) Attaches a computer-printed invoice containing all of the information necessary for registration to a blank standardized registration form; and
>
> (3) Furnishes the two documents to the customer when the tires are purchased; fully satisfies the tire registration amendments.

2. 2003 Interpretation to RMA

On July 18, 2003,[10] the agency responded to a letter from RMA asking whether Part 574 permits tire manufacturers to offer electronic registration in addition to the required mail-in form. RMA stated that it wanted to provide independent tire distributors and dealers with a supplemental form that notifies consumers that they may also register their tires by electronic means, *e.g.,* by directing the consumer to a website or a toll-free telephone registration line. In support of its request, RMA noted that the agency had recently concluded that child restraint manufacturers could provide consumers with a supplemental form encouraging electronic registration.[11] RMA said that no more than 10 percent of tire registration cards were being returned to the manufacturers and that the information was often incomplete or the writing illegible. RMA expressed the belief that offering tire registration via the Internet, by telephone or other electronic means would improve the registration rate and aid manufacturers in fulfilling their notification obligations.

In its response, the agency said it agreed that the rationales in its letters relating to child restraint registration were also applicable to tire registration. The agency concluded that Part 574 permits the provision of information about electronic registration as a supplement to the required mail-in form for independent distributors and dealers.

Likewise, as to non-independent distributors and dealers, the agency said that electronic registration could be offered to them. The agency cautioned, however:

> This interpretation does not relieve non-independent distributors and dealers from the requirements of section 574.8(b) that they themselves record the purchaser's name and address, the tire identification number(s) of the tire(s) sold, and a suitable identification of themselves as the selling dealer on a tire registration form and return the completed forms to the tire manufacturers or their designees. While we would interpret Part 574 to permit non-independent distributors and dealers to accomplish these tasks by electronic means, they may not transfer this responsibility to consumers.

3. 2005–2007 Issues Regarding Clearance of the Tire Registration Requirements Under the Paperwork Reduction Act

The information collected by tire dealers from tire purchasers and retained by tire manufacturers is considered to be a "collection of information"[12] as defined by the Office of Management and Budget (OMB). The significance of this definition is that approval of the "collection of information" is subject to OMB review. OMB has promulgated 5 CFR Part 1320 "Controlling Paperwork Burdens on the Public." OMB states that the purpose of Part 1320 is to implement the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) (PRA) concerning collections of information. The procedures established in Part 1320 are designed to "reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal Government."

Before a Federal agency can collect certain information from the public (which includes the Federal Government's directing that the information be collected from

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[9] February 1983 letter from Diane K. Steed to the Honorable Timothy E. Wirth. Letter is available at: *http://isearch.nhtsa.gov/gm/83/1983–1.12.html*.

[10] July 18, 2003 letter to Ann Wilson of RMA.

[11] Letter to John K. Stipancich, January 3, 2003; letter to Mark A. Rosenbaum, Esq., April 12, 2001.

[12] See 5 CFR 1320.3(a)(3).

new tire purchasers by tire dealers to give to tire manufacturers, also called third-party information), it must receive approval from OMB. If OMB approves a collection of information, it assigns an OMB control number and an expiration date. OMB will not "approve any collection of information for a period longer than 3 years." (See 5 CFR section 1320.12(e)(1).) The OMB control number assigned to the Part 574 collection of information is 2127–0050. The current status of OMB's approval is available online at *http://www.reginfo.gov/public/do/PRASearch*.

Because the Part 574 collection of information requirements are longstanding, we have, for many years, asked for and been granted, OMB approval to collect the information. As part of the periodic process to request OMB to renew approval of an existing collection of information, on December 28, 2005, we published in the *Federal Register* (70 FR 76909) an announcement that NHTSA planned to ask OMB for a renewal of approval to collect the Part 574 information, and sought public comment on the proposed renewal.

We received two comments in response. The first was from the National Automobile Dealers Association (NADA). NADA represents 20,000 franchised automobile and truck dealers that act as independent tire dealers when they sell tires to consumers under differing situations. The second comment was from Tire Recall Registry, Inc. (TRR). It raised several issues, most of which were related to its advocating electronic registration of tires. TRR cited the July 18, 2003 NHTSA interpretation letter to RMA in which NHTSA stated that information about and opportunities for electronic registration could be used to supplement the paper form specified by Part 574. TRR stated its belief that requiring paper forms resulted in an unnecessary burden under the OMB regulations at 1320.3(b)(1), given that electronic means could be used instead, thus reducing the collection of information burden.

On August 31, 2006, OMB renewed the collection of information for Part 574 for a period of 6 months, instead of 3 years due to its concerns about the burdens associated with tire registration. OMB posed several questions for the agency to answer regarding DOT's compliance with PRA requirements, the effectiveness rates of the tire registration requirements, possible means to reduce the paperwork burden and encourage tire dealers and purchasers to register tires by permitting electronic registration, and a discussion of alternatives that might be permitted for electronic registration, including the use of electronic registration in lieu of the paper mail-in form. The questions were to be answered as part of NHTSA's next request to renew the Part 574 collection of information. On December 8, 2006, NHTSA published a *Federal Register* document (71 FR 71238)[13] seeking comments on the OMB questions and proposing to renew the Part 574 collection of information.

In response to the December 2006 document, five organizations submitted comments. In addition to comments from RMA and NADA, comments were submitted by Computerized Information and Management Services, Inc. (CIMS), National Tire Registry Recall.com (NTRR), and the Tire Industry Association (TIA). Except for CIMS, all commenters supported efforts to expand the methods of registering new tire purchaser information to include website registration by the purchaser and electronic registration performed by independent tire dealers.

RMA stated that the continued registration of new tire purchasers is a critically important safety issue so that purchasers can be notified in the event of a product recall or other safety problem. It urged NHTSA to either interpret or revise Part 574 to allow an electronic alternative to the current paper card system. RMA said that it has data showing that less than 10 percent of tire registration cards [from independent tire dealers] are currently being returned to the tire manufacturer and many of these cards are inaccurate, incomplete, or illegible. RMA asked NHTSA to interpret or amend the current regulations in the following areas:

1. Modify Part 574 to permit tire distributor or dealer either (a) to provide consumer with the paper registration form bearing instructions about the opportunity to register the tires at the tire manufacturer's website or (b), on a voluntary basis, to register the tires electronically at point of sale (without having to provide any type of registration form to the consumer).

2. The current regulation only requires [independent] distributors to provide the form to first purchasers with the tire identification number and the dealer's name and address. Any revisions to the regulations to permit electronic or point-of-sale registration should not create any new or additional obligations for tire dealers or distributors by requiring them to register the tires.

3. The tire manufacturer's obligations should remain the same. They should only be required to continue to provide the paper forms to tire dealers and dis-

[13] Docket No. NHTSA–06–26554.

tributors and, upon receipt of the forms, retain the purchaser information for 5 years.

4. Through a NHTSA interpretation letter, a supplemental form regarding electronic tire registration is permitted. However, the agency should amend its regulations to permit information about such registration to be placed directly on the existing paper registration form.

NADA generally supported the RMA comments regarding permitting website registration of tires, and referred to the agency's provisions for electronic registration of child safety seats in 49 CFR 571.213 as being instructive in this regard. In addition to allowing registration by website or fax, NADA stated that tire dealers should also be permitted to register the tires for the purchaser, upon obtaining permission or a release from the purchaser to do so.

NADA noted that it has stated in the past that franchised automobile and truck dealers act as independent tire dealers as well. Commenting on past NHTSA announcements of intent to renew the Part 574 collection of information, NADA questioned in those prior renewals, and also in the current one, NHTSA estimates of 12,000 new tire dealers and distributors, when NADA stated that there are 20,000 franchised automobile and truck dealers.

CIMS stated that it provides tire registration services to over 80 percent of tire manufacturers/brand owners in the replacement tire market and to over 12,000 tire dealers and distributors. CIMS is opposed to making changes to the existing tire registration regulations. CIMS stated that the current tire registration regulations are working, and that independent tire dealers using the CIMS All Brand Form can comply with the tire registration regulation for one penny or less per tire. It stated that allowing electronic registration of tires will only cause more confusion, will remove the tire purchasers' rights and ability to ensure that their tires are registered, and will increase the liability of independent tire dealers if the tire registration information is not completely transmitted to the tire manufacturer or if they jeopardize the privacy of tire purchaser information.

CIMS indicated that tire registrations by year are as follows:

1997—37,000,000

2000—41,000,000 (Prior to Ford/Firestone recall)

2003—54,000,000 (Corresponds with NHTSA estimates, Docket No. 06–26554)

2006—59,000,000

CIMS stated that there will be added costs associated with electronic tire registration including developmental costs, software upgrades and employee training. CIMS did not provide any specific cost estimates.

NTRR stated its belief that changes are needed and that electronic registration would enhance public safety, and would be consistent with Paperwork Reduction Act priorities. NTRR stated that allowing electronic registration as an alternative, not merely as a supplement, would improve registration rates over the current methods. NTRR stated that the July 18, 2003 interpretation letter from NHTSA to RMA leaves unanswered the extent to which electronic registration and other alternatives to paper forms can be used in compliance with 49 CFR part 574. NTRR also stated that the tire registration form specified in Part 574 does not display the required OMB control number, and suggested that NHTSA does not adequately address privacy and confidentiality concerns under the PRA.

TIA stated that it has worked closely with the RMA in reviewing the need to revise the current tire registration regulations in 49 CFR part 574, and that it agrees with the four principles identified by RMA for revisions to the regulations. TIA stated that any revisions to the regulations should not create any new or additional obligations for tire dealers and thus should not require the tire dealers to register the tires. TIA stated that many TIA member tire dealers endorse electronic registration and are making electronic registration of new tires possible. TIA recommended that NHTSA adopt the changes recommended by RMA as quickly as possible.

In an additional *Federal Register* document on March 21, 2007 (72 FR 1334)[14] in which we asked that if the public had additional comments, to provide the comments directly to OMB by April 20, 2007, we provided a summary of the comments in response to the December 2006 document. In this March 2007 document, NHTSA specifically stated that we are:

* * * considering revisions to update 49 CFR part 574 to provide, to the extent consistent with the agency's authority, allowances for electronic and other pos-

[14] Docket No. NHTSA–06–26554.

> sible means of registering new tires at the point of sale. First, the agency will consider the inclusion of website registration information to be placed on the tire registration form in 574.7. Second, the agency plans to update the registration form to include the OMB control number. Third, the agency will fully evaluate what appropriate regulations are permissible to allow independent tire dealers to electronically register the tires on a voluntary basis for the consumer, within the requirements specified in Title 49, U.S.C. Chapter 301, Section 30117—providing information to, and maintaining records on, purchaser.
>
> Therefore, the agency will undertake rulemaking in 2007 to address these issues and provide the public with the opportunity to comment on the proposed changes. (See 72 FR at page 13345)

As stated in the March 2007 notice, the agency is now proceeding with rulemaking to consider allowing registration via the Internet or other electronic means for new tire purchasers.

II. Need for Rulemaking

NHTSA is proposing to amend the Part 574 tire registration procedures to facilitate Internet and other electronic registration of tires, including voluntary registration of tires by independent tire dealers. We believe this rulemaking is needed to ensure that the regulation permits, to the extent consistent with the agency's authority, the use of new technologies in registering tires. In addition to potentially reducing costs, the procedures could also result in improved tire registration rates. A higher new tire registration rate would help in the identification of first purchasers of defective or nonconforming tires, so that the purchasers may take appropriate action in the interest of motor vehicle safety. As described below, NHTSA's most recent data on tire registration rates were included in a termination of rulemaking notice published in the *Federal Register* on November 4, 1988 (53 FR 44632).

As discussed earlier, NHTSA found in a 1985 study that under the mandatory tire registration program for independent tire dealers, the registration rate was 18.1 percent. In 1987, NHTSA found that, under the voluntary independent tire dealer registration program, the tire registration rate among independent tire dealers had decreased to 9.5 percent. If the number of tires registered using computers is subtracted from 9.5 percent, the return rate for paper tire registration forms was only 8 percent. In 1987, the tire registration rate for tires sold by company-controlled dealers was found to be greater than 86 percent.

We have not performed additional surveys on tire registration rates since 1987. However, February 6, 2007 comments from RMA stated that "no more than 10 percent of tire registration cards are currently returned to manufacturers and a significant number of these cards are inaccurate, incomplete or illegible." Thus, regarding the response rate to paper forms for new tires sold through independent dealers, the agency believes that tire registration rates have not changed substantially for the past 20 years.

For these reasons, the agency does not agree with those that believe the current paper-form based tire registration program is effective. Even if electronic registration does not result in significantly more purchaser responses (for new tire sales through independent dealers), NHTSA believes the overall effectiveness rate of tire registration would improve, because voluntary electronic registration would eliminate illegibility or other ambiguity caused by hand-written information. For purchasers who do not like to fill in information by hand, electronic registration could also reduce the overall burden of registration.

III. Today's Notice of Proposed Rulemaking

After carefully reviewing the public comments to NHTSA's December 2006 publication of the announcement of its request to OMB to extend approval of the Part 574 tire registration collection of information, we have concluded that Part 574 should be amended to facilitate Internet and other electronic registration of tires, including voluntary registration of tires by independent tire dealers. Our proposal follows an approach similar to the ones suggested by RMA and NADA.

Specifically, under our proposal:

- Independent tire dealers could, in lieu of providing a paper registration form to the consumer, voluntarily register a tire by Internet or other electronic means, so long as such means were authorized by the tire manufacturer. These dealers would also have the option of providing to the consumer the mailable standardized paper registration form that includes the tire identification number (TIN) and the dealer's name and address (this is the current requirement set forth in Part 574), or using the same standardized paper registration form,

but voluntarily completing the form and registering the tire by sending the form to the tire manufacturer or its designee.

- The standardized paper registration form would be permitted to identify a website authorized by the tire manufacturer at which the consumer could register the tires instead of mailing in the form.
- We are proposing to remove the figures showing the standardized paper registration form from the CFR. Some requirements that were expressed by referring to the forms in the regulatory text would be added to the regulatory text, but the regulation would no longer specify as many details concerning the format of the forms.
- We are also proposing regulatory text that would make it clear that dealers owned or controlled by tire manufacturers may register tires by electronic means, consistent with a past interpretation. The figure showing the form used for these tires would also be removed.

Our proposal would not impose new obligations on tire dealers or tire manufacturers. Instead, it would accommodate and facilitate Internet and other electronic registration of tires, including voluntary registration of tires by independent dealers. We note that we are proposing a provision that would clarify that tire manufacturers must meet requirements concerning retention of information for registration information submitted to them by electronic or other means they authorize, in addition to that submitted to them on the standardized paper forms.

The details of our proposal are discussed below.

A. Tires Sold by Independent Tire Dealers—Alternative Means of Tire Registration

As noted in our March 2007 document, we are considering revisions to update 49 CFR part 574 to allow, to the extent consistent with the agency's authority, for use of electronic and other possible means of registering new tires at the point of sale.

The statutory requirements relevant to independent tire dealers are found at 49 U.S.C. 30117(b)(2)(B), which reads as follows:

> The Secretary shall require each distributor and dealer whose business is not owned or controlled by a manufacturer of tires to give a registration form (containing the tire identification number) to the first purchaser of a tire. The Secretary shall prescribe the form, which shall be standardized for all tires and designed to allow the purchaser to complete and return it directly to the manufacturer of the tire. The manufacturer shall give sufficient copies of forms to distributors and dealers.

Not surprisingly, given the pre-Internet date of enactment of the statute, the statutory provision appears to contemplate a mail-in paper form ("the manufacturer shall give sufficient copies of forms to distributors and dealers"). Also, the legislative history (House report)[15] refers to forms that are suitable for mailing and addressed to the manufacturer or its designee.

One relevant issue is the effect of voluntary tire registration by independent tire dealers on their obligations under section 30117(b)(2)(B). While the statute provides for a program in which purchasers of tires from independent tire dealers may register their tires by returning a form to the tire manufacturer, NHTSA's letter to Congressman Timothy Wirth[16] addressed the situation in which independent tire dealers may wish to register tires voluntarily for consumers. Invoking the principles of equitable interpretation, the agency concluded that voluntary registration would partially relieve independent dealers of their statutory obligations. Under those principles, a statutory requirement need not be literally applied in instances in which the underlying Congressional intent is otherwise satisfied. More specifically, the agency stated:

> Based on the principles of equitable interpretation, we believe that an independent tire dealer or distributor who (1) registers tires by computer; (2) attaches a computer-printed invoice containing all of the information necessary for registration to a blank standardized registration form; and (3) furnishes the two documents to the customer when the tires are purchased; fully satisfies the tire registration amendments. * * *

While, as discussed below, we now believe that this interpretation goes to some extent beyond what is necessary to satisfy Congressional intent, we believe the basic principle is correct. In particular, if an independent tire dealer voluntarily registers

[15] H.R. Rep. No. 97–576, p. 8.

[16] February 1983 letter from Diane K. Steed to the Honorable Timothy E. Wirth. Letter is available at: *http://isearch.nhtsa.gov/gm/83/1983–1.12.html*.

tires for the consumer, it serves no purpose to require the full procedures necessary to enable consumers to also register those tires.

Several other issues are whether the statute can be interpreted to permit the use of electronic forms in lieu of paper forms and, assuming that the answer to that issue is "yes," the meaning of the statutory command to "* * * give a registration form (containing the tire identification number) to the first purchaser * * *" in the context of electronic forms. As to the term "form," it could be interpreted broadly enough to include electronic as well as paper forms, notwithstanding the statutory language and legislative history mentioned above that suggests the forms are to be paper ones.

As to the term "give," it could readily be interpreted in the context of the statute to mean physically provide either "take away" means of registration (*i.e.,* mailable form) or means of "on-the-spot" registration (*i.e.,* an in-store computer terminal accessible to purchaser). It is not apparent how the term could be further interpreted to mean simply inform the purchaser about the opportunity to use means not physically present in the dealer's store (*e.g.,* use of a computer terminal located at the purchaser's home or elsewhere.) It is even less apparent how such further interpretation could be given the term "give" given the additional requirement that the form given the purchaser "* * * contain the tire identification number * * *"

A possible scenario that could be viewed as meeting all of the statutory requirements would be one in which the purchaser was provided access to a computer at the dealership where the screen showed the form with the tire identification numbers already filled in, and the purchaser could register the tires with the manufacturer by entering his or her name and address and clicking on a button to register the tires. We do not know whether manufacturers and dealerships would be interested in an option along these lines, but note that we are requesting comments below on this type of approach. We also note that a number of approaches for electronic registration by purchasers would appear not to meet these statutory requirements, but could be viewed as supplemental means of transmitting tire registration to manufacturers.

In light of the above discussion and in considering alternative means for registration of tires sold by independent dealers, we believe: (1) The regulation must include a basic procedure consistent with the statutory requirement that enables purchasers of tires from independent tire dealers to register their tires by returning a form with the TIN already filled in to the tire manufacturer; (2) the regulation may provide options under which an independent tire dealer may voluntarily register tires for consumers, in which case the dealer need not meet the full procedures necessary to enable consumers to register those tires; and (3) the regulation may accommodate means that tire manufacturers may provide for tire registration (*e.g.,* Internet registration) that consumers may use instead of mailing in the form.

Voluntary registration by independent dealers.

As indicated above, after reviewing our 1984 interpretation to Congressman Wirth, we now believe that it went to some extent beyond what was necessary to satisfy Congressional intent. In particular, the agency believes that electronic registration of the tires by independent dealers would satisfy the statutory requirements, without the need to provide an additional blank form to the purchaser. The purpose of the statutory requirement is to enable the purchaser to register the tire purchase with the manufacturer. As such, if the dealer registers the tires electronically for the purchaser and provides a blank form to the purchaser, confusion could result, since the purchaser might think there was a need to submit the paper form to the manufacturer.

Regarding the statement in the interpretation that the purchaser be given a computer-printed invoice with the information on the tire registration paper form, the agency now believes that statement also exceeds what is necessary. The tire registration information is kept by the tire manufacturer (or its designee). There is no need for the dealer or purchaser to retain that information, and NHTSA has no record retention requirement for either tire dealers or tire purchasers. Instead of duplicating the required information on the invoice given to the purchaser, the agency believes that a written statement on the invoice regarding the registration of the tires by the dealer would be sufficient to inform the consumer that the tires have been registered.

We are therefore proposing that independent tire dealers have the option of voluntarily electronically registering tires with the tire manufacturer. We note, however, that whether this option can be used depends on the tire manufacturer's providing a means to receive this information electronically, or designating an agent to do so for it. The agency is not aware of what specific means might be used to provide electronic registration, such as specific software that identifies tire sales and then automatically uses the Internet to transmit the information to the tire manufacturer or

its designee. However, the agency believes that many company-controlled tire dealers have autonomous systems in place to register the tires as part of the sale transaction. Such systems do not require additional or separate actions by sales personnel to register the tires. The agency welcomes additional details on the methods that are currently in place and also other methods that might be used, including how independent tire dealers may be able to register tires electronically.

Our proposal also includes an option in which independent tire dealers could use the standardized paper registration form, but voluntarily complete the form and register the tires by sending the form to the tire manufacturer or its designee.

One issue that arises with independent dealers being permitted to register tires voluntarily for consumers is whether they could charge a separate registration fee. We have tentatively concluded that this should not be permitted, as it could discourage registration and cause confusion. We request comments on this issue.

Another issue that arises with electronic registration of tires is the security of the information being transmitted. The proposed regulatory text would require that electronic registration be by secure means, *e.g.,* use of https on the web. We request comments on the need for such a provision, and whether it should be more specific. We note that in September 2005 we decided not to include an "encryption" requirement for electronic registration of child safety seats.[17] We may or may not adopt a requirement concerning secure means for electronic registration of tires, but would like to have the benefit of public comments before reaching a decision.

Regarding CIMS' comment that additional burden would shift to the tire dealer if it decided to use electronic registration, NHTSA notes that registration by independent tire dealers would be voluntary. Nothing in this rulemaking would require independent tire dealers to register tires for the purchaser.

NADA's comments regarding an optional electronic registration program stated that the tire dealer should obtain permission or a release from the purchaser before being permitted to register the tires on behalf of the purchaser. The agency believes that this would create an additional collection of information or other burden that would not be necessary if, instead, a registration statement is provided to the purchaser indicating that the tire dealer is performing tire registration for the purchaser. We also observe that such releases are not required for tire dealers controlled by tire manufacturers, which are required to register tires for consumers.

For the new electronic registration requirements, NHTSA also proposes to permit the tire manufacturer to designate a third party to collect or store the tire registration information. Such third party designation is currently allowed for the paper registration forms under 574.7, and NHTSA is not aware of any reason not to extend third party designation to electronic tire registrations methods. Since we do not have any detailed information on how designees would collect and retain tire registration information, the agency welcomes additional details that would assist the agency in establishing requirements.

Alternative means of registration by tire purchasers.

Consistent with our interpretation letter to RMA, we are including in the proposed regulatory text a provision stating that tire manufacturers may voluntarily provide means for tire registration via the Internet, by telephone or other electronic means.

RMA and NADA commented that the tire registration paper form should be allowed to include instructions for purchasers about registering tires directly on the tire manufacturer's website. NADA stated that the electronic registration provisions for child safety seats in FMVSS No. 213 are instructive about the value of permitting this. TIA stated that it agreed with the four principles for new tire registration requirements described by RMA (one of which is to allow website registration). NTRR's comments did not specifically address putting website information on the paper form.

The agency tentatively agrees that including, at the tire manufacturer's option, a website address for purchasers to register tires could facilitate registration for tire purchasers, and also improve the quality of information received by the tire manufacturer. As RMA stated, many of the paper registration forms that are received by tire manufacturers are inaccurately filled out, incomplete, or illegible. By allowing purchasers to type in the information directly on the tire manufacturer's website, the issue of illegibility should be eliminated.

NHTSA checked several tire manufacturers' websites, for both widely-known tire brands and lesser-known tire brands, and found in all but one case that the tire manufacturers already have website-based tire registration capability. Inclusion of website registration information would be performed at the option of the tire manufacturer. We are proposing simple text to keep information on the form to a min-

[17] 70 FR 53569, 53572–73, September 9, 2005.

imum: "Instead of mailing this form, you can register online at [insert tire manufacturer's website address]". This proposed language deviates slightly from the FMVSS No. 213 text that includes references to registering online on both sides of the form, although the text on the mailing label side of that form is on a part of the form that is removed prior to mailing. However, the tire registration form is not of that design, and much of the form space is needed for recording the tire identification numbers. We welcome comments on the proposed text and location of the optional website registration information.

We request comments on whether information about other possible means of supplemental registration should be permitted to be placed on the tire registration paper form. We note, as indicated above, that the available space on the form is limited.

Other possible options for tire registration.

We request comments on whether the regulation should specify additional options for registering tires sold by independent tire dealers that would be consistent with our statutory authority. We intend for the scope of this proposal to be broad and, depending on the comments, may adopt additional options in the final rule.

We note that, as indicated above, it is our goal to accommodate and facilitate Internet and other electronic registration of tires, including voluntary registration of tires by independent dealers. We also note that since additional options would also be voluntary, there is no reason to specify ones that would be unlikely to be used by independent tire dealers, tire manufacturers, and/or consumers.

We seek comment on whether there should be some type of option in which independent tire dealers might be able to use electronic forms in lieu of paper forms to enable consumers to register their tires. Such an approach might, for example, involve independent tire dealers setting up computer terminals at their dealerships in which tire purchasers would see a form on the computer screen with the TIN and possibly other information already filled in, which tire purchasers could use to register their tires. We note that if such an approach involved the consumer's being given the electronic form with the TIN filled in, the approach could, consistent with the requirements of 49 U.S.C. 30117(b)(2)(B), be an option that independent tire dealers could use in lieu of paper forms. We also note that if such an option were permitted in lieu of paper forms instead of as a supplement, the electronic form would need to be standardized.

We specifically request that any commenters recommending additional options for tire registration, beyond those in the proposed regulatory text, provide specific recommended regulatory text for those additional options.

Registration forms.

As discussed above, for tires sold by independent tire dealers, NHTSA is required by statute to prescribe a standardized tire registration form for all tires. Specifically, 49 U.S.C. 30117(b)(2)(B) provides "(t)he Secretary shall prescribe the form, which shall be standardized for all tires * * *"

The statute provides that tire manufacturers must give sufficient copies of the registration forms to distributors and dealers. Also, Part 574.8 permits distributors and dealers to use registration forms obtained from other sources.

Pursuant to the requirement to prescribe a standardized tire registration form, NHTSA has adopted requirements through rulemaking and placed them in Part 574. The details of some of the requirements, including size and data elements, are set in the regulatory text. The details of certain other requirements are not set out in the regulatory text. Instead, the regulatory text requires that forms conform in content and format to the forms depicted in the figures included in Part 574. See 574.7(a)(2).

To promote flexibility, we are proposing to remove the figures showing the forms in Part 574. To ensure that the forms remain standardized, we are proposing to add some requirements to the regulatory text that are currently expressed by referring to the figures, but with fewer details concerning format. We are also proposing to update the size standards to reflect the current U.S. Postal Service's "Domestic Mail Manual" (Updated 12–6–07) at Section 6.3 "Cards Claimed at Card Rates" that specifies physical standards that postcards must meet in order to be eligible for mailing at card rates.

Under our proposal, on the address side of the form, the following would continue to be required to be provided: The name and address of the manufacturer or its designee, and, in the upper right hand corner, the statement: "Affix a postcard stamp."

The other side of the form would continue to include the tire manufacturer's name (unless it already appears on the address side), and the statement: "IMPORTANT, In case of a recall, we can reach you only if we have your name and address." There would also continue to be a statement indicating that sending in the card will add

a person to the manufacturer's recall list. However, the regulation would no longer specify that the statement indicate that a person "must" send in the card to be on the recall list, since manufacturers may provide alternative means of registering tires.

Under our proposal, if a tire manufacturer provides a website where its tires can be registered, it may (but is not required to) include the following sentences: "Instead of mailing this form, you can register online at [insert tire manufacturer's registration website address]".

The form would also include the admonition: "Do it today."

The form would also continue to include space for recording the tire identification numbers for six tires. There would also continue to be shading to distinguish between areas of the form to be filled in by sellers and customers.

As indicated above, under our proposal, the regulation would no longer specify as many details concerning the format of the form.

We request comments on the removal of these figures and on what requirements expressed by reference to the figures should be added to the regulatory text.

Registration rates.

We request comments on the current registration rates of tires sold by independent tire dealers. Commenters are asked to provide information concerning the total number of such tires that are sold and the number of those tires that are currently being registered by each alternative means, *e.g.,* the number of tires registered by returning the paper form, the number registered using the tire manufacturer's website, etc. The agency requests that commenters provide the specific basis for any numbers or rates that are provided. We also request comments on how and why these registration rates may change if the agency adopts this proposed rule.

Other issues.

We request comments on other issues related to our proposal. As indicated above, we intend the scope of this proposal to be broad.

We specifically invite comments related to NHTSA's provisions for electronic registration of child safety seats in S5.8.2 of FMVSS No. 213. See final rule published in the *Federal Register* (70 FR 53569) on September 9, 2005.[18] The agency considered a number of issues related to electronic registration and electronic registration forms in that rulemaking. To what extent should the requirements we adopt related to electronic registration of tires be similar/different from the ones we adopted for child safety seats, and why?

B. Tires Sold by Dealers Controlled by Tire Manufacturers—Electronic Tire Registration

The tire registration form in Figure 4 of Part 574 is the form that is to be filled out by company-controlled tire dealers and returned to the manufacturer upon the sale of new tires. We note that we have no data on the continued use of this form, or what percentage of company-controlled dealers continue to use this form versus submit the registration information to the tire manufacturer using electronic means.

As noted above, the agency has previously provided an interpretation letter to the RMA (July 18, 2003 agency letter) stating that while company-controlled dealers are permitted to register tires electronically:

> This interpretation does not relieve non-independent distributors and dealers from the requirements of section 574.8(b) that they themselves record the purchaser's name and address, the tire identification number(s) of the tire(s) sold, and a suitable identification of themselves as the selling dealer on a tire registration form and return the completed forms to the tire manufacturers or their designees. While we would interpret Part 574 to permit non-independent distributors and dealers to accomplish these tasks by electronic means, they may not transfer this responsibility to consumers.

In this NPRM, NHTSA is proposing to include a provision expressly reflecting this existing option in the Part 574 requirements. Specifically, NHTSA proposes that electronic means be permitted as an alternative to the paper registration forms specified in S574.7(b). As earlier stated, we have little information on how these systems are configured, so we are proposing simple language and we welcome comments on alternative language.

As to Part 574's requirements for these forms, requirements concerning data elements are set forth in the regulatory text, and the regulatory text also specifies that the forms must be similar in format and size to that in Figure 4. We note that the statutory requirement that NHTSA prescribe a standardized tire registration form does not apply to ones for tires sold by dealers controlled by tire manufacturers.

[18] Docket NHTSA–2005–22324.

To promote flexibility, we are proposing to remove Figure 4 showing the registration forms to be used. We are proposing to add several requirements currently expressed by reference to the figure, and otherwise leave all other details to the tire manufacturer. Under our proposal, the form would continue to be required to include:

- A statement indicating where the form should be returned, including the name and mailing address of the manufacturer or its designee.
- The tire manufacturers' logo or other identification, if the manufacturer is not identified as part of the statement indicating where the form should be returned.
- The statement: "IMPORTANT; FEDERAL LAW REQUIRES TIRE IDENTIFICATION NUMBERS MUST BE REGISTERED."

We request comments on the removal of this figure and on what requirements expressed by reference to the figure should be added to the regulatory text.

VI. Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. The Office of Management and Budget reviewed this rulemaking document under E.O. 12866, "Regulatory Planning and Review." This rulemaking action has been determined to be significant under the DOT Policies and Procedures because of public interest.

In this document, NHTSA is proposing to amend Part 574 by permitting collection of the names and addresses of first purchasers of new tires by Internet and other computerized means. Nothing in the proposed rule, if made final, would require any tire dealer to use these new procedures. All collection of the names and addresses of first purchasers of new tires may continue to be collected as at present. However, we believe that permitting electronic means of tire registration will increase the rate of registrations, which will in turn increase the effectiveness of future tire recalls and thus improve motor vehicle safety.

There would be some cost impacts, in terms of time and/or money, associated with increased registrations of tires by electronic means. Since the options we are proposing are voluntary, we do not know to what extent they will be utilized by independent tire dealers and tire manufacturers. However, we are providing analysis to show the potential cost impacts.

Increased registrations by consumers using the Internet.

Under the proposed rule, tire manufacturers can provide, on a voluntary basis, Internet registration information on the tire registration form that is given to purchasers by independent tire dealers. Consumers could then register their tires online instead of filling out the paper form and mailing it to the tire manufacturer or its designee. The cost of printing this information on the form is negligible, and therefore there would be no cost increase to tire manufacturers that are responsible for printing the forms and providing them to independent tire dealers. However, the tire manufacturers offering the option of Internet-based tire registration on their websites would incur some cost to include a registration site. The agency has found that most tire manufacturers already have tire registration sites included on their websites. This method of registration would save consumers the cost of a postcard postage stamp, and it would save costs for tire manufacturers because they (or their designee) would not have to transcribe the information on the paper forms into a tire registration database.

In the table which follows, we are providing estimates of the monetized costs associated with various rates of increased tire registration using the Internet. Under this scenario, paper forms would continue to be provided to purchasers, but the additional registrations would occur via the Internet rather than by the forms being mailed in. Therefore, although tire registrations would increase, mailing and other paperwork costs would remain the same. We are assuming, for purposes of these estimates, that the costs associated with the current level of tire registration would not change. The additional costs associated with this scenario would be the time consumers spent registering tires via the Internet that they otherwise would not register. We also assume that because the tire registration information is collected using purely electronic means, there would be no additional labor burden for the tire manufacturer for recordkeeping associated with these additional registrations. To

monetize the costs of consumers filling out paper forms or using the Internet, a labor rate of $14.61 per hour is used.[19]

Consumer Cost Projections Associated with Increased Tire Registrations with Consumers Registering Tires Using the Internet

	Current tire registrations	Future tire registrations using Internet-based registration by consumers		
		10 percent increase	15 percent increase	20 percent increase
Consumer Hour Burden Estimates:				
Number of Consumers	10,000,000	11,000,000	11,500,000	12,000,000
Total Tire Registrations	54,000,000	59,400,000	62,100,000	64,800,000
Tire Registration Hours	225,000	247,500	258,750	270,000
Monetized Costs (Consumer time valued @ $14.61/Hour	$3,287,250	$3,615,975	$3,780,338	$3,944,700

Voluntary registration by independent tire dealers.

Under the proposed rule, independent tire dealers could voluntarily register tires for consumers, if this was authorized by the tire manufacturer. Dealers that did this would incur additional costs to upgrade their computer systems, with both initial startup costs and then costs for periodic maintenance of the systems. We assume that many independent tire dealers, especially the larger ones, already collect tire purchaser information as part of the sales process. For these manufacturers, we believe it may be possible to upgrade the sales system to include automatic electronic registration on behalf of the purchaser. We do not know the details of how this process may work, which would be up to the tire manufacturer and the independent tire dealers. The process might also include companies designated by the tire manufacturers to provide services in this area. We also do not know what actual startup and annual costs might be to independent tire dealers. However, once these systems are installed, tire registration rates would be 100 percent for tires sold through these dealers. This compares with overall current registration rates of 10 percent for tires sold through independent dealers.

The costs associated with voluntary tire registration by independent tire dealers would be offset, or partially offset, by the fact that these dealers would no longer need to provide paper forms to consumers, or fill out these forms with tire identification numbers.

The agency has estimated that there are a total of 59,000 tire dealers in the U.S., including 13,000 that are company-controlled dealers. The remaining 46,000 tire dealers include 20,000 car and truck dealers and 26,000 independent tire dealers.

There are two unknowns for estimating the cost impacts on independent tire dealers—how many independent dealers would voluntarily upgrade computer systems to register tires, and what the cost of these computer systems would be in terms of initial cost and annual maintenance. Each year, a number of independent dealers will install or upgrade computer systems, and they continue to maintain their systems in subsequent years. We will assume that an initial installation cost of providing an upgraded system is $750 and that annual maintenance thereafter is $200. We do not know whether each tire manufacturer would work directly with each independent tire dealer, or whether third party designees would provide an interface service for all tire manufacturers and independent tire dealers. We note that third party designees could provide efficiencies of having a single contact company that could be the interface for an independent tire dealer and multiple tire manufacturers.

We are providing cost estimates assuming that 30 percent of independent tire dealers would participate in such a voluntary program, with 10 percent beginning the first year (4,600 dealers), an additional 10 percent beginning the second year, and the third 10 percent beginning the third year. These costs can be summarized as follows:

[19] The median hourly rate among all occupations, May 2006, according to the Bureau of Labor Statistics; see *http://www.bls.gov/oes/current/oes_nat.htm#b00-0000.*

Year	Startup costs for computer systems	Annual maintenance costs	Total cost
2009	$3.45 M	0	$3.45 M
2010	3.45 M	$0.92 M	4.37 M
2011	3.45 M	1.84 M	5.29 M
2012 and Beyond	0	2.76 M	2.76 M

Since the proposed rule, if made final, would establish collection of information procedures that would be used entirely at the discretion of the tire dealer, and the estimated paperwork burdens of tire dealers electing to use these procedures are not expected to exceed $100 million annually, the agency does not consider this rulemaking to be "economically significant," as defined by E.O. 12866. Thus, it has not prepared a full regulatory evaluation.

B. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity "which operates primarily within the United States." (13 CFR § 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this rulemaking action under the Regulatory Flexibility Act. As explained above, NHTSA is proposing to amend Part 574 by permitting collection of the names and addresses of first purchasers of new tires by Internet and other computerized means. Electronic collection would be permitted in place of paper forms. This regulatory flexibility analysis does not apply to manufacturer-owned tire dealers, because they are not considered small businesses under SBA's affiliation rule at 5 CFR section 121.103(a)(1) which states in part: "Concerns and entities are affiliates of each other when one controls or has the power to control the other * * *" The tire manufacturer either "controls or has the power to control" dealerships that it owns.

Under SBA's size standard regulations (at 5 CFR Part 121), "tire dealers" are classified under North American Industry Classification System (NAICS) Code 441320 with a size standard of average yearly sales of $6 million. "New car dealers" are classified under NAICS Code 441110 with a size standard of average yearly sales of $24.5 million. "Used car dealers" are classified under NAICS Code 441120 with a size standard of average yearly sales of $19.5 million.

In its February 27, 2006 comments to NHTSA, NADA stated that of its "20,000 franchised automobile and truck dealers who sell new and used motor vehicles," a "significant number are small businesses as defined by the SBA." NADA did not specify the number that would be considered "small businesses." In the *Federal Register* of March 21, 2007 (54 FR 133440), we estimated the number of independent tire dealers to be 26,000. Assuming all NADA members are small businesses, the total number of independent tire dealers that are small businesses would be 46,000.

I hereby certify that if made final, this proposed rule would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification is that if made final, this proposed rule would not substantively change existing 49 CFR Part 574 requirements for small businesses that are independent tire dealers. The electronic collection of information procedures would be voluntary for independent tire dealers. The statement on the paper form giving website information about online registration of new tires (and the paper form itself) would be provided by the tire manufacturer. If it chooses not to adopt electronic tire registration procedures, the responsibilities of the independent dealer would remain the same, to pass out the paper forms to first purchasers of new tires.

C. National Environmental Policy Act

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this ac-

tion would not have any significant impact on the quality of the human environment.

D. Executive Order 13132 (Federalism)

NHTSA has examined today's proposal pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments or their representatives is mandated beyond the rulemaking process. The agency has concluded that the proposal does not have federalism implications because, if made final, the rule would not have "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."

If the proposed rule is made final, a State requirement would be preempted if it conflicted with the rule.

E. Civil Justice Reform

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows. The preemptive effect of this proposed rule is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

F. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid Office of Management and Budget (OMB) control number. The proposed changes to the tire registration and recordkeeping rule, if made final, would be "collections of information," as that term is defined by OMB at 5 CFR 1320. Before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the *Federal Register* providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

In compliance with the requirements of 5 CFR part 1320, NHTSA requests comment on the collection of information that would be revised if this NPRM were made final.

Title: 49 CFR part 574, Tire Identification and Recordkeeping.

OMB Control Number: 2127–0050.

Requested Expiration Date of Approval: Three years from date of last approval.

Type of Request: Extension of a currently approved collection, with changes.

Summary of the Collection of Information: 49 U.S.C. 30117(b) requires each tire manufacturer to collect and maintain records of the first purchasers of new tires. To carry out this mandate, 49 CFR part 574 requires tire dealers and distributors owned or controlled by a tire manufacturer to record the names and addresses of retail purchasers of new tires and the identification number(s) of the tires sold. A

specific form is provided to tire dealers and distributors by tire manufacturers for recording this information. The completed forms are returned to the tire manufacturers where they are retained for not less than 5 years. Part 574 requires independent tire dealers and distributors to provide a registration form to consumers with the tire identification number already recorded and information identifying the dealer/distributor. The consumer can then record his/her name and address and return the form to the tire manufacturer. These forms are also provided to tire dealers and distributors by tire manufacturers. Additionally, motor vehicle manufacturers are required to record the names and addresses of the first purchasers (for purposes other than resale), together with the identification numbers of the tires on the new vehicles, and retain this information for not less than 5 years.

Description of the Need for the Information and the Proposed Use of the Information: The information is used by a tire manufacturer after it or the agency determines that some of its tires either fail to comply with an applicable safety standard or contain a safety related defect. With the information, the tire manufacturer can notify the first purchaser of the tires and provide them with any necessary information or instructions or remedy.

Without this information, efforts to identify the first purchaser of tires that have been determined to be defective or nonconforming pursuant to Sections 30118 and 30119 of Title 49 U.S.C. would be impeded. Further, the ability of the purchasers to take appropriate action in the interest of motor vehicle safety may be compromised.

Description of the Likely Respondents (Including Estimated Number and Proposed Frequency of Response to the Collection of Information):

March 21, 2007 Federal Register Notice—In the 30-day notice announcing NHTSA's request for an extension to collect the tire registration and recordkeeping information had been forwarded to OMB, we estimated that the collection of information affects 10 million respondents annually. This group consists of approximately 20 tire manufacturers, 59,000 new tire dealers and distributors, and 10 million consumers who choose to register their tire purchases with tire manufacturers. A response is required by motor vehicle manufacturers upon each sale of a new vehicle and by non-independent tire dealers with each sale of a new tire. A consumer may elect to respond when purchasing a new tire from an independent dealer.

Today's Estimate Resulting From the Proposed Collection of Information Including Electronic Reporting—If made final, today's NPRM would affect the tire registration and recordkeeping collection of information as follows: The publication "Modern Tire Dealer" reports that the tire industry's annual unit sales of new tires in the United States for the past 3 years were as follows: 2004—319 million; 2005—326 million; 2006—313 million. Thus, over the past 3 years, the average sales of tires per year in the U.S. were roughly 320 million.

Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information:

March 21, 2007 Federal Register Notice—In the March 21, 2007 notice, we provided the following estimated burden:

New tire dealers and distributors	59,000.
Consumers	10,000,000.
Total tire registrations (manually)	54,000,000.
Total tire registration hours (manually)	225,000 hours.
Recordkeeping hours (manually)	25,000 hours.
Total annual tire registration and recordkeeping hours	250,000 hours.

We note that with today's proposed rule, tire registration by purchasers would be facilitated by accommodating electronic means. We believe that if electronic registration were accommodated, the response rate for purchasers may increase. Moreover, some independent tire dealers may voluntarily register tires for consumers, thereby resulting in a higher registration rate.

Given that the various options we are proposing would be voluntary, we do not know to what extent they would be utilized by independent tire dealers, tire manufacturers and consumers. Therefore, based on the information that is available, these are our estimates of burden.

The same information (name and address of the purchaser) would be collected regardless of the format, paper form, or typing in information on a company website. Because some people type faster and some people write faster, NHTSA believes that the amount of time it will take to provide information about the name and address of the purchaser would be very roughly the same, regardless of the format. To the extent more consumers registered their tires, actual burdens realized could thus increase concomitantly with the higher registration rates. On the other hand, it may

be possible for tire manufacturers and independent tire dealers to develop electronic systems, tied in with the systems used for monitoring inventory and recording sales information, that could automatically register the tires with the tire manufacturer at little additional cost.

NHTSA believes that virtually all recordkeeping by tire manufacturers is already done electronically. NHTSA estimates that it takes roughly 25,000 hours to transfer handwritten data to an electronic format for storage. Because, with website-based information, there would be no change in format (*i.e.,* going from electronic reporting to electronic storage), NHTSA believes there would be virtually no burden hours imposed in transferring information provided on a tire manufacturer's website to a recordkeeping site. For these reasons, NHTSA believes the recordkeeping burden hours would remain at 25,000 hours.

NHTSA solicits comments on the proposed changes in the collection of information associated with part 574 and on NHTSA's analysis of how the changes will affect the number of burden hours affecting the public. Comments must refer to the docket and notice numbers cited at the beginning of this NPRM and be submitted to: Docket Operations, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272) directs NHTSA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE). The NTTAA directs the agency to provide Congress, through the OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

After carefully reviewing the available information, NHTSA has determined that there are no voluntary consensus standards relevant to this rulemaking, as the information to be collected and sent to tire manufacturers is needed only in the event of a tire recall. Accordingly, this proposed rule is in compliance with Section 12(d) of NTTAA.

H. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any 1 year (adjusted for inflation with base year of 1995). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires NHTSA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows NHTSA to adopt an alternative other than the least costly, most cost effective or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted.

This proposed rule would not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of more than $100 million annually. Accordingly, the agency has not prepared an Unfunded Mandates assessment.

I. Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

—Have we organized the material to suit the public's needs?

—Are the requirements in the rule clearly stated?

—Does the rule contain technical language or jargon that is not clear?

—Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?

—Would more (but shorter) sections be better?

—Could we improve clarity by adding tables, lists, or diagrams?

—What else could we do to make this rulemaking easier to understand?

If you have any responses to these questions, please include them in your comments on this NPRM.

J. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

K. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the *Federal Register* published on April 11, 2000 (65 FR 19477 at 19478) or you may visit *http://docketsinfo.dot.gov/*.

V. Public Participation

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments. Your comments must not be more than 15 pages long.[20] We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit your comments by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using Optical Character Recognition (OCR) process, thus allowing the agency to search and copy certain portions of your submissions.[21]

Please note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, it must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html*. DOT's guidelines may be accessed at *http://dmses.dot.gov/submit/DataQualityGuidelines.pdf*.

How Can I Be Sure That My Comments Were Received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under *FOR FURTHER INFORMATION CONTACT*. When you send a comment containing information claimed to be confidential business informa-

[20] See 49 CFR § 553.21.

[21] Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

tion, you should include a cover letter setting forth the information specified in our confidential business information regulation.[22]

In addition, you should submit a copy, from which you have deleted the claimed confidential business information, to the Docket by one of the methods set forth above.

Will the Agency Consider Late Comments?

We will consider all comments received before the close of business on the comment closing date indicated above under *DATES*. To the extent possible, we will also consider comments received after that date. Therefore, if interested persons believe that any new information the agency places in the docket affects their comments, they may submit comments after the closing date concerning how the agency should consider that information for the final rule.

If a comment is received too late for us to consider in developing a final rule (assuming that one is issued), we will consider that comment as an informal suggestion for future rulemaking action.

How Can I Read the Comments Submitted By Other People?

You may read the materials placed in the docket for this document (*e.g.,* the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov*. Follow the online instructions for accessing the dockets. You may also read the materials at the Docket Management Facility by going to the street address given above under *ADDRESSES*. The Docket Management Facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

List of Subjects in 49 CFR Part 574

Labeling, Motor vehicle safety, Reporting and recordkeeping requirements, and Tires.

In consideration of the foregoing, NHTSA proposes to amend 49 CFR part 574 as follows:

PART 574—TIRE IDENTIFICATION AND RECORDKEEPING

1. The authority for part 574 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

2. Section 574.7 is amended by revising paragraphs (a)(2) and (a)(3) and adding new paragraphs (e) and (f) to read as follows:

§ *574.7 Information requirements—tire manufacturers, new tire brand name owners.*

(a)(1) * * *

(2) Each tire registration form provided to independent distributors and dealers pursuant to paragraph (a)(1) of this section shall contain space for recording the information specified in paragraphs (a)(4)(i) through (a)(4)(iii) of this section. Each form shall:

(i) Have the following physical characteristics:

(A) Be rectangular;

(B) Be not less than 3½ inches high, 5 inches long, and 0.007 inches thick;

(C) Be not more than 4¼ inches high, or more than 6 inches long, or greater than 0.016 inch thick.

(ii) On the address side of the form, be addressed with the name and address of the manufacturer or its designee, and include, in the upper right hand corner, the statement "Affix a postcard stamp."

(iii) On the other side of the form:

(A) Include the tire manufacturer's name, unless it appears on the address side of the form;

(B) Include a statement explaining the purpose of the form and how a consumer may register tires. The statement shall:

(1) Include the heading "IMPORTANT".

(2) Include the sentence: "In case of a recall, we can reach you only if we have your name and address."

(3) Indicate that sending in the card will add a person to the manufacturer's recall list.

(4) If a tire manufacturer provides a website where its tires can be registered, it may (but is not required to) include the following sentence: "Instead of mailing this

[22] *See* 49 CFR 512.

form, you can register online at [insert tire manufacturer's registration website address]."

(5) Include the sentence: "Do it today."

(C) Include space for recording tire identification numbers for six tires.

(D) Use shading to distinguish between areas of the form to be filled in by sellers and customers.

(1) Include the statement: "Shaded areas must be filled in by seller."

(2) The areas of the form for recording tire identification numbers and information about the seller of the tires must be shaded.

(3) The area of the form for recording the customer name and address must not be shaded.

(D) Include, in the top right corner, the phrase "OMB Control No. 2127–0050".

(3) Each tire registration form provided to distributors and dealers that are not independent distributors or dealers pursuant to paragraph (a)(1) of this section must contain space for recording the information specified in paragraphs (a)(4)(i) through (a)(4)(iii) of this section. Each form must include:

(A) A statement indicating where the form should be returned, including the name and mailing address of the manufacturer or its designee.

(B) The tire manufacturers' logo or other identification, if the manufacturer is not identified as part of the statement indicating where the form should be returned.

(C) The statement: "IMPORTANT: FEDERAL LAW REQUIRES TIRE IDENTIFICATION NUMBERS MUST BE REGISTERED".

(D) In the top right corner, the phrase "OMB Control No. 2127–0050".

* * * * *

(e) Tire manufacturers may voluntarily provide means for tire registration via the Internet, by telephone or other electronic means.

(f) Each tire manufacturer shall meet the requirements of paragraphs (b), (c) and (d) of this section with respect to tire registration information submitted to it or its designee by any means authorized by the manufacturer in addition to the use of registration forms.

3. Section 574.8 is revised to read as follows:

§ *574.8 Information requirements—tire distributors and dealers.*

(a) *Independent distributors and dealers.*

(1) Each independent distributor and each independent dealer selling or leasing new tires to tire purchasers or lessors (hereinafter referred to in this section as "tire purchasers") shall comply with paragraph (a)(1)(i), (a)(1)(ii) or (a)(1)(iii) of this section:

(i) At the time of sale or lease of the tire, provide each tire purchaser with a paper tire registration form on which the distributor or dealer has recorded the following information:

(A) The entire tire identification number of the tire(s) sold or leased to the tire purchaser, and

(B) The distributor's or dealer's name and street address. In lieu of the street address, and if one is available, the distributor or dealer's e-mail address or website may be recorded. Other means of identifying the distributor or dealer known to the manufacturer may also be used.

(ii) Record the following information on a paper tire registration form and return it to the tire manufacturer, or its designee, on behalf of the tire purchaser, at no charge to the tire purchaser and within 30 days of the date of sale or lease:

(A) The purchaser's name and address,

(B) The entire tire identification number of the tire(s) sold or leased to the tire purchaser, and

(C) The distributor's or dealer's name and street address. In lieu of the street address, and if one is available, the distributor or dealer's e-mail address or website may be recorded. Other means of identifying the distributor or dealer known to the manufacturer may also be used.

(iii) If authorized by the tire manufacturer, electronically transmit the following information on the tire registration form to the tire manufacturer, or its designee, using secure means (*e.g.,* https on the web), at no charge to the tire purchaser and within 30 days of the date of sale or lease:

(A) The purchaser's name and address,

(B) The entire tire identification number of the tire(s) sold or leased to the tire purchaser, and

(C) The distributor's or dealer's name and street address. In lieu of the street address, and if one is available, the distributor or dealer's e-mail address or website may be recorded. Other means of identifying the distributor or dealer known to the manufacturer may also be used.

(2) Each independent distributor or dealer that complies with paragraph (a)(1)(i) or (ii) of this section shall use either the tire registration forms provided by the tire manufacturers pursuant to § 574.7(a) or registration forms obtained from another source. Paper forms obtained from other sources must comply with the requirements specified in § 574.7(a) for forms provided by tire manufacturers to independent distributors and dealers.

(3) Multiple tire sales or leases by the same tire purchaser may be recorded on a single paper registration form or in a single website transaction.

(4) Each independent distributor or dealer that is complying with paragraph (a)(1)(iii) with respect to a sale or lease shall include a statement to that effect on the invoice for that sale or lease and provide the invoice to the tire purchaser.

(b) *Other distributors and dealers.*

(1) Each distributor and each dealer, other than an independent distributor or dealer, selling new tires to tire purchasers:

(i) shall submit, using paper registration forms or, if authorized by the tire manufacturer, secure electronic means, the information specified in § 574.7(a)(4) to the manufacturer of the tires sold, or to the manufacturer's designee.

(ii) shall submit the information specified in § 574.7(a)(4) to the tire manufacturer or the manufacturer's designee, not less often than every 30 days. A distributor or dealer selling fewer than 40 tires of all makes, types and sizes during a 30 day period may wait until a total of 40 new tires is sold. In no event may more than 6 months elapse before the § 574.7(a)(4) information is forwarded to the respective tire manufacturers or their designees.

(c) Each distributor and each dealer selling new tires to other tire distributors or dealers shall supply to the distributor or dealer a means to record the information specified in § 574.7(a)(4), unless such means has been provided to that distributor or dealer by another person or by a manufacturer.

(d) Each distributor and each dealer shall immediately stop selling any group of tires when so directed by a notification issued pursuant to 49 U.S.C. Section 30118.

Notification of defects and noncompliance.

4. In Part 574, Figures 3a, 3b and 4 are removed.

Issued on: January 16, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E8–1099 Filed 1–23–08; 8:45 am]

ATTACHMENT 3

Date: 02/00/83
From: Author Unavailable: Diane K. Steed; NHTSA
To: The Honorable Timothy E. Wirth, House of Representatives
Title: FMVSS Interpretation
Text:

Dear Mr. Wirth:

This responds to your letter, consigned by Mr. Matthew Rinaldo, commenting on this agency's February 3, 1984 final rule on the voluntary tire registration procedures for independent tire dealers. You asked me to respond to several points in your letter.

You noted that the final rule includes a discussion which concluded that section 158 of the National Traffic and Motor Vehicle Safety Act (the Safety Act), as amended by the Motor Vehicle Safety and Cost Savings Authorization Act of 1982 (the Authorization Act), requires each independent dealer to furnish a registration form to the tire purchaser. That discussion further stated that the section does not allow those dealers to return forms directly to the tire manufacturer without first furnishing the form to the purchaser with the necessary information filled in by the dealer. You indicated your hope that this position could be modified.

You stated further that you became aware of computerized tire registration systems after the enactment of the Authorization Act, and that these systems will yield 100 percent registration. You stated also that the legislative history of the Authorization Act makes clear that Congress wanted to increase the rate of registration for replacement tires sold through independent dealers. You suggested that it would be in accordance with Congressional intent in enacting the Authorization Act for an independent dealer to furnish the first purchaser with a registration form on which it had not filled in any of the required information but to which it had attached a copy of the computerized invoice bearing that and other information.

A literal interpretation of the statutory language chosen by Congress would cause us to reaffirm the position we took in the February 1984 final rule. Under that interpretation, the suggested practice of using a computerized invoice in place of filling in the required information on a registration form would violate the voluntary registration requirements in several respects.

However, reconsideration of this issue has led us to conclude that this is an appropriate case for applying the principles of equitable interpretation. Under the principles of equitable interpretation, the language of the amendments need not be applied in instances where it is clearly contrary to the underlying Congressional intent. I agree that the Authorization Act's legislative history shows that one aspect of the Congressional intent underlying the tire registration amendments was to increase the registration rated for tires sold by independent dealers and distributors. Another aspect of that intent was to reduce the burdens which the registration process placed on those dealers and distributors. A literal interpretation of the amendments would either discourage independent dealers and distributors from using computer registration, a highly effective method of registration, or burden them with procedural steps which are made unnecessary by computer registration. In either event, the result appears to run counter to one of the aspects of Congressional intent mentioned above.

Based on the principles of equitable interpretation, we believe that an independent dealer or distributor who: (1) registers tires by computer; (2) attaches a computer-printed invoice containing all of the information necessary for registration to a blank standardized registration from; and (3) furnishes the two documents to the customer when the tires are purchased; fully satisfies the tire registration amendments. We must emphasize, however, that the omission by a dealer of any of these three actions would make the dealer subject to all aspects of the voluntary tire registration requirements set forth in the amendments. (A full discussion of the literal and equitable interpretations of the tire registration amendments is contained in the enclosed analysis.)

Your letter noted that in my previous letter to you on tire registration, I indicated that if there were any tire recalls during the period when there were not tire registration requirements applicable to independent dealers, I would consider what steps should be taken to inform the consumers whose tires were unregistered. You stated that some 101,000 tires were recalled during fiscal 1983, and you asked the agency to take three steps. First, you asked that we determine whether any of the recalled tires were sold during the period when there were no registration requirements applicable to tires sold by independent dealers. Second, you urged that we initiate procedures to ensure that purchasers of unregistered tires are informed that their tires have been recalled. Third, you urged that we develop a program to enable those who purchased tires from independent dealers during the period when there were no registration requirements applicable to such tires to register those tires with the manufacturers.

I have instructed agency staff to carefully consider each of these requests. I will report the results of these considerations to you as soon as they are available.

Finally, there is a possible misunderstanding which I would like to clarify in your letter. You stated in the second full paragraph on page 2 of the letter that there were no tire registration requirements applicable to tires sold by independent dealers between October 15, 1982 "and the date of effectiveness of this final rule." The final rule became effective on March 26, 1984. However, there was an interim final rule in effect on June 20, 1983, until March 26, 1984, and that interim final rule established voluntary registration procedures applicable to independent dealers. Independent dealers and tire manufacturers which did not comply with the requirements of the interim final rule were subject to civil penalties of up to $1,000 per violation, as specified in section 109 of the Safety Act. I want to be sure that it is clear that the period during which there were no registration requirements applicable to independent dealers lasted from October 15, 1982, until June 20, 1983, and not beyond that date.

As with your previous correspondence on this topic, I have placed copies of your letter and this response in the appropriate rulemaking docket. Please let me know if you have any other concerns or comments on the issue of voluntary tire registration, so that this agency can work with you to ensure proper implementation of the changes mandated by the Authorization Act.

Sincerely,

HON. DIANE K. STEED,
Administrator.

Computerized Registration and the Voluntary Tire Registration Requirements

This analysis considers the effects of the changed language in section 158 of the National Traffic and Motor Vehicle Safety Act (the Safety Act), as amended by the Motor Vehicle Safety and Cost Savings Authorization Act of 1982 (the Authorization Act), on independent dealers and distributors wishing to use a computerized system for recording tire purchases and for registering those purchases with the tire manufacturer.

Section 158(b)(2)(B) of the Safety Act specifies that the National Highway Traffic Safety Administration——

shall require each (independent dealer) to furnish the first purchaser with a tire registration form (containing the tire identification number of the tire) which the purchaser may complete and return directly to the manufacturer of the tire. (Emphasis added.)

This statutory language seemingly forecloses the possibility of a dealer's using a computerized registration system in place of the dealer's performing each of the actions specified by the voluntary tire registration requirements.

In a computerized registration system, the dealer must enter the date of sale, number of tires sold and their tire identification numbers, the customer's name and address, and the dealer's name and address into a computer. If each item of this information is not entered, the dealer will not receive credit from the sale from the manufacturer. A further result is that the dealer will not have to accurate inventory records, which are a by-product of this system, for his or her own purposes. When this information has been entered into the computer, an invoice is printed which contains that information. Experience with computerized registration has shown registration rated at or very near 100 percent registration of the tires sold by the dealers using the computerized registration systems.

I agree that the Authorization Act's legislative history shows that one aspect of the Congressional intent underlying the tire registration amendments was to increase the registration rated for tires sold by independent dealers. Another aspect of that intent was to reduce the burdens which the registration process placed on independent dealers and distributors. However, the letter of the Authorization Act does not provide this agency with broad discretion to determine how best to achieve those goals. The provisions enacted by Congress were quite explicit in specifying the action to be required of each independent dealer and distributor. The only aspects of the voluntary registration left to this agency's discretion were the contents and format of the registration forms to be used. Even that discretion is circumscribed by the requirement in section 158(b)(2)(B) of the Safety Act that the contents and format of the forms "shall be standardized for all tires." In explaining how the voluntary registration procedures would work, the House of Representatives Committee on Energy and Commerce said that independent dealers and distributors—are required to furnish the first purchaser of a tire with a standardized registration form, containing the tire identification number of the tire, which would be recorded on the form by the dealer or distributor at or before the time of purchase. The form should be presented to the purchaser in a manner suitable for mailing and addressed to the tire manufacturer or his designee. H.R. Rep. No. 97–576, 97th Cong., 2d Sess. at 8 (1982). (Emphasis added)

Although a literal interpretation of the statutory language chosen by Congress would cause us to reaffirm the position we took in the February 1984 final rule, reconsideration of this issue has led us to conclude that this is an appropriate case for applying the principles of equitable interpretation. The tire registration amendments are remedial legislation for which the rule of construction is——

(C)ases within the reason, though not within the letter, of a statute shall be embraced by its provisions; and cases not within the reason, though within the letter, shall no be taken to be within the statute. (Sutherland, Statutory Construction, 54.04) We believe that, in the circumstances described in the letter sent by Messrs. Wirth and Rinaldo, the tire registration amendments can an should be given a restrictive interpretation. In this way, the equity or intent underlying those amendments can be best effectuated. Sutherland states that——

When the natural or literal meaning of statutory language embraces applications which would not serve the policy or purpose for which the statute was enacted or help to remedy the mischief at which it was aimed, the courts may construe it restrictively in order not to give it an effect beyond its equity or spirit. (54.06)

It is necessary, therefore, to interpret literally the meaning of the language adopted by Congress and then to determine the effect on the amendment's policy or purpose of applying that interpretation to all independent dealers or distributors. Viewed literally, that language would be violated in three respects by an independent dealer's attaching a computer printout (containing the required registration information) to a blank registration form. First, the registration materials given to

the first purchaser would not be registered with a standardized form and others would be registered with what would be in effect be a two part form consisting of a blank standardized form and an invoice. Second, a registration form with a computerized invoice attached would not be presented to the purchaser ". . . in a manner suitable for mailing . . .," as specified in the House Committee Report. We have interpreted that quoted language as meaning that the purchaser would have to do nothing more than attach a stamp in order to mail the form to the manufacturer. In the example described in the Wirth/Rinaldo letter, the purchaser would have to provide his or her own envelope in order to send the form and invoice to the tire manufacturer. Thus, the registration materials would not be presented ". . . in a manner suitable for mailing" . . . Third, the language in the House Committee Report requires dealers to fill in the tire identification number on the registration form before furnishing the form to the tire purchaser.

However, under the principles of equitable interpretation, the language of the amendments need not be applied in instances where it is clearly contrary to the underlying Congressional intent. A literal interpretation would either discourage independent dealers and distributors from using computer registration, a highly effective method of registration, or burden them with procedural steps which are made unnecessary by computer registration. In either event, the result appears to run counter to one of the aspects of Congressional intent mentioned near the beginning of this analysis.

The reason for requiring standardized registration forms was to ensure that all forms used by independent dealers and distributors to register tires would be the same in content and format, regardless of the brand or type of tires. All independent dealers and distributors, even those with computerized registration, can fill out and use the standardized forms. Alternatively, those with computerized registration can print an invoice bearing the information otherwise required to be filled in on the form by dealer or purchaser and attach that invoice to the form to be given the purchaser.

The purpose for requiring that the registration forms be presented in a mailable form was to facilitate the registration of tires that might otherwise never be registered. In the case of tires sold by a dealer or distributor using computerized registration, the tires are already registered with the tire manufacturer before the form is presented to the purchaser. Thus, there is no need with respect to those tires for the forms to be suitable for mailing. Further, there is no indication in the amendments or their history that Congress intended that registration forms be mailed in for tires which have already been registered. The mailing of those forms would be redundant. Accordingly, presenting the forms in a mailable form would be unnecessary to achieving the purposes of the tire registration amendments and could be inconsistent with those purposes.

We believe that the principles of equitable interpretation can be used also to relieve the dealers and distributors using computerized registration from being required to provide purchasers with a registration form on which they have filled in the necessary information. However, this relief can be provided only in instances in which these dealers and distributors can be provided only if in instances in which these dealers and distributors provide the purchasers with evidence that the tires have already been registered. Provision of that evidence is necessary because compliance with the requirement to fill in the information becomes redundant and even inconsistent with the tire registration amendments only if the tires have in fact been registered. The evidence which the independent dealer furnishes to show that the tires have already been registered is the computer-printed invoice bearing all of the information otherwise required to be written or stamped on the registration form by either the dealer or the purchase. Absent that evidence, the independent dealer would be required to comply with all statutory requirements for voluntary registration, even if the dealer were using a computerized registration system.

Accordingly, we conclude that an independent dealer or distributor who attaches a computerized invoice containing all of the information necessary for registration to a blank standardized registration form and furnishes the two documents to the customer when the tires are purchased fully satisfies the requirements of the voluntary tire registration process.

Hon. DIANE K. STEED,
Administrator,
National Highway Traffic Safety Administration,
Department of Transportation,
Washington, DC.

Dear Ms. Steed:

We are writing to comment on the final rule on tire identification and recordkeeping (Docket No. 70–12; Notice 25) issued by the National Highway Traffic Safety Administration on February 3, 1984. We expressed similar concerns in a letter to Secretary Elizabeth H. Dole of June 7, 1983, commenting on the interim final rule on this matter.

We noted that the final rule includes a discussion of whether the Motor Vehicle Safety and Cost Savings Authorization Act of 1982 (P.L. 97–331) permits an independent tire dealer to return the tire registration form to the tire manufacturer instead of furnishing it to the purchaser. The rule indicated that the language of the statue prevents the agency from adopting such a procedure. We hope that this position can be modified.

Since the enactment of this statute, we have been made aware of a computerized system utilized by one of the tire manufacturers through which dealers notify the manufacturer of tire sales. The information furnished through this system includes the purchaser's name and address and the tire identification number. Clearly, the automatic furnishing of this information by the dealer to the manufacturer via computer results in 100 percent tire registration. The question posed by NHTSS in the final rule is apparently whether such a system is compatible with the statute.

The legislative history surrounding the tire registration provisions of P.L. 97–331 clearly states that it was Congress's purpose in adopting the "voluntary tire registration" system to increase tire registration to the maximum extent possible. Thus, it would be both ironic and extremely unfortunate if the implementation of this law led to decreased usage of a computer system that would ensure 100 percent tire registration.

Therefore, we suggest that additional consideration be given to ways in which agency procedures for compliance with the statute can take into account such a computerized system. For example, would a tire dealer who furnished to his customer a registration form to which was attached a copy of the computerized invoice, including the tire identification number, meet the statutory obligation "to furnish the first purchaser of a tire with a registration for (containing the tire identification number of the tire)?" Such a result would obviously be in accordance with Congressional intent in enacting Section 4 of the Motor Vehicle Safety and Cost Savings Authorization Act of 1982. Additionally, in the same letter to Secretary Dole, we urged that NHTSA establish procedures to inform purchasers of tires during the period in which there were no registration requirements—between October 15, 1982 and the date of effectiveness of the final rule—that they will not receive notification by mail in the event of a recall. On July 15, 1983, you responded that "if there are any tire recalls involving tires sold during (that time, you) will consider what steps should be taken to inform the consumers whose tires are unregistered."

We are now aware that during Fiscal Year 1983 some 101,000 tires were recalled. We, therefore, again request that NHTSA promptly review the matter to determine whether any of the tires recalled were sold during the period in which no registration requirements were in effect. We urge that you initiate procedures to ensure that the purchasers of those tires are informed that a recall has occurred. Additionally, we urge that the agency develop a program to enable those who purchased tires during that period to register them with manufacturers.

We urge that NHTSA give further consideration to these issues, in the interest of increasing tire registration. Please feel free to discuss this with us or with our staff (Patti Shwayder, Policy Analyst. 225–9304; Cecile Srodes, Associate Minority Counsel, 226–3400).

Sincerely yours,

MATTHEW J. RINALDO,
Ranking Minority Member.

Subcommittee on Telecommunications, Consumer Protection and Finance

TIMOTHY E. WIRTH,
Chairman.

Subcommittee on Telecommunications, Consumer Protection and Finance

Senator DORGAN. Ms. Gillan, thank you very much. We appreciate your being here.

And finally, we will hear from Mr. Paul Cullen, General Counsel, Owner Operator Independent Drivers Association.

Mr. Cullen, you may proceed.

STATEMENT OF PAUL D. CULLEN, SR., MANAGING PARTNER, THE CULLEN LAW FIRM, PLLC; GENERAL COUNSEL, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

Mr. CULLEN. Thank you, Mr. Chairman. It is my honor today to appear on behalf of 161,000 owner-operator drivers and small business truckers who operate throughout the United States.

I ask that my full testimony be included in the record of the hearing today.

I'd like to begin by addressing issues that you took up with Mr. Gribbin, with respect to the interpretation of the 2008 Appropriations bill, particularly the word "establish."

Mr. Gribbin relies on a well-known principle of statutory interpretation that you're to rely on the plain language of the words used by Congress. There is, however, an exception to that principle, and that principle can be abandoned if the plain meaning leads to an absurd result.

Now, I suppose, if you were on Mars or Venus, for the last 6 months or a year, and you didn't have access to the *Washington Post* or the *Congressional Quarterly* or *Landline Magazine* or *Transport Topics,* you might not know what the word "establish" was intended to mean.

Putting that aside, everyone knows that the interpretation urged by DOT is absurd and is a justification for abandoning the plain language principle, and a justification for resorting to the aids to construction that you, Mr. Chairman, presented to us in your opening remarks today. You should proceed diligently further, because it appears on the face of things that the agency is simply ignoring the will of Congress, and ought not to be allowed to do so.

Turning to the other major issues, we're dealing with complex legal and policy issues, and there appears to be a dense cloud of smoke generated by the Department of Transportation regarding their responsibilities under NAFTA and their authority to deal with trans-border trade and trucking services.

In order to address this and to dissipate this cloud of smoke, let's go back to basic principles. What is the responsibility of the United States under NAFTA?

One turns to the text of NAFTA, Article 1202(1). The only thing that the United States agreed to under NAFTA was to accord to Mexican motor carriers the same treatment that we accord to our own motor carriers. That principle is known as national treatment.

Mexican motor carriers are entitled to be treated just like an American motor carrier, no better, no worse. The only way we can violate that principle is to deny them operating authority, arbitrarily. But if we hold their feet to the fire, and require them to follow the same standards as an American motor carrier, we honor our obligation of national treatment under NAFTA.

What is the authority of the Secretary and the FMCSA to implement our obligations under NAFTA? That authority is set forth in Title 49 of the U.S. Code, Section 13902(a)(1) and (4). That authority is to entertain applications for operating authority and grant

them if the applicant is willing and able to comply with all U.S. laws. And to deny those applications if the applicant is unwilling or unable to comply will all U.S. laws.

How does the pilot program square against our NAFTA obligations and the authorities of the Secretary under 13902? The Secretary has agreed under the pilot program to permit Mexican motor carriers to comply with 3 areas of Mexican law in lieu of compliance with the corresponding areas of United States law. Those areas include commercial driver's licenses, drug testing and medical qualifications.

Under 13902, the Supreme Court, in *Public Citizen* v. *DOT,* said unequivocally that the Secretary has only ministerial authority, and has no authority to alter the terms and conditions under which Mexican motor carriers may enter the country. Simply stated, the Secretary has no legal authority to implement the pilot program as she has done, by waiving compliance with American statutes and regulations, and substituting compliance with Mexican statutes and regulations in their place.

Thank you.

[The prepared statement of Mr. Cullen follows:]

PREPARED STATEMENT OF PAUL D. CULLEN, SR., MANAGING PARTNER, THE CULLEN LAW FIRM, PLLC; AND GENERAL COUNSEL, OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

Introduction

My name is Paul D. Cullen, Sr. I am Managing Partner of The Cullen Law Firm, PLLC of Washington, D.C. This testimony is submitted in my capacity as General Counsel to the Owner-Operator Independent Drivers Association, Inc. (OOIDA) of Grain Valley, Missouri. OOIDA is a trade association representing the interests of independent drivers, owner-operators and small-business truckers throughout the United States. OOIDA currently has in excesses of 161,000 members. OOIDA is a petitioner in a proceeding now pending before the United States Court of Appeals for the Ninth Circuit in which it challenges the legal authority of the Secretary and the FMCSA to issue Federal operating authority to Mexico-domiciled motor carriers under its Cross-Border Pilot Program.[1] Specifically, OOIDA challenges the legal authority of the Secretary and FMCSA to accept compliance with Mexican regulations covering commercial drivers licenses, drug testing and medical standards in lieu of compliance with corresponding U.S. statutes and regulations.

OOIDA applauds the actions taken by Congress to withhold funding for FMCSA's Cross-Border Pilot Program under Section 136 of the Consolidated Appropriations Act, 2008 (Pub. L. 110–161). The Bush Administration's continuation of the Program despite the clear directions of Congress to the contrary is both shocking and deplorable. However, the Administration's obvious contempt for the rule of law in this matter goes well beyond its brazen disregard for the provisions of Section 136. It extends as well to the disregard of legal precedent. In prior litigation challenging the authority of the Secretary of Transportation and the Federal Motor Carrier Safety Administration (FMCSA) to allow Mexican trucks into the United States without complying with the National Environmental Policy Act, the Solicitor General of the United States specifically renounced the existence of the authority that the Secretary and FMCSA have asserted in promulgating the current Mexican truck program. Yet, the FMCSA has arrogated unto itself authority to alter the terms and conditions for entry by Mexico-domiciled motor carriers into the U.S.—the very authority that the Solicitor General told the Supreme Court that the agency did not have. FMCSA is authorized to issue operating authority to Mexico-domiciled motor carriers *only* if they are willing and able to obey all of our laws and regulations.

[1] *Owner-Operator Independent Drivers Ass'n, Inc.* v. *U.S. Department of Transportation, et al.,* No. 07–73987 (9th Cir. filed Oct. 15, 2007). Another challenge based on separate grounds is also pending before the Ninth Circuit. *Sierra Club, et al.,* v. *U.S. Department of Transportation, et al.,* No. 07–73415, (9th Cir. filed April 23, 2007). Both cases were consolidated for oral argument which was held on February 12, 2008. As of this date, no decision has been reached.

Restricting operating authority to those who satisfy these conditions is completely compatible with our Nation's obligations under NAFTA.

In this testimony, I will show that:

1. FMCSA's Cross-Border Pilot Program is neither authorized nor required by any obligation of the United States under the North American Free Trade Agreement (NAFTA);

2. FMCSA has no authority to issue operating authority to motor carriers unless they are "willing and able" to obey all applicable U.S. laws and regulations; and

3. FMCSA has no authority to alter the statutory terms and conditions under which Mexico-domiciled motor carriers may provide trucking services within the continental United States.

The North American Free Trade Agreement

On December 17, 1992, the leaders of the United States of America, Canada, and the United Mexican States signed the North American Free Trade Agreement ("NAFTA"), a treaty regulating trade in goods and services between and among the parties to that treaty.[2] On November 20, 1993, the U.S. Senate officially ratified NAFTA.[3] Transborder trucking services are governed by NAFTA Article 1202(1) which provides that "[e]ach Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers." The obligation described in Article 1202(1) is known as "National Treatment." Simply stated, the United States has agreed to treat Mexico-domiciled motor carriers exactly the same as it treats U.S.-domiciled motor carriers, no better, no worse. The United States has undertaken no obligation to provide "special treatment" or "different treatment" to other trucks which would include providing exemptions or waivers from the application of U.S. trucking laws. The only thing the U.S. is obligated to do is provide "National Treatment."

NAFTA's "National Treatment" provision applies to trucking services in which a tractor and trailer provide service from a point in Mexico to a point in the United States as well as transit of Mexican trucks from Mexico through the United States to Canada. Those who provide such services are called service providers. Service providers of the United States are U.S.-domiciled trucking firms.[4] The treatment given to U.S. domestic trucking service providers under U.S. laws and regulations establishes a frame of reference for determining whether the United States is providing National Treatment to service providers from Mexico or Canada.[5]

Implementation of this commitment is really rather simple. The only thing that FMCSA must do to fulfill the National Treatment obligation under NAFTA is to process applications for Mexico-domiciled motor carrier's operating authority by the same terms and conditions as it processes similar applications by U.S.-domiciled applicants.

On February 6, 2001, an International Arbitral Panel (IAP) issued its final decision from a challenge by the Government of Mexico alleging that a blanket refusal by the United States to process applications by Mexico-domiciled motor carriers violated its NAFTA obligation to afford National Treatment to such carriers. The IAP decision sets forth the contentions of the parties, the legal and factual basis for those contentions and the conclusions of the IAP itself. Of particular interest is this passage from the Government of Mexico's brief as quoted in the IAP's final decision:

> Rather, the governments contemplated that motor carriers would have to comply fully with the standards of the country in which they were providing service. In other words, there was a clear expectation that a Mexican motor carrier applying for operating authority in the United States would have to demonstrate that it could comply with all requirements imposed on U.S. motor carriers.[6]

A unanimous five member panel found that the "U.S. blanket refusal to review requests for operating authority . . . is inconsistent with . . . U.S. treatment of U.S. domestic service providers."[7] Because of this inconsistency, the IAP concluded

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[2] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

[3] H.R. 3450, 103d Cong. (1st. Sess. 1993) (Vote No. 395, passed 61–38–1).

[4] *In the Matter of Cross Border Trucking Services,* See File No USA–MEX–98–2008–01 at 74–75, ¶253 (NAFTA Arbitration Panel Feb. 6, 2001).

[5] *Id.* See also *id.* at 25–26, ¶125.

[6] *Id.* See also *id.* at 25–26, ¶125.

[7] *Id.* at 68, ¶256.

that "the U.S. refusal to consider applications is not consistent with the obligation to provide national treatment."[8]

Following its findings, the IAP took pains to point out that nothing in its decision should be interpreted as in any way inhibiting the ability of a Party to implement its own legitimate safety objections:

> It is important to note what the Panel is not determining. It is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the panel imposing a limitation on the application of safety standards properly established and applied pursuant to applicable obligations of the Parties under NAFTA.

The IAP also held that a Party may be permitted to implement additional procedures with respect to service providers domiciled within the territory of another Party, provided that such procedures were imposed in good faith with respect to a legitimate safety concern and that such requirements did not conflict with other provisions of NAFTA.[9]

Two conclusions follow from the IAP's analysis. First, the United States would bring its policies in complete harmony with its NAFTA obligations by simply making operating authority available to Mexico-domiciled motor carriers under precisely the same terms and conditions as it applies to U.S.-domiciled motor carriers. Second, attempts to harmonize U.S. and Mexican truck regulatory regimes, while advancing potentially beneficial safety goals, has nothing to do with complying with the obligation of the United States to provide *national treatment*.

The Cross-Border Pilot Program

On May 1, 2007, FMCSA announced the initiation of a demonstration project as "part of FMCSA's implementation of . . . [NAFTA's] cross-border trucking provisions."[10] FMCSA has called its demonstration project "a critical step in the process of moving forward with the Nation's obligations under NAFTA."[11] FMCSA's characterization of its demonstration project is simply incorrect. Establishing special treatment for Mexico-domiciled motor carriers is neither required nor authorized by NAFTA. Moreover, as we now demonstrate, NAFTA's requirement to afford National Treatment is also the only approach that is compatible with FMCSA's statutory and regulatory authority under U.S. law.

FMCSA Exceeds Its Statutory Authority When Registering Mexico-Domiciled Motor Carriers Under the Cross-Border Pilot Program

Under 49 U.S.C. § 13902(a)(1), FMCSA is authorized to issue motor carrier operating authority *only* if it finds that the applicant is willing and able to comply with any (i) safety regulations promulgated by FMCSA, (ii) safety fitness requirements established by FMCSA under Section 31144, (iii) minimum financial responsibility requirements established under Sections 13906 and 31138, and (iv) the duties of employers and employees under Section 31135.[12] Section 13902(a)(4) mandates that the Secretary "shall withhold registration" if she determines that a registrant "does not meet, or is not able to meet" any of the aforementioned requirements. These statutory requirements for issuing motor carrier operating authority are in complete harmony with NAFTA's National Treatment requirement.

In *Department of Transportation* v. *Public Citizen,*[13] the Supreme Court addressed FMCSA's responsibilities under Section 13902(a)(1) holding that the Agency had "no discretion" under this provision[14] to prevent entry of Mexican trucks operated by motor carriers that satisfied the conditions in this section.[15] By necessary implication, FMCSA would also have no discretion under Section 13902(a)(4), but to deny operating authority to a motor carrier who "does not meet, or is unable to meet the

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[8] *Id.* at 74, ¶278. See also *id.* at 81, ¶259.

[9] *Id.* at 82 ¶301.

[10] 72 Fed. Reg. 23883 (Col. 1) (May 1, 2007). This statement was repeated in FMCSA's *Federal Register* Announcement of June 8, 2007 (72 Fed. Reg. 31877 (Col. 1)) and of August 17, 2007 (72 Fed. Reg. 46263 (Col. 3)).

[11] Demonstration Project on NAFTA Trucking Provisions, 72 *Fed. Reg.* 46263, 46266 (Col. 1) (August 17, 2007) (FMCSA Docket No. 2007–280552396).

[12] A motor carrier must also be willing and able to comply with regulations referred to in Section 13902(a)(1)(A), the scope of which was left open to further interpretation by FMCSA in *Peter Pan Bus Lines* v. *FMCSA,* 471 F.3d 1350, 135455 (D.C. Cir. 2006).

[13] *U.S. Department of Transportation* v. *Public Citizen,* 541 U.S. 752, 766 (2004).

[14] *Id.* at 770.

[15] *Id.* at 767.

requirements in Section 13902(a)(1)." This would be true whether the motor carrier was domiciled in Canada, Mexico, or the United States.

FMCSA's demonstration project completely ignored the statutory mandate imposed under Sections 13902(a)(1) & (4). Rather than addressing the question of whether Mexico-domiciled motor carriers are willing and able to comply with U.S. safety regulations as it is required to do under its governing authority, FMCSA is acting outside the scope of its authority by implementing a policy of issuing operating authority on the basis of compliance with Mexican laws and regulations governing commercial drivers licenses, physical qualifications of drivers and drug testing.[16] Under *Public Citizen,* FMCSA has no authority to depart from the mandate of Section 13902(a) requiring that all motor carriers demonstrate that they are willing and able to comply with U.S. laws and regulations.[17] FMCSA's decision to issue operating authority based upon compliance with Mexico's laws and regulations is, very simply, not in accordance with law and exceeds the statutory limits on the agency's authority to grant operating authority.

In *Public Citizen,* petitioners (Sierra Club, Public Citizen and International Brotherhood of Teamsters) argued that FMCSA should not authorize the entry of Mexican trucks into the United States unless it prepared an environmental impact statement as required by the National Environmental Policy Act[18] (NEPA). NEPA requires various Federal departments and agencies to file environmental impact statements in connection with major Federal action.[19] The U.S. Court of Appeals for the Ninth Circuit agreed with the petitioners and held that FMCSA violated NEPA by not filing an environmental impact statement in connection with its proposed approval for the operation of Mexican trucks within the continental United States.[20] The U.S. Supreme Court reversed, holding that FMCSA had only ministerial authority to approve or disapprove applications for operating authority under 49 U.S.C. § 13902(a) and that the narrow range of discretion available to it in approving applications for operating authority could not be the cause of any adverse impact on the environment.[21] Under the Supreme Court's reasoning, the only one capable of undertaking major Federal action was the President who had the authority to lift the embargo on Mexican trucks.[22] Since the President is exempt from the filing requirements under NEPA, *Public Citizen* presented the Court with no cognizable claim. The Supreme Court's holding in *Public Citizen* is the controlling word on this subject. Because FMCSA's responsibilities under Section 13902(a) have been found to be ministerial, providing it with no discretion to alter the terms or circumstances under which Mexican motor carriers may provide services within this country, it simply has no authority to accept compliance with Mexican regulations in lieu of compliance with its own regulations.

FMCSA welcomed the Supreme Court's ruling that it had only ministerial, nondiscretionary functions with respect to the approval of operating authority for Mexican motor carriers. That ruling allowed it to defeat the petitioners in *Public Citizen* and sidestep responsibilities under NEPA. That court's holding, however, is incompatible with the authority it now asserts in implementing its Cross-Border Pilot Program. By accepting compliance with Mexican laws and regulations covering commercial drivers licenses, drug testing and standards of medical qualifications in lieu of compliance with its own regulations, FMCSA has completely rewritten the conditions for entry into the U.S. market for trucking services.

The following statements by Solicitor General Olson in briefs to the Supreme Court in *Public Citizen* set forth the official position of the United States with respect to the authority of the Secretary and FMCSA in this area. The authority claimed by the Secretary and FMCSA in *Public Citizen* is significantly more narrow than the breadth of authority claimed in connection with FMCSA's ongoing Cross-Border Pilot Program:

> 1. "FMCSA's relevant authority involves granting or refusing operating authority to particular Mexican motor carriers, based solely on whether they are 'willing and able to comply' with United States safety and financial-responsibility standards. 49 U.S.C. § 13902(a)(1)." Brief for Petitioners on Writ of Certiorari at 22.

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[16] Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31,884 (June 8, 2007) (FMCSA Docket No. 2007–28055–1547).

[17] 541 U.S. at 766–767.

[18] *Public Citizen* v. *U.S. Department of Transportation,* 316 F.3d 1002 (9th Cir. 2003).

[19] 42 U.S.C. § 4332(2)(C).

[20] *Public Citizen,* 316 F.3d 1002 at 1032.

[21] *Public Citizen,* 541 U.S. at 766, 770, 772.

[22] *Id.* at 770.

2. "FMCSA's role in this context is the essentially ministerial one. . . . FMCSA's authorizing statute does not make it responsible . . . for opening or closing the border." Reply Brief for the Petitioners on Petition for a Writ of Certiorari at 10.

3. "Consistent with the legislative limitations on its powers, FMCSA has not claimed any power to determine whether or under what conditions Mexican carriers should be allowed to operate in the United States." Reply Brief for the Petitioners on Writ of Certiorari at 3.

4. "While Congress left FMCSA with a narrow range of discretion in fashioning the final registration procedures, Congress did not empower FMCSA to change the fundamental condition for entry." Reply Brief for the Petitioners on Writ of Certiorari at 5.

FMCSA's Cross-Border Pilot Program alters the fundamental conditions for entry of Mexico-domiciled motor carriers. It is contrary to its narrow authority to act under Section 13902(a) and is neither authorized nor required by NAFTA. The legal gamesmanship exhibited by the agency—claiming only narrow ministerial authority in *Public Citizen* and broad authority to rewrite the conditions for issuing operating authority in the Cross-Border Pilot Program—is regrettable, and shows once again a rather incomplete appreciation for the rule of law.

Conclusion

OOIDA commends this Committee for its diligence in pursuing this matter. It is important to note that the legal defects identified here with respect to the Cross-Border Pilot Program would also apply to any permanent program implemented by the Secretary and FMCSA if such programs included accepting compliance with Mexican laws and regulations in place of compliance with U.S. laws and regulations. OOIDA looks forward to working with the Committee in the months ahead to help restore respect for the rule of law in this matter.

Senator DORGAN. Mr. Cullen, thank you very much. I think both of you have presented important and interesting information.

I said at the start of this hearing, that for me, this is a safety issue. If there were no safety issues, and if we had an equivalency of standards between the U.S. and Mexico, I wouldn't hold a hearing, I wouldn't offer an amendment, I'd say, "That's fine, homogenize trucking rules between our three countries—the U.S., Canada, Mexico, that's fine with me," if you had equivalency. But there isn't anyone who is thinking clearly that will make the case that there is equivalency between our country and Mexico with respect to standards—driver's records, vehicle inspections, and so on.

Ms. Gillan, you have covered some of that in your written statement, and your oral statement, as well, but you heard the Secretary today—she continues to make the case that they are inspecting every truck, every time, do you understand the loophole in that every truck, every time? I think the Inspector General sitting beside her said, "She can't make that claim, she doesn't know."

Ms. GILLAN. Absolutely, Senator. In fact, the safety community looks at these slogans as giving us a false sense of security and feeling that everything's safe. And "every truck, every time" is really just that they're checking on the license, and the English proficiency—which you already discussed today, really isn't English proficiency—I think that DOT Secretary Peters is trying to give everybody a sense that these trucks are undergoing some complete Level I inspection when, in fact, they're not.

And I also think that when she talked about the pilot program, there was going to be 1,000 trucks, and these were going to be the safest of the safe trucking companies, and then we find out that Trinity actually, through the research that was done by OOIDA, had an abysmal safety record. And the problem is, that as we go

forward, this is the program that they're going to use, we're convinced, to justify opening the border, and we cannot let that happen.

Senator DORGAN. Mr. Cullen, some would say, "Well, Mr. Cullen is here representing the Owner-Operator Independent Drivers." I know a lot of them, I mean, I see a lot of them, and they're running a small business, and you know, they have a small trucking company, they're out there working for a living, trying to make a go of it. They'd say, "Well, you come here, and you're just—you don't want any competition, that's why you want to keep Mexican drivers and vehicles out." Respond to that.

Mr. CULLEN. Our concerns are primarily safety-driven. But there is a relationship between competition and safety. If a Mexican driver comes into this country, and is willing to drive for 32 cents a mile, or 25 cents a mile, that drives down the compensation available to American drivers. A poorly compensated driver tends to be an unsafe driver, or is driven toward circumstances that lead to lack of safety. He doesn't maintain his truck as diligently as he can, doesn't replace the tires as often as he should and is forced to work long hours, because he earns so little per hour.

So that the notion that there's a big difference between safety and economics really should be examined closely by this Committee and others. There is a direct-line relationship between profitability and adequate compensation and safety.

Senator DORGAN. I did not raise the question of cost and wages, and fair competition—that is another issue that I think is of concern. But, I think safety is such a paramount issue here, that there's no need to have a lengthy discussion about the issue of driving down costs and prices and wages here in the United States. But, I do think that there is a relationship, as you suggest, Mr. Cullen, to that issue and safety, so——

Mr. CULLEN. Speaking directly to safety, the issue that I raise in my testimony is, against what standard do we measure safety and under 13902(a), safety is measured by the willingness and ability of drivers to obey U.S. laws, and we have the toughest and best safety laws in the world, certainly in North America.

And you can not substitute compliance with Mexican safety standards, at their state of development and their state of development of these regulations, and compare it fairly to America's. We are so far ahead of them in safety standards, and the safety standards applicable in this country should not be the lowest common denominator—Federal law requires safety standards of the United States to apply to anyone who wants to drive in our market, including Mexican trucks.

Senator DORGAN. In most of the trade agreements that we have, including NAFTA and including this issue of cross-border trucking, we have seen diminished standards. You're quite correct, that in our country we have generally lifted standards, and lifted wages, and done the things that have created a stronger economy, expanded the middle class, and so on.

In doing that, with respect to regulations and standards, we've been very stringent and pretty particular about what we do, and then we engage with other countries, and we discover that the way you engage is to diminish standards in our country. And I think

that is a disservice to what we have built here. But, that is for, perhaps, another discussion.

I don't want to mention that we indicated to the Secretary of Transportation that she was welcome to invite one of the American trucking companies, she continued to refer today to American trucking companies who would have opportunities in Mexico and we encouraged her to invite one of those companies to testify here, and they either could not find one, or did not invite one. But we did encourage them to do that.

Mr. CULLEN. I'm sure if we polled 161,000 members of OOIDA, I'd be hard-pressed, and OOIDA would be hard-pressed, to find anyone who's trying to knock on the door and risk their bodily safety, the safety of their equipment and livelihoods, by driving deeply into Mexico. We would do Mexico a great service by pulling them up to our standards, by encouraging them, if they do come to this country, to follow U.S. standards, and that would be a great benefit to them. But I don't think anyone—at least the drivers that we're familiar with, has the stomach to try and go down to Mexico and navigate through safety standards that probably are decades out of date to what we do here.

Senator DORGAN. I want to adjourn in just a moment, because I have another duty I hope that attend to.

But Sheryl Jennings McGurk is here, Sheryl Jennings McGurk, where are you? All right.

Why don't you take a seat at the table, Sheryl Jennings McGurk had prepared a statement that I had put in the record here in the U.S. Senate during this debate, and when she came up to me before the hearing, I indicated if we had a couple of minutes at the end of the hearing, and you wished to make a very brief statement, I'd be happy to recognize you.

As I understand it, your parents and your nephew were killed in an automobile accident, and that accident occurred with respect to cross-border trucking.

I will recognize you, if you can summarize for me in just three or 4 minutes, I would appreciate that. But, I appreciate the fact that you have great passion about this issue, and are very concerned about it.

And why don't you go ahead and make your statement?

Ms. JENNINGS MCGURK. Thank you, sir.

As you mentioned, my name is Sheryl McGurk, and our family paid the ultimate price for allowing unsafe Mexican trucks into the United States. And my mom, my dad and my nephew were killed by a Mexican truck that was actually operating outside of the commercial zone when its drive shaft fell off the truck, severed its brakes, and the truck was moving backward down the freeway.

My mom and dad were on their way for a vacation to see my oldest brother, and they never had a chance, never saw the truck. And to lose three members of your family, is indescribable. And the hole it leaves in your life can never be filled. And my family will do all we can to prevent this from happening to another family.

And I sat here today listening to all of the talk about the legislation, and it just breaks my heart, because the right thing to do is to inspect trucks, so that this doesn't happen to another family.

You know, I urge Congress to shut down this unsafe and illegal program, because I don't want other families to have to go through this. And you have my full story, I don't want to take up any more time. It's just too hard for me to talk about it right now.

[The prepared statement of Ms. McGurk follows:]

PREPARED STATEMENT OF SHERYL JENNINGS MCGURK IN SUPPORT OF DORGAN-SPECTER AMENDMENT, SEPTEMBER 11, 2007

On behalf of all members of my family, including my parents and nephew lost in 2005 in a horrendous and unnecessary crash with a large truck that should never have been where it was, I strongly support the Dorgan/Specter amendment that will prevent any spending to carry out the Mexican truck pilot program begun by the Federal Government last week. We hope that telling the story of what happened to my family will help prevent others from going through what we have and what we will continue to go through for the rest of our lives.

My husband Sean and I were married on June 6, 2004. This was an extraordinarily special day for us because it was also my parent's 45th wedding anniversary. They were married following my father's graduation from the first class of the United States Air Force Academy in 1959. I had a very close relationship with my mom and dad, they were not just my parents but they were also my best friends! They asked us to share this date with them forever and of course we accepted, hoping to be blessed with a long and happy marriage. It was a special day shared by our family.

My mom, Marie Jennings, was a beautiful, stylish, lady and her bouncy and adventurous personality was the perfect compliment to my dads more serious and quiet demeanor. My mom served our country first as the wife of an Air Force officer, and next as a mom, raising myself and my two older brothers, David and Bob; swim team, soccer, boy scouts, girl scouts, you name it, we kept her quite busy! We moved across the country and around the world. As we grew up, she decided to use her talents by working for the Federal Government as a civil servant and she did so, for 25 years.

My dad was an officer and gentleman! He retired as a colonel after 27.5 years. He served first as a fighter pilot in Vietnam where he was awarded the Distinguished Flying Cross. He later became a test pilot and an instructor pilot. During his career he flew almost all the planes the AF had at the time. He loved to fly and had recently been recertified so he could fly with his friend to attend an air show in Oshkosh, WI. During his career, he still made time to be my dad as a soccer coach, a ski buddy, and a private tutor. Later on he decided to continue to serve his country by teaching high risk youth at Hollywood High School in Los Angeles, young adults at the University of Phoenix and he also volunteered teaching for free at private schools.

My nephew, David Michael Jennings, was a great kid! He was my brother David's only son and the first grandchild. He was born in Beavercreek, Ohio. He was active in high school. He played football, the French horn in the marching band, ran track, and was active in the Spanish and math clubs. David was an Eagle Scout, quite an honor for any young man. He was active in his community and his church. He volunteered as team captain for Relay for Life and the Special Olympics. Upon graduating high school, he left home to live with my parents and attend junior college. He was completing his sophomore year at Mira Costa College where he was a Student Ambassador and active in student government. He sponsored a 5K run for charity and beach clean-ups in Carlsbad, CA. He was transferring to UCSD in the fall.

On February 15, 2005, just 8 months after we were married, my mom and dad started out on exciting journey to visit my oldest brother, Bob, his wife Sandy, and their youngest grandson, Jack. David volunteered to take my parents to the airport. Unfortunately, their journey was cut short only 30 miles from their home in Carlsbad, CA.

It was around 5 a.m. A truck from Mexico was headed north on I–5 when the driver thought he was having mechanical issues. He pulled his truck off the freeway to check it out. At that time he decided he would not be able to get his truck from where he now was to Los Angeles where he needed to deliver his goods. He decided to take his truck back onto the freeway and headed south. It was a bad decision. His truck proceeded to break down in the middle of the freeway. My parents and nephew never had a chance.

This accident was 100 percent avoidable. The truck had numerous safety issues and should not have been operating in the United States. For this, our lives are for-

ever changed and we lost three of the most incredible people. This loss has left a hole in our lives that cannot be filled. To lose your mom, your dad, and your nephew; all at once; is indescribable. Your world changes in an instant.

Please help ensure this doesn't happen again. Vote for the Dorgan/Specter amendment. Safe roads are everyone's responsibility.

Senator DORGAN. Well, I appreciate your being here, and as I indicated, I put your statement in the Senate record when we had this discussion and this debate. I understand these passions, my mother was killed driving down a city street at 30 miles per hour after visiting a friend in the hospital, and she was hit by a drunk driver, fleeing at 80 to 100 miles per hour on a city street, and I have been passionate about these issues for a long, long, long time. And I understand the carnage on America's highways, I understand about losing a parent, and I understand the passion that you have about that, because I have been through some of that.

This issue, to me, is about protecting what we have in this country—a set of standards that we can be reasonably proud of—insisting that we try to maintain safety standards that give the American people some security and some sense of safety when driving on the roads in this country, and you know, I'm very interested in allowing open borders, to the extent we can, but I'm not very interested in any case, of diminishing standards.

If other countries meet our standards, God bless them, good for them. But, if we are going to succumb to those who say, you know, it's a global economy, let's get with it, let's understand that not everybody meets our standards, we still have to participate—that means the diminishment of American standards, including safety standards. I'm not willing to do that on American roads, and there isn't any way in my judgment that the Secretary of Transportation, or the White House, with whom I believed they consulted, and I now understand they did—I don't think that there's any way that they can honestly tell the American people that allowing long-haul Mexican trucking can be done without diminishing safety standards in this country for the rest of the American drivers on American roads.

And I, you know, the fact is, we're going to continue this discussion and debate, as I indicated to the Secretary. There will be consequences for a Federal agency that ignores the law.

So, let me thank all three of you for being here, I wish I had more time to ask questions of you—we took a long time in the first panel today, but your contribution to this hearing is very, very important to us, and this issue will continue.

One final point—my hope is that the Administration will decide that it can't ignore the law in 8 or 10 areas, maybe they should pick one where the law is pretty obvious—that would be this one—and decide to obey the law. But, in any event, we will be coming very quickly up to Appropriations again, and I'm an appropriator, and I will have an opportunity to dig some spurs into this issue, it's a reference to my upbringing in North Dakota, but as I indicated, this issue is not over, by any means. Our Secretary and her legal counsel will not have the last word on this issue, the U.S. Congress will have the last word.

This hearing is adjourned.

[Whereupon, at 4:26 p.m., the hearing was adjourned.]

APPENDIX

PREPARED STATEMENT OF THE U.S. CHAMBER OF COMMERCE

The U.S. Chamber of Commerce is pleased to present this written testimony on the remarkable success of the U.S.-Mexico trade partnership and the costs imposed by the long delay in implementation of the cross-border trucking provisions of the North American Free Trade Agreement (NAFTA). The Chamber strongly supports the Department of Transportation's Cross-Border Truck Pilot Program. This pilot program, administered by the Federal Motor Carrier Safety Administration (FMCSA), provides temporary operating authority to a limited number of motor carriers domiciled in Mexico and the United States for cross-border commercial operation.

In the Chamber's view, implementing the cross-border trucking provisions of NAFTA is long overdue. The pilot program is an important step to enhance North America's competitiveness, reduce congestion and pollution at the border, and promote economic growth. Questions about safety have been fully answered, and every truck entering the U.S. must meet every U.S. safety requirement.

Free and fair trade has played a key role in our Nation's economic growth and development since it was founded, and NAFTA played an important role in the accelerated economic growth our Nation has enjoyed since it entered into force in 1994. Trade between the United States and Mexico has more than quadrupled in real terms, rising from $81 billion in 1993 to $347 billion in 2006. The trucking industry is critical to this trade partnership since trucks transport over 80 percent of the value of our trade with Mexico.

However, beginning in 1995, the United States has failed to abide by its commitment under NAFTA to open the U.S.-Mexico border to cross-border trucking. The difficulties that stem from this barrier to trade should not be underestimated. Current rules maintain a cumbersome, environmentally damaging, and costly system that represents a brake on further growth in mutually beneficial commerce. The time has come for our countries to open our borders to a modern cargo transportation system that will allow our economic partnership to reach the next level of success.

The Story So Far

NAFTA gave U.S. and Mexican carriers the right to pick up and deliver international freight into the neighboring country's border states beginning in December 1995. This market access was scheduled to expand to the entire territory of the United States and Mexico by January 2000. The United States failed to comply with its commitments on both of these occasions.

NAFTA also included measures to permit U.S. and Mexican carriers to invest across the Rio Grande. Starting in December 1995, U.S. and Canadian investors were supposed to be allowed to invest in Mexican trucking companies or terminals providing exclusively international freight services up to a 49 percent ownership cap. NAFTA laid out a schedule to raise this cap to 51 percent in 2001 and 100 percent in 2004.

By the same token, Mexican carriers were to be allowed to invest and fully own U.S. trucking companies for the purpose of transporting international cargo within the United States beginning in 1995. The United States finally moved toward implementation of these provisions on June 5, 2001, when President George W. Bush issued a memorandum instructing the U.S. Department of Transportation to begin accepting and processing applications by Mexican nationals for the purpose of establishing U.S. trucking companies.

A NAFTA dispute settlement panel in February 2001 determined that the United States had violated its obligations on cross-border trucking. At the time, analysts calculated that the United States could be slapped with retaliatory duties totaling between $1 billion and $2 billion for every year Washington refuses to allow cross-border trucking. Mexico refrained from retaliation out of respect for the U.S. administration's efforts to comply with its obligations.

In 2004, the Attorneys General for California, Arizona, Oklahoma, Massachusetts, Illinois, New Mexico, Oregon, Washington and Wisconsin filed briefs with the Supreme Court, opposing the administration's effort to open U.S. roads to Mexican trucks and asserting that air-quality reviews must precede any such move under the Clean Air Act. Noting that Mexican trucks would be subject to all U.S. environmental and safety regulations in any event, the administration argued that extensive delays and higher costs could result if such additional reviews were required. The Supreme Court agreed with the administration.

Cross-Border Trucking

In the Chamber's view, the dispute over cross-border trucking has threatened our relationship with Mexico, our second-largest export market. Cross-border trucking today was described in a coalition letter signed by the U.S. Chamber of Commerce and other business organizations as "archaic and convoluted. . . . Currently, a shipment traveling from the United States to Mexico, or vice versa, requires no less than three drivers and three tractors to perform a single international freight movement. Through interline partnerships, a U.S. motor carrier handles freight on the U.S. side, and a Mexican carrier handles the freight on the Mexican side, with a 'middleman' or drayage hauler in the middle. The drayage driver ferries loads back and forth across the border to warehouses or freight yards for pickup or subsequent final delivery within the designated border commercial zone."

The upshot is congestion, air pollution, and higher prices for both consumers and business. The fraught logistics of the existing system often compel trucks to return home with empty trailers or with no trailer at all. Our border infrastructure is seriously overburdened, and the entire system is quickly becoming a real brake on further growth in trade.

These problems are particularly severe for U.S. companies that operate "just-in-time" manufacturing facilities in Mexico. These operations were established with a clear expectation that transportation services would be able to deliver inputs from the United States or elsewhere to facilities in Mexico according to schedule. Our mutually beneficial trading relationship with Mexico will plainly suffer—with costly effects for U.S. workers, farmers, consumers, and companies—if we fail to ensure the expeditious delivery of materials to these manufacturing facilities by modernizing the cumbersome transportation system upon which our trade with Mexico depends.

Safety: A Vital Issue

Safety is plainly one of the most important issues at play in this dispute. Ensuring the safety of all trucks on American roads was a top priority of the U.S. trade officials who negotiated NAFTA. The Congress approved NAFTA because it was broadly satisfied with the fruits of their labors.

And why shouldn't we be? Under NAFTA, *every truck entering the United States is required to meet each and every U.S. safety requirement.* In fact, Mexican motor carriers applying for U.S. permits will be required to provide far more detailed information regarding their ability to meet U.S. safety requirements than their American or Canadian counterparts. Any lingering concerns over the safety of these carriers from Mexico and their trucks and drivers can surely be addressed in the proposed rules for implementing NAFTA.

While safety is an overriding concern, the United States can certainly address this issue while keeping its international obligations and expanding upon the mutually beneficial trading relationship with Mexico. Failure to try would send a troubling message about the difference in our treatment of Canada and Mexico, our two closest neighbors and largest export markets.

Finally, it is imperative that Congress make available the required funds to ensure that safety enforcement inspections of trucks on the U.S.-Mexico border are carried out with all due seriousness. The U.S. Chamber strongly supports providing necessary funding to hire additional safety inspectors to be stationed at the border and to build and maintain adequate border inspection facilities.

Conclusion

Because NAFTA has already eliminated most tariffs and other barriers to trade with Mexico, improving our transportation infrastructure is one of the best things we can do to keep this partnership on track. Implementing NAFTA's trucking provisions offers the opportunity to fix the cumbersome, environmentally damaging, and costly transportation system upon which our trade with Mexico depends. Growing inspection capabilities at the U.S.-Mexico border will ensure that trucks will be able to operate on both sides of the U.S.-Mexico border with safety and efficiency.

In the final analysis, this issue revolves around whether the United States will keep its word. We should be mindful that the United States made a commitment under NAFTA to work with Mexico to modernize our cross-border transportation

system. The U.S. Chamber urges the Congress to work with the administration to assist in implementing NAFTA's cross-border trucking provisions and show the world that America keeps its commitments.

PREPARED STATEMENT OF JAMES P. HOFFA, GENERAL PRESIDENT, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

My name is Jim Hoffa, General President of the International Brotherhood of Teamsters. I represent 1.4 million Teamsters and their families. They drive America's highways every day.

More than 600,000 of our members earn their living behind the steering wheel of a delivery truck, semi-tractor trailer, school bus, police car, taxicab or other vehicle. They have a right to a safe workplace. Their families have a right to safe roads.

In Mexico, twice as many people die in highway accidents per vehicle miles traveled as in the United States. In Mexico, trucks and Mexican drivers don't have to meet the same safety standards as they do here. In Mexico, enforcement is notoriously lax.

For those reasons, I have long thought that allowing Mexican trucks on our roads would place American drivers in danger.

Congress is also concerned about the risk of letting hazardous Mexican trucks drive our highways. That is why laws were passed requiring the Federal Motor Carrier Safety Administration (FMCSA) to meet specific safety standards before starting a cross-border trucking pilot program.

Under U.S. law (Section 350 of the 2002 Transportation Appropriations Act), FMCSA could not let a Mexican truck travel beyond the border zone if it did not satisfy the statutory safety requirements.

The 2002 law, otherwise known as the Murray-Shelby amendment, was reinforced in 2007 by Section 6901 of Public Law 110–28. That law set additional standards. It also required the Inspector General to verify that FMCSA met those standards *before* opening the border.

A promise by FMCSA to meet those standards was not sufficient to satisfy the legal requirement for allowing Mexican trucks onto our highways.

Unfortunately, the Bush Administration couldn't wait to open the border to Mexican trucks. It couldn't wait to make sure safety standards were met, and it couldn't wait to obey the law.

On Aug. 6, 2007, and on Sept. 6, 2007, the Transportation Department's Office of Inspector General issued reports establishing that the Bush administration had not met the statutory requirements for starting the pilot program.

On Aug. 6, the Inspector General reported that certain standards hadn't been met:

- Databases on Mexican drivers' records in both Mexico and in the U.S. were incomplete.
- FMCSA didn't have the capacity to inspect every truck at high-volume crossings.
- FMCSA could not verify that drug and alcohol testing in Mexico met U.S. Department of Transportation (USDOT) regulations.

On Sept. 6, the Inspector General issued a report describing additional legal standards for the pilot program that hadn't been met:

- FMCSA can't check trucks and drivers from Mexico at every border crossing.
- State police didn't know how to test English language proficiency among drivers.
- FMCSA said it would only inspect trucks that were available at the time inspectors were onsite.

It is of no small consequence that the Inspector General reported on Sept. 6 that *FMCSA has not developed sufficient plans for checking every truck every time.*

In other words, no one was watching the trucks that crossed the border to check if they were allowed beyond the border zone.

When the Inspector General's staff visited three border crossings—one at Otay Mesa, Calif., and two in El Paso, Texas—they found no state or Federal officials posted in places where they could identify trucks in the pilot program. The Inspector General's staff found no evidence that Federal officials *could* be posted in position to monitor trucks once the program started.

One month earlier, the Inspector General reported that traffic was too heavy at the Laredo crossing for FMCSA to monitor all trucks. Once an FMCSA inspector

picked a truck out of the hundreds in line for inspection, no other FMCSA officials remained to watch the vehicles pouring over the border.

If every truck in the pilot program isn't checked, then every truck driver isn't questioned for his ability to speak English. The Inspector General in September reported that state officials responsible for truck safety were very concerned about the English-speaking skills of Mexican drivers.

English language proficiency is a serious safety issue. A good example was provided by the National Transportation Safety Board, which investigated a 2005 highway tragedy that was compounded by a bus driver's inability to speak English. A bus evacuating Texas nursing home patients from Hurricane Rita caught fire, and emergency response was delayed because the driver couldn't communicate with first responders. Twenty-three people died.

Unfortunately, FMCSA has a cavalier attitude about the need for truck drivers to speak English. The Inspector General cited a USDOT memo that says a driver who can identify the meaning of four highway signs—in any language—is deemed to be proficient in English if the inspector understands what he is saying. In other words, if a driver says in Spanish that a stop sign means stop, he is considered proficient in English if the inspector understands him.

FMCSA has also paid little attention to the problem of drug and alcohol testing for Mexican truck drivers. Mexico is an underdeveloped country that lacks an infrastructure for testing drug and alcohol use. Well documented is the epidemic of illegal stimulant abuse among Mexico's drivers, who are forced to work long hours for low pay.

The Inspector General reported that drug and alcohol testing in Mexico needs further attention. That is probably an understatement.

Congress ordered FMCSA to verify that Mexican motor carriers can comply with USDOT drug testing regulations before starting the pilot program.

Monitoring drug collection facilities is a necessary prerequisite for verifying Mexican carriers' ability to operate a drug and alcohol testing program consistent with USDOT's regulations (Part 40 of Title 46 CFR). In other words, FMCSA could not legally open the border to Mexican trucks until drug collection facilities in Mexico were monitored. But this is not even something that FMCSA has promised to do.

USDOT does not monitor collection facilities in Mexico, according to the Inspector General's most recent (March 10, 2008) report. Without monitoring of Mexican drug collection facilities, chain of custody could easily be compromised, testing may not be scientifically valid, collection facilities may not meet USDOT requirements and their collectors may not be trained.

Nor is FMCSA educating Mexican employers about their responsibilities and U.S. standards for drug testing. The agency has a website that lists all the rules with which Mexican motor carriers must be familiar, but the site has no mention of the 106 pages of USDOT drug and alcohol regulations. Those regulations govern employers' responsibilities, such as standing down employees, making unannounced follow-up tests or respecting an employees' procedural and privacy rights.

I can only conclude that FMCSA ignores the problem of adequate drug and alcohol testing because it is too hard to solve.

Another enormous problem that FMCSA can't solve is the inadequacy of Mexico's database of commercial drivers licenses. U.S. law requires state and Federal inspectors to "verify electronically the status and validity of the license of each driver of a Mexican motor carrier commercial vehicle crossing the border" for at least half of such vehicles.

The Inspector General reported on Aug. 6, 2007, that state and Federal officials had checked the status of Mexican commercial drivers licenses over 19,000 times. In 18 percent of the queries, the result was "driver not found." If the driver is not found, the status and validity of his license cannot be verified. *Since FMCSA has produced no evidence that the Mexican commercial drivers license database can verify the status of every driver, the database must still be incomplete and inaccurate.*

Clearly there are gaping holes in the pilot program's safety net. If a state trooper pulls over a Mexican driver, chances are one in six that a record of his license can't be found. FMCSA failed to make sure the driver can speak English or that he's free of drugs and alcohol or that the truck was checked at the border.

There is one law that should have been fairly easy for FMCSA to follow—to inspect half of the Mexican carriers' trucks on-site before letting them onto U.S. highways.

There are only 55 trucks in the pilot program now. But FMCSA could not even inspect half of those trucks on-site. FMCSA only inspected the trucks that happened to be onsite during its pre-authority safety audit.

I am astonished that FMCSA couldn't make sure even a handful of Mexican trucks are safe. Not because I think FMCSA is interested in safety, but because I

think FMCSA needs to avoid the criticism that it's letting dangerous trucks on our highways. There are many, many opponents of this program who would seize on any evidence that FMCSA can't even monitor a small sample of Mexican trucks when it's trying to prove that it can. After all, the pilot program is wildly unpopular with the public and with Congress. It is under intense scrutiny by the Inspector General. It is under review in Federal court.

Given all that, I would think FMCSA would take some pains to make sure that the small number of trucks it admitted into the pilot program is safe.

FMCSA could not even do that.

Somehow FMCSA managed to allow Trinity Industries de Mexico—a company with an abysmal safety record—onto our highways.

Opponents of the pilot program obtained Trinity's horrible safety record from FMCSA's own database, which is easy to find on the Internet. Opponents submitted that safety record to the 9th Circuit Court of Appeals as part of the lawsuit against the pilot program. Only after the public declaration was made did Trinity withdraw from the program on Feb. 1.

The decision to allow Trinity's dangerous trucks onto our highways strongly suggests that FMCSA is completely incapable of enforcing safety standards for even a few motor carriers.

FMCSA Administrator John Hill told reporters on March 11 that Trinity's safety violations were minor. That is not true.

With 10 trucks that operate in the border zone, Trinity amassed 75 out-of-service orders and should have received another 476 in the year before the pilot program, according to Commercial Vehicle Safety Alliance standards.

Under Federal law, trucks are placed out-of-service when an "imminent hazard" is present. The law defines "imminent hazard" as "any condition of vehicle, employee, or commercial motor vehicle operations which substantially increases the likelihood of serious injury or death if not discontinued immediately."

All of those failures to meet safety standards were documented by the Inspector General. Because the Inspector General did not verify that safety standards were met, it was therefore illegal to open the border to Mexican trucks under the pilot program.

Nevertheless, Transportation Secretary Mary Peters defied the law. She gave the green light to the program just hours after the Inspector General's Sept. 6 report was issued.

My union has challenged the legality of the pilot program before the 9th Circuit Court of Appeals in San Francisco. Public Citizen, Sierra Club and the Owner-Operator Independent Drivers Association joined us in the case. Oral arguments were heard in the case on Feb. 12. We are awaiting a decision from the court.

Our case was strengthened in December, when a law was passed cutting off funding for the cross-border trucking demonstration project.

A few days after the pilot program started, a truck accident in Mexico killed more than 30 people. The Senate, concerned about safety, passed an amendment on Sept. 12 that cut off funding for the pilot program. The vote was overwhelming: 75–23.

No one questioned that the intent of the amendment was to stop the pilot program. Sen. John McCain, R–AZ, ardently supports cross-border trucking. He said the amendment would stop the program.

FMCSA's Hill acknowledged the program's defeat. When the amendment passed, Hill said it was a "sad victory for the forces of fear and protectionism."

That should have been the end. The U.S. Supreme Court ruled in 1984 that "If the intent of Congress is clear, that is the end of the matter."

But then the Bush Administration decided to create its own reality by ignoring the clear intent of Congress.

The amendment said: "None of the funds made available under this Act may be used to establish a cross-border motor carrier demonstration program to allow Mexico-domiciled motor carriers to operate beyond the commercial zones along the international border between the United States and Mexico."

That amendment became law on Dec. 26, when President Bush signed the Consolidated Appropriations Act of 2008.

Shortly afterward, Secretary Peters announced through a spokesperson that she would ignore the law and keep the border open.

Her rationale was a novel interpretation of the law. She said Congress only meant to cut off funds for a program that had already been established.

Secretary Peters has been told by the Senate's legal counsel and by a half dozen Members of Congress that she is in violation of the law.

If Secretary Peters were right about the amendment—and she is not—the pilot program would be in violation of the laws listed above. It would also be in violation

of several other laws that were not identified by the Inspector General *before* the program started.

The law (49 U.S.C. 31315(c)) says that FMCSA pilot programs can't go forward unless certain criteria are met. Those include:

- "A specific data collection and safety analysis plan that identifies a method for comparison." *There is none.*
- "A reasonable number of participants necessary to yield statistically valid findings." After 6 months, the Inspector General reported there are only 16 Mexican trucking companies with 55 trucks participating. The Inspector General on March 10 reported that *"no reliable statistical projections regarding safety attributes can be made at this point."*
- "An oversight plan to ensure that participants comply with the terms and conditions of participation." The Inspector General, again on March 10, reported that FMCSA had no such plan. The agency failed to implement a key quality control measure—a monthly analysis of a random 10 percent sample of Customs and Border Protection data to document that drivers and vehicles are being checked every time they cross the border. The Inspector General reported *"FMCSA does not have assurance that it has checked every Mexican truck and driver that is participating in the project when they cross the border into the United States."*
- "The safety measures in the project are designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved."

  It is well established that the safety measures for Mexican trucks and drivers are lower than the level of safety that U.S. trucks and drivers must achieve. FMCSA has even acknowledged that there are differences between U.S. and Mexican safety laws, including commercial drivers' license requirements, medical requirements, hours-of-service requirements and drug-testing procedures. (72 *Federal Register* notice 46263, Aug. 17, 2007).

  Mexican drivers don't lose their commercial drivers licenses if they're convicted for crimes in their own vehicles, as are U.S. drivers.

  Mexican drivers do not have mandatory safety training, as do U.S. drivers.

  Mexican drivers are not required to comply with U.S. hours-of-service laws while operating in Mexico, so a Mexican driver could drive 10 hours in Mexico and then another 11 hours in the U.S.

  Mexican drivers do not have to meet U.S. standards for pre-employment drug testing as do U.S. drivers.

The Transportation Department under Secretary Peters' leadership has repeatedly broken the law in its pursuit of the cross-border pilot program.

It has also shown a pattern of secrecy and deception.

No announcement was made about the department's intention to open the border on Sept. 6, 2007 until after the Teamsters found out and made it public. The FMCSA then stonewalled journalists for several days until it finally admitted its intentions.

Requests for information about how USDOT developed plans for the pilot program have been denied. Information about the participating companies has not been made public, nor have copies of equivalent Mexican motor carrier and motor vehicle laws.

What is perhaps more disturbing than the DOT's secrecy is its dishonesty. Secretary Peters has told Congress "There are no exceptions to safety regulations for trucks or drivers from Mexico." But that is demonstrably not true.

She has claimed, "Every truck and every driver are checked every time they cross the border." But as the Inspector General pointed out, the Secretary has no way of knowing that.

She has claimed, "The current safety record of the participating trucks in the demonstration program is better than that of the U.S. trucking fleet." But there are not enough participants in the program to determine whether that is true.

She has claimed that safety is at the heart of all that is done at USDOT, and that it is foremost in their minds as the cross-border trucking program is developed. But that is clearly false.

She has claimed that opening the borders to Mexico will benefit the U.S. consumer by lowering the cost of goods. But that is sheer casuistry.

Part of the cost of trucking goods goes to safety. Consumers pay more because trucking companies have to pay for truck inspections; drivers' physical exams, safety training, drug tests, living wages; anti-lock brakes, adequate lighting, safe tires.

What Secretary Peters is proposing is lowering the cost of goods by lowering safety standards—by opening our borders to Mexican trucks and Mexican drivers that

don't meet our safety standards. If she succeeds, and I hope and pray she does not, the result will be a lowering of safety standards for all U.S. trucks, all U.S. drivers and all U.S. motorists.

Of all the specious claims that Secretary Peters has made, the one I find most galling is her statement that opening the border to dangerous trucks from Mexico is "working significantly in favor of U.S. truckers."

I represent hundreds of thousands of U.S. truckers. The Teamsters' allies represent hundreds of thousands more. I assure you not one of them thinks this program works in favor of them.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. CALVIN L. SCOVEL III

Question 1. Please investigate the circumstances surrounding the withdrawal of Trinity Industries of Mexico from the cross-border program. Specifically, please report on the following:

a. Why was Trinity preapproved for participation in the cross-border pilot program when the company had a prior record of over 100 safety violations per truck, per year, for vehicles involved in traffic within the buffer zone?

b. When did the Department of Transportation first become aware of Trinity's record of safety violations?

c. Did the Department of Transportation request that Trinity withdraw from the pilot program?

i. If not, why not?

ii. If so, did DOT also revoke Trinity's operating authority within the buffer zone?

d. How does the withdrawal of one of the largest carriers in the pilot program, after being cited for numerous safety violations, affect the sampling validity of the pilot program?

i. Does DOT plan to factor Trinity's record of safety violations into the results of the pilot program?

ii. If not, is it not true that the withdrawal of a large carrier with a record of safety violations would inflate the perceived safety record of the remaining pilot program participants?

Question 2. Please review the information complied by the Owner-Operator Independent Drivers Association regarding the safety records of Mexican carriers approved for the pilot program, and determine whether there were carriers other than Trinity with a poor safety record that were nonetheless approved.

Answer. In response to the concern raised at the hearing over the safety of Mexico-domiciled carrier, Trinity Industries, Inc., we have revised our current audit work to include a more detailed review of that specific carrier. As Inspector General Scovel stated at the March 11, 2008 hearing we will address the questions posed by the Committee in our upcoming final report on demonstration project that is due 60 days after the project completion, as required under Section 6901 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007.

Specifically, we will review and comment on: (1) Trinity's safety history, (2) Trinity's withdrawal from the demonstration program, and (3) the impact of Trinity's withdrawal on the demonstration project. We will accomplish this work by reviewing safety performance data, such as inspection records, crash data, and safety ratings, as well as soliciting interviews from the appropriate sources to better understand the carrier's withdrawal from the program. We will consult with our statistician to understand what impact the carrier's withdrawal might have had on data sufficiency and the ability to yield statistically valid results.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. MARY E. PETERS

Question 1. Please explain in detail the FMCSA's standards and procedures for determining whether Mexican drivers involved in the cross-border pilot program are proficient in English. As part of your explanation, provide answers to the following:

a. Provide copies of any and all written guidelines or instructions given to FMCSA inspectors regarding English proficiency tests for Mexican drivers in the cross-border pilot program.

b. Provide a monthly tally of the numbers of drivers tested for English proficiency since the pilot program began, and the pass/fail ratio for each month.

c. Explain in detail why FMCSA provided guidance to its inspectors that in the test involving recognition of road signs, it would be acceptable for drivers to respond in a language other than English.

d. Identify any other aspect of the English proficiency test wherein it is acceptable for drivers to respond in a language other than English.

Answer. 49 CFR 391.11(b)(2) provides a person shall not drive a commercial motor vehicle in the United States unless that person can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.

On July 20, 2007, FMCSA issued a policy memorandum providing guidance to FMCSA and state and local level enforcement personnel conducting North American Standard Driver/Vehicle Inspections to determine whether drivers are able to communicate sufficiently to understand and respond to official inquiries and directions in English.

The policy guidance required a determination of a driver's ability to communicate in English sufficiently to understand and respond to official inquiries and directions made by the commercial motor vehicle (CMV) inspector on the basis of a driver interview conducted by the inspector during the driver/vehicle inspection. The interview must be conducted in English.

On February 1, 2008, FMCSA issued a supplement to the English language proficiency policy incorporating an assessment of the driver's ability to understand common United States highway traffic signs. Under this policy, an enforcement officer will conduct an assessment by randomly selecting four signs from a list of signs and asking the driver to explain the meaning of three of the four signs. The driver is allowed to explain the meaning in any language provided the enforcement officer can understand the language. This assessment, and indeed the remainder of the inspection, may be conducted in a language other than English because: (1) the driver's English proficiency has already been sufficiently demonstrated; and (2) it allows the remainder of the inspection to be conducted in the most efficient manner possible.

In summary, the English language proficiency policy contains two distinct assessments; the ability to speak English, and the ability to understand highway traffic signs. The assessment of the driver's ability to speak English is conducted first. If the driver participating in the border demonstration project is unable to demonstrate an ability to speak English, the driver is placed out-of-service and not allowed to operate in the U.S. In this case, no assessment of the driver's ability to understand common highway traffic signs is conducted. The assessment of the driver's ability to understand common highway traffic signs is only conducted if the driver has successfully demonstrated an ability to speak English.

Attachments:

1. Policy memorandum dated July 20, 2007.

2. Policy attachment dated February 1, 2008.

3. Table showing monthly totals of drivers tested for English language proficiency and the number of violations (fail) of 49 CFR 391.11(b)(2).

Question 2. You testified at an oversight hearing of the Commerce Committee on February 28. In answer to a question about the cross-border program, you stated that "we are not implementing a program. We are not establishing a program. We are continuing a program that was established prior."

a. Does that mean that DOT is claiming that the cross-border pilot program was both "established" *and* "implemented" prior to the passage of the Omnibus Appropriations Act?

b. If so, does that mean that it was DOT's intention all along to continue with the pilot program even if the omnibus language had contained the words "establish" and "implement"?

Answer. The Department does not claim that it both "established" and fully "implemented" the cross-border demonstration program prior to the enactment of the 2008 Omnibus Appropriations Act. The cross-border demonstration program was established in September 2007—well before enactment of the current Appropriations Act on December 26, 2007. The Department's implementation of the cross-border

demonstration program is ongoing and our implementation actions and activities are not prohibited by the appropriations provision that precludes the use of funds "to establish" a cross-border demonstration program. Consistent with the Appropriations Act prohibition in section 136, the Department's Federal Motor Carrier Safety Administration (FMCSA) has not established any new cross-border demonstration programs with Mexico and, in compliance with section 136, will not do so.

In answer to the particular question whether it was the Department's intention to continue with the demonstration project even if the appropriations language had contained the words "establish" and "implement," as did section 410 of H.R. 3074, as passed by the House of Representatives on July 24, 2007, the Department would have abided by the plain meaning of the legislative language and would not have continued to implement the previously established cross-border demonstration project. It is our position that we are fully complying with sections 135 and 136 of the 2008 Omnibus Appropriations Act.

Question 3. You have indicated that the Department of Transportation may extend the current cross-border pilot program into FY 2009. If Congress were to once again move to cut off funds for the ongoing pilot program, is there any statutory language that the Department of Transportation would be willing to honor?

a. If so, please suggest specific language that the Department would feel bound to respect.

b. If not, please explain whether you believe that the U.S. Congress does not have the Constitutional authority to cut off funds for a specific program of the Department of Transportation.

Answer. The Department certainly recognizes the Constitutional power of the Congress to appropriate funds and prescribe the conditions governing the use of Federal funds. As I acknowledge in my response to the previous question, the future enactment of an appropriations provision barring the Department's use of appropriated funds to "establish or implement" or "implement" the cross-border demonstration project would preclude the Agency from obligating funds for the project. We also note that Congressional appropriations language frequently bars agencies from expending funds for particular programs and activities. For example, a provision in the same title of the 2008 Omnibus Appropriations Act in which the section limiting the use of funds "to establish" a cross-border demonstration project appears prohibits the use of funds to either "establish or implement a program under which Essential Air Service communities are required to assume subsidy costs commonly referred to as the EAS local participation program." (section 103, division K, title I, Pub. L. 110–61). Clearly, when Congress seeks to prohibit the use of funds to either establish or implement a program or project, it has enacted appropriate legislative language to accomplish this result.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARK PRYOR TO HON. MARY E. PETERS

Question 1. What steps has Department of Transportation taken to develop programs to meet the requirements of Section 703 of the Port Security Act (Public Law 109–347) signed into law in October 2006? Will the Department meet these safety requirements by the end of April?

Answer. Section 703, Trucking Security, of the Security and Accountability For Every Port Act of 2006 (SAFE Port Act), requires the Federal Motor Carrier Safety Administration (FMCSA) to implement requirements from two U.S. Department of Transportation, Office of Inspector General (OIG) reports:

1. June 4, 2004 Memorandum: Need to Establish a Legal Presence Requirement for Obtaining a Commercial Driver's License (Control No. 2004–054).

- The report recommended that FMCSA establish a "legal presence" requirement for obtaining a CDL.
- The report provides that all CDL applicants should demonstrate either citizenship or lawful permanent residence in the U.S. before a State may issue a CDL.

2. February 7, 2006 Memorandum: Report on Federal Motor Carrier Safety Administration Oversight of Commercial Driver's License Program (Report Number MH–2006–037).

- The report contains three broad recommendations to detect and prevent fraudulent testing and licensing activity in the CDL program:

  a. Direct the States to report on the final disposition of all suspect drivers identified by the States. These disposition reports should emphasize, but

not necessarily be limited to, instances where there is specific or direct evidence that the driver participated in a fraudulent activity to obtain the CDL.

b. Determine that State CDL programs are out of compliance, under Federal regulations, if the State fails to impose adequate internal controls to prevent fraud or fails to take or propose necessary corrective action.

c. Impose sanctions, under Federal regulations, against those States that fail to establish adequate fraud control measures for their CDL programs.

The FMCSA is addressing the OIG and Port Security Act requirements in an ongoing Notice of Proposed Rulemaking (NPRM) titled, "The Commercial Driver's License Testing and Commercial Learner's Permit Standards." The NPRM was published on April 9, 2008.

Question 2. Are Mexican carriers required to register with the IRP and pay apportioned registration fees to the states as our U.S. carriers pay?

Answer. Mexican carriers are required to comply with all U.S. vehicle registration requirements. They have the option to purchase State trip permits or pay full registration fees in each U.S. and Canadian jurisdiction just as U.S. and Canada-domiciled motor carriers do. If they operate in more than one State, they will be able to pay the registration fees through the International Registration Plan (IRP) in one of the four southern Border States. These States are acting as "host" States for all Mexico-domiciled motor carriers for IRP purposes and are prepared to register them as they receive operating authority. If they operate in only one State, they will be required to register their vehicles with and pay the vehicle registration fee to the State in which they operate.

FMCSA has provided funding to the four southern Border States to assist them in preparing to register Mexico-domiciled motor carriers.

FMCSA routinely provides information on Mexico-domiciled motor carriers participating in the demonstration project to the four southern Border States and to IRP, Inc.

Fees collected by the host States will be distributed, in accordance with IRP bylaws, to all other IRP member States, including Arkansas, in which the motor carrier operates.

Question 3. How should Arkansas or other states for that matter, collect taxes that are unique to their state? Will the USDOT provide to the states the names of all Mexican carriers, their mileage through each state, their addresses, and will non-payment of a state tax constitute a reason to expel a Mexican carrier from U.S. markets?

Answer. States collect taxes from Mexico-domiciled motor carriers in the same manner as are taxes collected from U.S. or Canadian motor carriers operating in the State. Arkansas imposes an ad valorem tax on motor carriers with authority to operate in the State. Enforcement is done at the roadside. If a motor carrier does not pay the tax, any of its vehicles stopped for routine inspection and weighing are not allowed to continue until the tax is paid.

The U.S. Department of Transportation routinely provides information on the Mexico-domiciled motor carriers participating in the border demonstration project to Arkansas and other States through IRP, Inc. Additionally, the information is published in the *Federal Register* and available on the Internet at *http://www.fmcsa.dot.gov/cross-border/cross-border-carriers.htm.* IRP, Inc. will provide States information regarding carriers registered to travel in each State in accordance with the IRP, Inc by-laws.

Question 4. In October 2006, a national safety organization filed a Freedom of Information Act (FOIA) request for all records relevant to DOT preparing a pilot program or demonstration project to allow long-haul Mexican truck operations. The DOT granted the request. Yet, the DOT has made no records available for inspection after an entire year and a half. Where is DOT in providing the documents requested?

Answer. In October 2006, the Advocates for Highway and Auto Safety (AHAS) requested pursuant to the Freedom of Information Act (FOIA) the following:

- All records regarding any and all FMCSA activities to formulate, develop, evaluate, implement, or otherwise consider any effort, plan, initiative, pilot program or other program intended to evaluate any Mexican-domiciled motor carriers that would be permitted by FMCSA to operate beyond the current U.S. municipalities and commercial zones on the U.S.-Mexico border.
- All records that discuss, evaluate, consider or refer to how such an effort, plan, initiative, pilot program or other program for evaluating any Mexico-domiciled

motor carriers operating beyond the current U.S. municipalities and commercial zones on the U.S.-Mexico border complies with the funding restriction of Section 350(a) of the Fiscal Year 2002 U.S. Department of Transportation and Related Agencies Appropriations Act, Pub. L. 107–87 (Dec. 18, 2001).

- All records that consider, discuss, evaluate, or refer to the specific policy considerations, decisions, and actions by the FMCSA and the U.S. Department of Transportation for how any such pilot program or other program, plan, or initiative for evaluating some Mexico-domiciled motor carriers operating beyond the current U.S. municipalities and commercial zones on the U.S.-Mexico border complies with each specific requirement set forth in sections 350(a) and (b) of the Fiscal Year 2002 U.S. Department of Transportation and Related Agencies Appropriations Act cited above.

In responding to this complex FOIA request, FMCSA coordinated with over 20 offices and divisions, including offices located in the field, that produced over 300,000 pages as potentially responsive for consideration and processing by the FOIA office. This FOIA response set a new precedent for FMCSA since the average FOIA response generally consists of a few dozen to a few hundred documents.

Due to the small size of the FOIA Office and the large number of documents involved with this request, the FMCSA FOIA Office procured a contractor to develop a system to assist FMCSA in organizing the materials in order to methodically review each document. As a result of the system developed, currently, FMCSA has determined that of the initially identified 300,000 pages, over 80,000 pages appear to be responsive to the AHAS FOIA request. FMCSA continues to process these pages and plans to begin releasing responsive records as quickly as possible.

Since October 2006, in addition to the AHAS FOIA request, FMCSA has received 21 FOIA requests for information or pages that relate to Mexico-domiciled motor carriers operating beyond U.S. commercial zones. FMCSA has answered, released pages or provided information for 20 of the 21 requests; however, none of these requests have involved a significant number of pages, as with the AHAS request.

ATTACHMENT 1

Memorandum

U.S. Department Of Transportation
Federal Motor Carrier Safety Administration

July 12, 2007

MC–ECE–0026–06
Subject: *Action:* Requirements for Inspection of Mexico-domiciled Carriers Operating under the Cross-Border Demonstration Project
From: William Quade
Acting Associate Administrator for Enforcement and Program Delivery
To: Assistant Administrator and Chief Safety Officer
Associate Administrator for Field Operations
MC–E Office Directors/Division Chiefs
Office of Chief Counsel, Enforcement and Litigation
Field Administrators/Service Center Directors
Division Administrators/State Director
National Enforcement Team
National Training Center
Reply to Attn. of: MC–ECE

Purpose

This memorandum provides guidance to the Federal Motor Carrier Safety Administration (FMCSA) and State enforcement personnel to: (1) Ensure that every commercial motor vehicle (CMV) operated by Mexico-domiciled motor carriers granted provisional operating authority for transportation beyond United States municipalities and commercial zones on the United States-Mexico border[1] is inspected upon each entry into the United States; and (2) Enforce the regulatory requirement that every Mexico-domiciled long-haul CMV display a current Commercial Vehicle Safety Alliance (CVSA) inspection decal while operating in the United States.

Background

Section 350(a)(5) of the Fiscal Year 2002 U.S. Department of Transportation (DOT) Appropriations Act directs FMCSA to require all long-haul Mexico-domiciled

[1] These motor carriers are commonly known as "long-haul" carriers.

CMVs to display a current CVSA inspection decal when operating in the United States until the motor carrier operating the CMV has held permanent operating authority from FMCSA for at least 3 consecutive years.

On March 19, 2002, FMCSA published two interim final rules necessary for implementation of the North American Free Trade Agreement: 49 CFR Part 365—Application by Certain Mexico-Domiciled Motor Carriers to Operate Beyond United States Municipalities and Commercial Zones on the United States-Mexico Border; and 49 CFR Part 385—Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States. Both rules impose inspection and CVSA decal requirements on Mexico-domiciled, long-haul motor carriers.

Under 49 CFR section 385.103(a), each Mexico-domiciled, long-haul motor carrier operating in the United States will be subject to an oversight program to monitor its compliance with applicable Federal Motor Carrier Safety Regulations (FMCSRs), Federal Motor Vehicle Safety Standards, and Hazardous Materials Regulations. It requires that each Mexico-domiciled carrier granted *provisional operating authority* under part 365 have on every CMV it operates in the United States a current decal attesting to a satisfactory inspection by a certified inspector.

Section 350(a)(5) of the FY 2002 Appropriations Act requires all Mexico-domiciled commercial vehicles seeking authority to operate beyond the border commercial zones to pass a CVSA Level I inspection and be issued a decal to that effect, and 49 CFR 385.103(c) requires such vehicles to display a currently-valid CVSA decal while operating in the United States. Taken together, these provisions implicitly authorize FMCSA and its State partners to place a Mexico-domiciled vehicle out-of-service (OOS) for failure to display the required CVSA decal. Any other conclusion would prevent Federal and State inspectors from ensuring that Mexico-domiciled vehicles remain continuously in compliance with all applicable safety standards. A number of inspection and OOS scenarios are described below.

Operating Authority

There are two types of Mexico-domiciled motor carrier authority.

- For operations within the United States municipalities and commercial zones, a Mexico-domiciled motor carrier may obtain a Certificate of Registration.
- For operations beyond the United States municipalities and commercial zones, a Mexico-domiciled motor carrier may obtain Operating Authority.

A Mexico-domiciled motor carrier may not hold both types of authority concurrently. Therefore, when a Mexico-domiciled motor carrier is issued operating authority to operate beyond the United States municipalities and commercial zones, each CMV operated in the United States must display a current CVSA inspection decal (including those that continue to operate exclusively in the commercial zones).

USDOT Number Identification

When FMCSA grants operating authority to a Mexico-domiciled motor carrier, it is assigned a distinctive USDOT number. This USDOT number includes a suffix to identify the type of authority the motor carrier has been issued.

- X—Motor carriers authorized to operate beyond the United States municipalities and commercial zones will be assigned a USDOT number that ends with the letter X.
- Z—Motor carriers authorized to operate within the United States municipalities and commercial zones will be assigned a USDOT number that ends with the letter Z.

These motor carriers are subject to the marking requirements in 49 CFR section 390.21, and should be cited accordingly if the suffix is not included in the vehicle markings. Enforcement actions for violations of section 390.21 are recommended.

Commercial Driver's License Requirement

Every Mexico-domiciled CMV (as defined in 49 CFR section 383.5) driver who is subject to commercial driver's license requirements in 49 CFR Part 383 will undergo a license verification check upon entry into the United States, in accordance with procedures outlined within the Licencia Federal enforcement policy.[2]

[2] See *Mexican Licencia Federal Enforcement Policy* dated October 24, 2001 and *Mexican Licencia Federal de Conductor Enforcement Policy Clarification* dated November 25, 2006.

English Language Proficiency Requirement

Every Mexico-domiciled CMV (as defined in 49 CFR section 390.5) driver will undergo an assessment to determine whether the driver meets the requirements of 49 CFR section 391.11(b)(2). Guidance for performing the English language proficiency assessment will be outlined in the forthcoming policy memorandum titled: *Action:* Placing Drivers Out of Service for Violating 49 CFR Section 391.11(b)(2)—English Language Proficiency (MC–ECE–0005–07).

Policy

1. Inspection Upon Entering the United States

The FMCSA Division Administrators (DAs) are responsible for ensuring every Mexico-domiciled CMV entering the United States required to display a USDOT number ending in "X" is subject to a CVSA Inspection Decal Compliance Check. During this compliance check, the inspector must verify that the power unit and trailer (if applicable) display a current CVSA inspection decal. In addition, the inspector will ensure the driver possesses a valid Licencia Federal de Conductor and meets the requirements of section 391.11(b)(2).

This effort will require coordination between the DAs, State agencies and Customs and Border Protection[3] performing operations at the same ports of entry. Any of these agencies may perform the screening of a vehicle to identify CMVs required to display a USDOT number ending in "X." However, the DAs are ultimately responsible for ensuring every vehicle required to display a USDOT number ending in "X" entering the United States is subject to a CVSA Inspection Decal Compliance Check, and its driver is subject to a driver license verification check and an English language proficiency assessment. Those vehicles not displaying a current CVSA inspection decal must be inspected and a CVSA inspection decal issued to those that pass before they are allowed to proceed.

The inspector (Federal or State) must obtain and record the information on the CVSA Inspection Decal Compliance Check record (see attachment), which will be used for reporting purposes. Each week, the inspector must submit the compliance check records via e-mail as a Microsoft Word or scanned document, to the DA of their State, or his/her designee. The DAs, or their designees, will transfer the information from the compliance check records into the Excel spreadsheet template provided. The Excel spreadsheet must be sent weekly via e-mail to the North American Borders Division Chief, or his or her designee.

Discovery of an "X" motor vehicle without a CVSA inspection decal at the Southern Border or in the United States beyond the Southern Border Ports of Entry.

The following guidance and procedures will ensure that all Mexico-domiciled, long-haul CMVs are inspected and display a current CVSA inspection decal. If a CMV does not display a current CVSA inspection decal the inspector should follow the inspection and enforcement guidance below:

Scenario 1

- Inspection of a CMV Not Displaying a Current CVSA Inspection Decal at a Southern Border Port of Entry.
  - Conduct a Level I inspection and refer to the enforcement guidance below.

Scenario 2

- Inspection of a CMV Not Displaying a Current CVSA Inspection Decal operating in the United States beyond the Southern Border Ports of Entry.
  - Conduct a Level I inspection and place the vehicle out-of-service (OOS) for failing to display a current CVSA inspection decal as required.[4]
  - If one or more critical vehicle inspection items[5] are discovered, record the violation of failing to display a current CVSA decal as required. also record the critical vehicle inspection item(s) and any other vehicle defect discovered. Affix an OOS sticker on the appropriate vehicle(s), inform the driver of the OOS defect(s).

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[3] Customs and Border Protection and FMCSA have committed to coordination of screening and inspection of Mexico-domiciled CMV and drivers entering the United States as part of the Demonstration Project.

[4] The CVSA Executive Committee has approved this out-of-service requirement for inclusion in the North American Standard Administrative Out-of-Service Criteria.

[5] Critical Vehicle Inspection Items are defined within the North American Standard Truck Inspection Procedures.

- If no critical vehicle inspection items are discovered, record the OOS violation of failing to display a current CVSA inspection decal as required on the ASPEN inspection report using the violation citation and description below. Remove the OOS sticker, issue a CVSA inspection decal and annotate in the ASPEN software the verification of the OOS violation repair.
- Refer to the enforcement guidance below.

- Violation Cites for Not Displaying a Current CVSA Inspection Decal
  - 49 CFR section 390.3(e)(1)/385.103(c)—Failing to comply with all applicable regulations contained in 49 CFR Parts 350–399/Failing to display a current CVSA decal as required.

2. Enforcement guidance for vehicles not displaying a current CVSA Inspection Decal

- Record the violation of failing to display a current CVSA decal as required and any other vehicle defect(s) discovered. Affix an OOS sticker on the appropriate vehicle(s).
- If the inspector who performed the initial inspection is available for re-inspection of the vehicle(s), verify that the defect(s) have been repaired, annotate in the ASPEN software the verification of the repairs and issue a CVSA inspection decal. The vehicle(s) may now be allowed to proceed out of the inspection area.
- If the same inspector is not available, the subsequent inspector must complete a Level I inspection, note that the previous OOS item(s) was corrected, annotate in the ASPEN software verification of the repair and issued a CVSA inspection decal. The vehicle(s) may now be allowed to proceed out of the inspection area.

Note: The Secretariat of Communications and Transportation Mexico and the U.S. Department of Transportation committed to the prompt correction of readily repairable OOS defects on otherwise properly functioning and compliant vehicles. Therefore, it is the obligation of the DAs to ensure timely re-inspection of Mexico-domiciled CMVs placed OOS, whether the re-inspection is performed by a State or Federal inspector.

- Enforcement Actions for Not Displaying a Current CVSA Inspection Decal
  - Enforcement actions should be initiated when a CMV is discovered to be operating in the United States beyond the Southern Border Ports of Entry with the following exception:
    - Trailers picked up within the United States and transported to Mexico.

State enforcement personnel should pursue appropriate State enforcement action for the OOS violation. If the jurisdiction does not have the authority then initiate Federal enforcement action by obtaining the proper documents and forward them to the FMCSA Division office for processing.

Implementation Date

This memorandum is effective immediately.

If you have any questions or need additional information, please contact the Enforcement and Compliance Division at (202) 366–9699.

ATTACHMENT

CVSA Inspection Decal Compliance Check Record

DOT #				
Date:				
Time:				
Inspection Location:				
Trip Origin:				
Trip Destination:				
Drivers License Number	Drivers License Check Performed (Circle One)			
(1)	Yes or No			
(2)	Yes or No			
English Proficiency Assessment Performed	Yes or No			
CVSA Decal Number	Month Decal Issued			
(1)	(1)			
(2)	(2)			
Level of Inspection (Circle One)	None	I	II	III
NOTES:				

CVSA Inspection Decal Compliance Check Record

DOT #				
Date:				
Time:				
Inspection Location:				
Trip Origin:				
Trip Destination:				
Drivers License Number	Drivers License Check Performed (Circle One)			
(1)	Yes or No			
(2)	Yes or No			
English Proficiency Assessment Performed	Yes or No			
CVSA Decal Number	Month Decal Issued			
(1)	(1)			
(2)	(2)			
Level of Inspection (Circle One)	None	I	II	III
NOTES:				

CVSA Inspection Decal Compliance Check Record

DOT #				
Date:				
Time:				
Inspection Location:				
Trip Origin:				
Trip Destination:				
Drivers License Number	Drivers License Check Performed (Circle One)			
(1)	Yes or No			
(2)	Yes or No			
English Proficiency Assessment Performed	Yes or No			
CVSA Decal Number	Month Decal Issued			
(1)	(1)			
(2)	(2)			
Level of Inspection (Circle One)	None	I	II	III
NOTES:				

CVSA Inspection Decal Compliance Check Record

DOT #				
Date:				
Time:				
Inspection Location:				
Trip Origin:				
Trip Destination:				
Drivers License Number	Drivers License Check Performed (Circle One)			
(1)	Yes or No			
(2)	Yes or No			
English Proficiency Assessment Performed	Yes or No			
CVSA Decal Number	Month Decal Issued			
(1)	(1)			
(2)	(2)			
Level of Inspection (Circle One)	None	I	II	III
NOTES:				

ATTACHMENT 2

Memorandum

U.S. Department of Transportation
Federal Motor Carrier Safety Administration

February 1, 2008

Subject: *Action:* 49 CFR Section 391.11(b)(2) English Language Proficiency
Reply to Attn. of: MC–ESB
From: William A. Quade
Associate Administrator for Enforcement and Program Delivery
To: Assistant Administrator and Chief Safety Officer
Associate Administrator for Field Operations
MC–E Office Directors/Division Chiefs
Office of Chief Counsel, Enforcement and Litigation
Field Administrators/Service Center Directors
Division Administrators/State Director
National Enforcement Team
National Training Center

Purpose

This policy memorandum supplements the previously issued policy concerning enforcement of Section 391.11(b)(2) regarding English language proficiency. This policy incorporates an assessment of a driver's ability to understand common United States (U.S.) highway traffic signs.

Background

On July 20, 2007, the Acting Associate Administrator for Enforcement and Program Delivery issued a policy memorandum titled, "Placing Drivers Out of Service for Violating 49 CFR Section 391.11(b)(2) English Language Proficiency," Policy Number MC–ECE–0005–007. The policy provided guidance and an assessment tool to confirm a driver's ability to communicate in English sufficiently to understand and respond to official inquiries and directions. It did not confirm a driver's understanding of U.S. highway signs.

Policy

A driver's ability to understand U.S. highway traffic signs will be confirmed following the driver interview.

Determining a Driver's Ability to Understand Highway Traffic Signs

Inspectors should take the following steps to assess the driver's ability to understand U.S. highway traffic signs:

1. Explain to the driver that he or she must be able to understand the meaning of U.S. highway signs.
2. The inspector will randomly select four signs from the attached list of signs.
3. The inspector will ask the driver to explain the meaning of the four selected highway signs. (Note: The driver's explanation may be in any language, provided the inspector is able to understand the driver's explanation.)
4. Failure to satisfactorily explain the meaning of at least three of the four signs will result in a violation of section 391.11(b)(2).

When an inspector determines a driver is not able to understand U.S. highway traffic signs:

The inspector will be required to cite the violation of 391.11(b)(2), and *manually amend* the violation description as follows:

- Select the base violation 391.11(b)(2);
- Amend the violation description to read: "Driver must be able to understand highway traffic signs and signals in English language"; and
- *DO NOT* activate the Out-of-Service designation.

The ASPEN inspection software will be modified in March 2008 and updated with the following citation: *391.11(b)(2)S—Driver must be able to understand highway traffic signs and signals in the English language.* Until this violation is programmed in ASPEN, inspectors should follow the guidance above.

Applicability

This policy applies to all interstate drivers operating in the U.S.

Effective Date

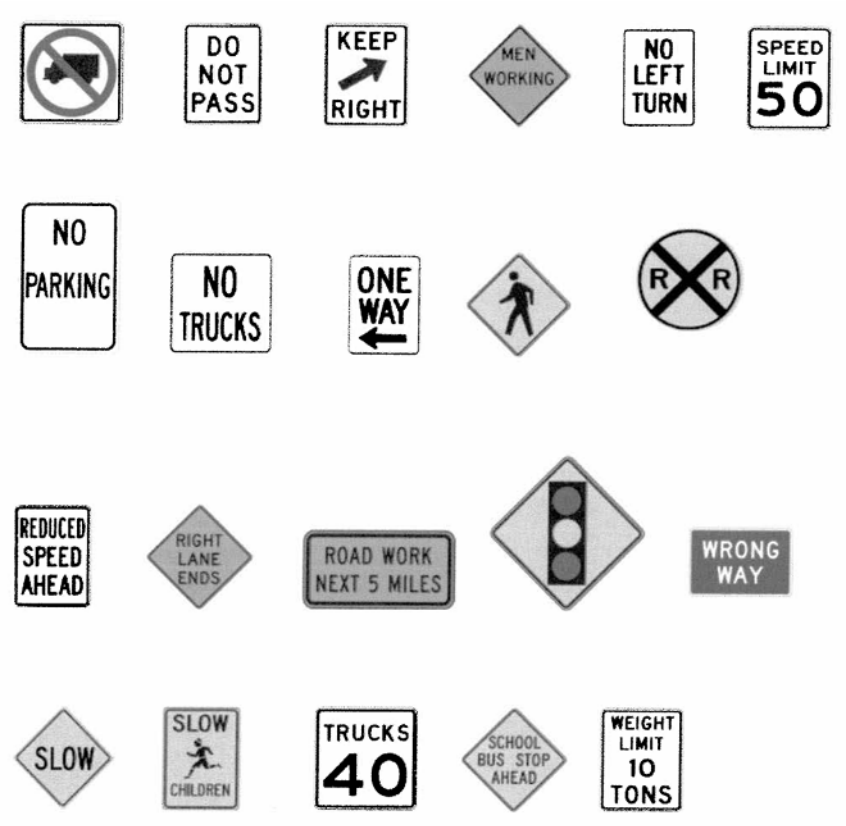
All Federal inspectors will begin implementing this policy immediately for all commercial vehicle drivers entering the U.S. from Mexico. Additionally, the policy will be implemented for all other commercial vehicle drivers operating in the U.S. when the inspector determines the driver's ability to understand U.S. highway traffic signs may be limited.

State inspectors should also be encouraged to implement this policy. However, the decision to implement by State inspectors will be at the discretion of the State agency.

The Federal Motor Carrier Safety Administration is working with the Commercial Vehicle Safety Alliance to develop a comprehensive policy on 49 CFR 391.11(b)(2). Once developed, the policy will provide uniform enforcement by Federal and State inspectors.

If you have any questions or comments regarding this document, please contact the Enforcement and Compliance Division at 202–366–9699.

ATTACHMENT



ATTACHMENT 3

Comparison Report, Total and Commercial Zone Inspections, Violations

Number of inspections conducted in the border commercial zone by month from September 2007 to present.

Total inspections	Total inspections in commercial zone	Month	Year
292,165	33,957	Sep.	2007
300,614	35,762	Oct.	2007
262,365	34,942	Nov.	2007
237,867	31,472	Dec.	2007
279,611	35,634	Jan.	2008
260,748	35,851	Feb.	2008
197,026	23,367	Mar.	2008
1,830,396	230,985		

Number of violations noted on the above inspection reports for 391.11(b)(2) by month. Distinguish between all inspections total and commercial zone.

Total violations	Total violations in commercial zone	Month	Year
4,187	3,587	Sep.	2007
5,325	4,693	Oct.	2007
4,855	4,352	Nov.	2007
4,130	3,712	Dec.	2007
5,205	4,755	Jan.	2008
6,188	5,791	Feb.	2008
4,413	4,134	Mar.	2008
34,303	31,024		

Number of Out-of-Service (OOS) violations noted on above inspection reports for 391.11(b)(2) by month. Distinguish between all inspections total and commercial zone inspections total.

Total OOS Violations	Total OOS violations in commercial zone	Month	Year
452	188	Sep.	2007
526	217	Oct.	2007
431	178	Nov.	2007
330	145	Dec.	2007
331	130	Jan.	2008
409	187	Feb.	2008
237	84	Mar.	2008
2,716	1,129		

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BYRON L. DORGAN TO PAUL D. CULLEN, SR.

Question. Please submit for the record the results of the research conducted by compiled by the Owner-Operator Independent Drivers Association on Mexican carriers that were approved for the pilot program despite a poor safety record.

Answer. [Mr. Cullen's response is a series of three documents which are retained in Committee files.]

○