



# U.S. Senate Committee on Appropriations

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**U.S. Senate Appropriations Transportation,  
Housing and Urban Development, and Related Agencies Subcommittee  
Testimony of Joan Claybrook  
President, Public Citizen**

WASHINGTON, D.C. . The U.S. Senate Appropriations Transportation, Housing and Urban Development, and Related Agencies Subcommittee on Wednesday held a hearing to examine the proposed Fiscal 2008 budget for the department. As part of that hearing, the subcommittee heard testimony from Joan Claybrook, President of Public Citizen. Ms. Claybrook's prepared statement is below.

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## **I. Introduction.**

Good morning, I am Joan Claybrook, President of Public Citizen. I wish to commend the Subcommittee on Transportation, HUD, and Related Agencies for scheduling this hearing and continuing its careful oversight and scrutiny of the safety issues involved in opening the southern U.S. border to interstate truck commerce throughout the United States. I also very much appreciate the opportunity that you have provided me to list the reasons why the recently announced border ~~program~~ pilot program is an exceptionally unwise public safety policy. Because only one witness representing the views of highway and truck safety groups was asked to testify, I wish to state that all of the preeminent truck safety groups, including Advocates for Highway and Auto Safety (Advocates), Citizens for Reliable and Safe Highways (CRASH) and Parents Against Tired Truckers (P.A.T.T.) that have been at the forefront of federal and state legislative initiatives to prevent truck crash deaths and injuries support many of the views in my statement concerning opening the southern border under the guise of a pilot program.

Let me begin by stating for the record that the Federal Motor Carrier Safety Administration (FMCSA), the agency within the U.S. Department of Transportation (DOT), responsible for overseeing the motor carrier safety is just not up to the job. I have been involved in truck safety issues for over 30 years and worked with Democratic and Republican Members of Congress is helping to craft the legislation that created FMCSA in 1999. The agency has never met any of its safety goals even after weakening them repeatedly these past five years, has had nearly everyone of its safety regulations unanimously overturned by the courts, has ignored congressional direction to advance and improve safety, and completely ignores its statutory mandate to make safety its highest priority. For the record, I would like to submit articles from two leading

newspapers, the New York Times and the Dallas Morning News, reporting on serious and chronic problems with the agency's programs and policies that put trucking interests first and the safety of the American public last. I would also like to submit for the record a list of Congressional safety mandates FMCSA has and still ignores.

I believe one of the best responses to the Administration's announcement to open the southern border was contained in an Associated Press article published on February 23, 2007. National Transportation Safety Board member Debbie Hersman questioned how the U.S. could spare sending inspectors to Mexico when only a tiny percentage of the hundreds of thousands of U.S. truck companies are inspected every year. "They lack the inspectors to conduct safety reviews of at-risk domestic carriers," Hersman said. "That situation only gets worse if resources are diverted to the border."

At the outset, the recent announcement appears to be a calculated, cynical move intended to ensure that the border is open to all commercial traffic regardless of the implications for highway safety. It is no coincidence that the Secretary of Transportation announced a very limited pilot program that includes just 100 hand-picked Mexico-domiciled trucking companies and test period that will conclude in just 12 months. This select group of motor carriers most likely will not be representative of all Mexico-domiciled companies, vehicles and drivers that will be allowed across the border once the pilot program is completed and prematurely declared a "success". The abbreviated 12-month duration of the pilot program is shorter than any previously considered or authorized FMCSA pilot program and only one-third of the three-year maximum time limit allotted by Congress for such programs in current law. As a result, there is no possibility that this pilot program will achieve the goal of collecting sufficient safety data to allow for accurate and reliable analysis of the safety issues at stake. The pilot program will merely serve as a show-piece in order to permit the Secretary to proclaim victory and declare the entire southern border open to unfettered long-haul truck commerce before the end of 2008. In order to properly serve the public and protect safety we must avoid this "mission accomplished" mindset and deal realistically with the many safety issues that are yet to be resolved before the border is in fact ready to be opened to all commercial vehicles.

## **II. Summary of Recommended Actions.**

While it is clear that because of the enactment of the Murray/Shelby language in Section 350 of the Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 2002 (2002 DOT Appropriations Act), P.L. 107-87, has fostered long overdue changes and improvements, it does not mean that the border is ready to be opened. Permitting this pilot program to proceed before the border is actually ready to be opened could be disastrous. For that reason, this Committee once again needs to step in on behalf of the public.

I will briefly summarize the actions that still need to be taken to protect public safety at the border.

Do not allow the ruse of a pilot program to be used to open the border.

Ensure that all Section 350 requirements have been fully completed before any truck is permitted to cross the border, including:

- Security issues for hazmat operations have been satisfactorily resolved;
- Sufficient inspection resources are available at all designated border crossing points for verifying bus driver commercial licenses and CVSA decals;
- That alcohol and drug testing regimes are fully compliant;
- That all data requirements are fully compliant;
- Require that truck inspection facilities capable of requiring Level 1 inspections are in close proximity to each border crossing where trucks are allowed.

Require DOT to document that every state is enforcing state laws to issue out of service orders to foreign vehicles that do not have proper operating authority.

Provide that certification of compliance with U.S. safety standards is enforced for all commercial vehicles.

Ensure that DOT complies with Section 4007 governing the conduct of pilot programs.

Require NTSB investigations of fatal or injury producing crashes.

Require commercial vehicles entering the U.S. are equipped with electronic on-board recorders.

Increase the minimum level of insurance coverage required for Mexico-domiciled motor carriers engaging in commerce in the U.S.

Require DOT respond to outstanding FOIA requests in full with no withholding of any records.

### **III. Background: The Border Zone and NAFTA.**

Currently, Mexico-domiciled motor carriers operate mainly in a narrow strip called a commercial zone along the southern borders of the four southwestern states contiguous with Mexico. The border zones in California, Arizona, New Mexico and Texas vary in size between 3 and 20 miles inland from U.S. border. In the Bus Regulatory Reform Act of 1982, Pub. L. 97-261, Congress imposed a legislative moratorium on granting operating authority to both Mexican and Canadian motor carriers seeking to operate in the U.S. but provided for Presidential modification of the moratorium. Although the moratorium was lifted almost immediately for Canadian motor carriers, it remains in effect for Mexico-domiciled motor carriers restricting them to operating only within the confines of the border commercial zones.

In December 1992, Canada, Mexico and the U.S. ratified the North American Free Trade Agreement (NAFTA). NAFTA committed the governments to reducing trade barriers and promoting open, unfettered trade across all three countries, including free movement of commercial motor vehicles (CMV) transporting freight and passengers. NAFTA also sought to harmonize differing laws, policies, and regulations

governing major areas of trade although each country was permitted to maintain its regulations regarding health, safety and environmental protection. NAFTA was invoked immediately as the justification for eliminating the southern border operating restrictions on Mexico-domiciled motor carriers and allowing them unfettered access to the remainder of the U.S., as well as intercontinental access to Canada, as long as U.S. requirements for truck and bus safety design, CMV freight (including hazmat) and passenger operations, and driver qualifications were adhered to.

NAFTA provided for complete border opening to commercial traffic by December 18, 1995. However, on that same day, the President postponed implementation of NAFTA cross-border interstate trucking privileges for Mexico-domiciled motor carriers based on concerns both for highway safety and environmental issues involving diesel emissions. The U.S. DOT Secretary subsequently announced that Mexico-domiciled trucks would continue to have access only to the four southwestern states commercial zones until U.S. safety and security concerns were satisfactorily addressed.

Oversight investigations and reports conducted by U.S. government agencies in the 1990s painted a dismal picture both of Mexico-domiciled motor carrier safety and of the poor quality of preparation and level of readiness of U.S. federal and state enforcement officials to handle the potential number of Mexico-domiciled trucking and bus companies that might apply for operating authority to transport freight and passengers throughout the U.S. and into Canada. These and other concerns about CMV safety at the southern border prompted Congress to take action to respond to the shortage of resources and programs to provide for adequate inspection of Mexico-domiciled CMVs and oversee safety compliance with U.S. laws and regulations. The 1998 Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), Pub. L. 105-178, responded to the poor inspection effort at the U.S.-Mexico border by allowing up to 5 percent of Motor Carrier Safety Assistance Program (MCSAP) funds to be directed to border enforcement efforts, and by requiring the Secretary of Transportation to review the qualifications of foreign motor carriers seeking operating authority in the U.S.

Following enactment of TEA-21, however, studies continued to find violations by Mexico-domiciled motor carriers including widespread violations of registration, identification numbers, illegal operation beyond the commercial zones in the border states, and also showed multiple, serious safety violations such as no licenses, no medical certificates, no logbooks, and noncompliant safety equipment.

Nevertheless, in February 2001, the U.S. stated that it would comply with its NAFTA obligations and allow Mexico-domiciled motor carriers to operate beyond the commercial zones by January 2002. In clarifying the action the Secretary of Transportation stated that "every Mexican firm, vehicle and driver that seeks authority to operate in the U.S. at the border or beyond must meet the identical safety and operating standards that apply to U.S. and Canadian carriers." Testimony of Secretary of Transportation Norman Y. Mineta before the Senate Commerce, Science and Transportation Committee (July 18, 2001).

The concern in Congress over motor carrier safety at the southern border continued to mount as a result of oversight reports by the DOT Office of Inspector General (IG), the Government Accountability Office (GAO), along with independent assessments by national safety organizations, documenting the poor and often belated administrative response of the DOT to the growing number of Mexico-domiciled motor carriers seeking entry at the southern border. These oversight findings showed that the agency's plan for conducting a safety application and monitoring system was highly inadequate. Congressional concern resulted in passage of the Murray/Shelby Amendment, Section 350 of the 2002 DOT Appropriations Act. That provision, which was developed in this committee, imposed numerous highly specific safety requirements and processes that FMCSA had to comply with prior to permitting any Mexico-domiciled motor carrier to operate beyond the border zones. A litany of provisions and preconditions to the opening of the border that is, I dare say, well known to the members of this subcommittee, and that address many, but not all, of the safety concerns at the border.

That legislation also gave the DOT IG a major oversight role in verifying that certain of the preconditions to Mexican long-haul truck commerce were fulfilled. Carrying out that responsibility has involved a series of follow-up audit reports because, as of the date of the last such audit, January 2005, the IG could not verify that DOT had in all respects completed the full slate of requirements in Section 350. A further IG audit report is expected in a few weeks. Despite the importance of this action and the key role of the IG in the process, the decision to open the border was made by DOT shortly before the next IG report is to be submitted to Congress.

#### **IV. Section 350 Has Been Essential in Advancing Motor Carrier Safety.**

It is indeed fortunate that the circumstances of this precipitous decision to begin opening the border have been controlled by the foresight and wisdom of this Committee. The prudent action of the Senate Committee on Appropriations, which inserted Section 350 into the 2002 DOT Appropriations Act, resulted in detailed requirements for U.S. DOT compliance, including oversight and corroboration of key features of border safety preparedness by the DOT IG's office. Without that crucial legislative action, there would have been a very different outcome to the safety of cross-border truck and bus operations by Mexico-domiciled motor carriers.

The detailed requirements of Section 350 impose pre-conditions to opening the border and govern the verification of numerous safety requirements controlling the potential operation of long-haul commerce in the U.S. by Mexico-domiciled motor carriers. In addition, Section 350 also applies to the safety quality of the short-haul drayage operations confined to the southern commercial zones. There should be no doubt that, without the important safety controls of Section 350, the southern border would already have been opened without the safeguards called for in the legislation. Without Section 350, much more dangerous trucks and buses would have crossed into the U.S. and operated freely on all of our highways, and the losses of lives and the injuries inflicted by such a foolhardy decision would have mounted month by month in state after state.

By its very terms, Section 350 includes two types of benchmarks. First, all of the substantive provisions of section 350(a) must be completely fulfilled in all respects before the Secretary of Transportation can review or process an application by a Mexico-domiciled motor carrier for authority to operate beyond the U.S. commercial zones. Second, all substantive requirements of section 350(b) and (c) must be fully completed before a single vehicle (truck or bus) owned or leased by a Mexico-domiciled motor carrier is permitted to operate beyond the U.S. commercial zones. The terms of the statute are unequivocal and only the completion of all those pre-conditions will satisfy the legal requirements of Section 350.

I regard it as appalling that DOT rushed this decision and unveiled its pilot program without waiting several weeks for the release of the next DOT Inspector General (IG) cross-border audit report that will update the January 2005 report.

It is also a serious problem that DOT and FMCSA have not been forthcoming with information about this pilot program. Because such a program has been the subject of rumors for some time (according to DOT planning began in 2004), Advocates for Highway and Auto Safety filed a request with the agency for records pertinent to the pilot program under the Freedom of Information Act (FOIA). Although the law requires a release of records within 20 working days, no records have been released even though over four (4) months have elapsed since the FOIA request was filed on October 17, 2006. Again, it would appear to be no coincidence that Advocates' FOIA request has been stonewalled as DOT prepared in stealth to announce its pilot program.

The enlightened safety approach of Section 350, however, does not exhaust the important safety issues relevant to the opening of the border. Beyond the four corners of Section 350 there are a number of other serious, real-world concerns that must be addressed and that preempt any pilot program attempt to short circuit border safety.

## **V. Mexico-Domiciled Motor Carrier Safety Is Still Dangerously Deficient.**

As you know, the Secretary certified on November 20, 2002, that authorizing Mexico-domiciled motor carrier operations in the U.S. did not pose an unacceptable

safety risk. That certification certainly could not have been made with the facts then before the Secretary. At the time of the certification, the results of U.S. inspections and of the very few Compliance Reviews (CRs) that had been conducted portrayed a horrific record of poor safety compliance by Mexico-domiciled trucks and buses conducting operations in the southern commercial zones. Drivers from Mexico were regularly found without valid Mexican commercial driver licenses, a wide range of hazardous materials (hazmat) violations were constantly cited, Mexico-domiciled trucks and buses were crossing our southern border into the U.S. at illegal points of entry, and trucks and buses from Mexico had consistently high rates of equipment defects such as bad tires and inoperative brakes. This raises a concern regarding the sufficiency of the certification issued by the Secretary and whether it was intended to evade the Congressional intent behind Section 350 by sacrificing safety for expediency.

The current status of cross-border trucking operations by Mexico-domiciled carriers is still alarming. Drivers coming into the U.S. from Mexico still have high rates of violations. For example, the Federal Motor Carrier Safety Administration's (FMCSA) NAFTA Safety Stats on its Analysis and Information web site shows that for 2005, the latest year that figures are posted, 21.5 percent of Mexico-domiciled commercial motor vehicles were placed out of service (OOS) for vehicle defects. Of these, fully 17.50 percent were found to have their brakes out of adjustment. Bad brakes on trucks and buses from Mexico have been a chronic border safety problem for years.

Similarly, when drivers cross over into the U.S. driving trucks and buses from Mexico, over 15 percent do not even have any paper logbooks when they are asked for their records of duty status (RODS), and almost one in four drivers do not even have their own country's commercial driver license, the Licencia Federal de Conductor. In addition, one out of every 10 drivers from Mexico does not even have the proper license for the type of commercial motor vehicle they are driving. As for hazmat being hauled into the U.S., a very frightening aspect of cross-border trade for both safety and security concerns, nearly 22 percent of the vehicles transporting hazmat used prohibited placards in 2005 for identifying the nature of the dangerous cargo that was being hauled across the border, more than three times the rate for U.S. motor carriers hauling hazmat.

## **VI. FMCSA Has a Poor Record of Ensuring the Safety of All Truck and Bus Operations In the U.S., Including Mexico-Domiciled Motor Carriers In the Border Zone.**

On the basis of this ongoing, poor safety record of border-zone operations by Mexico-domiciled motor carriers, the U.S. DOT asks that we nevertheless suspend belief and good judgment and accept on faith that the trucking companies from Mexico hand-picked to participate in the so-called "pilot program" will be radically different in the safety of their operations and management. DOT has implied that it will maintain intensive oversight of the companies selected to conduct U.S. long-haul operations.

This claim starkly contrasts with the poor record of FMCSA oversight of domestic motor carrier operations and the current Mexico-domiciled commercial zone trucking operations. There were 14,000 active motor carriers domiciled in Mexico conducting operations in the U.S. in 2005. However, only 106 compliance reviews were conducted on Mexico-domiciled motor carriers that year, and that figure represents a decline from 236 in 2004 and 268 in 2003. The most intensive safety evaluation of a motor carrier, the CR, has slipped **by more than 60 percent in only two years**. The 2005 figure represents a comprehensive safety evaluation **of only three-quarters of one percent (0.75%)** of Mexico-domiciled motor carriers operating in the U.S. border zone. This is an even poorer oversight record than FMCSA's recently criticized failure by the members of the National Transportation Safety Board at a public hearing on February 21, 2007, of conducting severely inadequate numbers of compliance reviews for domestic carriers, only about 1.5 percent each year. Even at its height in 2003, the best year for the agency and its state partners in conducting compliance reviews on Mexico-domiciled motor carriers, **less than two percent were performed**.

This meager oversight performance by FMCSA does not augur well for placing any trust in DOT's assurances that the participants in the pilot program will be closely scrutinized for their safety performance. Even if they are, that closer scrutiny could come at the expense of even further declines in FMCSA's safety evaluation of border-zone-only Mexico-domiciled motor carriers. It has to be stressed that the agency has taken on new responsibilities in recent years that further dilutes its resources, such as performing Safety Audits on approximately 48,000 new entrant domestic motor carriers. So it is clear that FMCSA is overwhelmingly putting its faith in controlling the safety of border-zone-only Mexico-domiciled carriers with federal and state roadside inspections. The agency is doing almost nothing to evaluate the safety management controls, drivers, and equipment of these carriers operating in the southern commercial zones through the most intensive safety evaluation, the compliance reviews. And it never has.

The agency estimates that there were 4,575,887 crossings into the U.S. through the 24 recognized ports of entry by Mexico-domiciled motor carriers operating 41,101 power units (tractors) that engage in millions of trailer movements. But only 180,061 inspections on these carriers' tractors and trailers were performed in 2005. And those inspections resulted in 21.3 percent of the vehicles being placed out of service for non-compliance with the Federal Motor Carrier Safety Regulations. This exceptionally poor inspection record does not encourage an optimistic view that FMCSA will inspect vehicles operated by long-haul carriers participating in the pilot program.

None of the figures that I have cited from FMCSA's own data reassures us that DOT is on the job ensuring that Mexico-domiciled motor carrier safety is being dramatically improved. Yet, against this backdrop of poor safety performance and meager oversight efforts, DOT now wants to find a way to justify opening our borders not just to limited operations in a narrow swath of roads in the four southern border states, but to long-haul foreign commerce traveling throughout the U.S.

## **VII. Several Major Areas of Mexico-Domiciled Motor Carrier Safety and Oversight Remain Seriously Defective and Jeopardize Safety for Everyone.**

### **a. The States Are Not Stopping Border-Zone-Only Mexico-Domiciled Motor Carriers from Operating throughout the United States.**

Current information shows that the states still are not ready to deal with truck commerce coming from Mexico. Dozens of states are still not placing Mexico-domiciled trucks and buses OOS when they are found to be operating illegally beyond the southern commercial zones. While all states may now have in place the legal basis for placing Mexico-domiciled vehicles OOS that do not have operating authority, as required by Section 350(a), many states are not exercising that authority through enforcement actions. This undermines the safety goals Congress intended to achieve in passing Section 350.

Although FMCSA issued an interim final rule in August 2002 requiring state inspectors to place OOS any commercial vehicles operating without authority or carrying cargo or passengers beyond the scope of their authority, the fact is that about half the states are apparently not actually using their new authority to place Mexico-domiciled motor carrier trucks and buses OOS if they are found with illegal operating authority. 67 FR 55162 (Aug. 28, 2002). When the DOT IG issued the last audit of cross-border motor carrier safety, the report emphasized that the states were apparently not even placing border-zone-only trucks and buses from Mexico OOS when they were found to be operating beyond the commercial zones. Section 350 requires that measures are in place to ensure that effective enforcement actions can be taken against Mexican motor carriers. This includes taking action against Mexican carriers that do not have proper operating authority. *Follow-Up Audit of the Implementation of the North American Free Trade Agreement's (NAFTA) Cross Border Trucking Provisions – Federal Motor Carrier Safety Administration*, Report Number MH-2005-032, Office of the Inspector General, United States Department of Transportation, January 3, 2005.

We know this is true because FMCSA representatives have been very careful about how they characterize the states' new authority to place Mexico-domiciled motor carriers out of service. For example, in a October 3, 2006, written statement of William Quade, the Director of Safety Programs for the agency, FMCSA carefully states that every State has adopted this regulation and the Commercial Motor Vehicle Safety Alliance has made operating beyond the scope of operating authority a violation that results in a carrier being placed out-of-service if discovered during a roadside inspection. Similarly, Mr. Quade also states that since establishing this regulation, FMCSA has trained our employees and our State partners to identify carriers, regardless of where the carrier is from, who are operating beyond the scope of their operating authority. What is not stated, however, is whether and to what extent the states are actually putting illegal Mexico-domiciled motor carriers OOS.

FMCSA's Fiscal Year (FY) 2008 budget submission to this committee reveals the festering problem of the states failing to put illegal carriers OOS even though they all now have the authority to do so. The budget document discusses the agency's goals for the Performance and Registration Systems Management (PRISM) program. FMCSA states that for FY 2007, PRISM grants will ensure that 25 PRISM states enforce their legislative authority to suspend, deny, or revoke vehicle registrations based on Federal out-of-service orders. Budget Estimates Fiscal Year 2008, Federal Motor Carrier Safety Administration, at 3B-15. Similarly, the agency has a goal for FY2008 of 30 states to suspend, revoke, or deny vehicle registrations based on OOS orders. *Id.*

If many states are still not actually stopping domestic trucks and buses from operating that don't have valid registration, it is certain that many of those states are not actually placing foreign motor carriers OOS if they are found to be operating beyond the scope of their legal authority. The DOT IG in the latest, January 2005, published report on the southern border, *op. cit.*, pointed out that, despite confirming that all states were equipped with the authority to place carriers out of service that are found to be operating with invalid authority from FMCSA, only four of 14 states interviewed in 2004 by the staff of the DOT IG were found to be actually placing Mexico-domiciled trucks and buses OOS because of a determination of illegal operating authority. Over two years later, there seems to have been no improvement. It appears that FMCSA's FY2008 budget goals for stopping trucks and buses already sanctioned with OOS orders and lifting their registrations is a harbinger of ongoing, poor state enforcement practices for Mexico-domiciled motor carriers found without proper operating authority.

It should be apparent to the committee that Mexico-domiciled motor carriers are not being inspected often enough, they receive few CRs each year, the vehicles have high rates of crucial safety equipment defects such as brake misadjustment, their drivers often don't have either logbooks for hours of service compliance or their own national driver's license, and the states do not appear to be putting them out of service and preventing them from operating when they exceed their authority to operate beyond the border zone. It is against this backdrop of poor safety performance and poor federal and state oversight that DOT proposes to advance a pilot program to allow up to 100 Mexico-domiciled trucking to haul freight throughout the U.S. It is inconceivable that a similar pilot program would ever be proposed by the U.S. DOT to accommodate foreign airlines seeking to operate in this country if the same safety flaws, foibles and failings existed. There would be a deafening outcry in Congress and by the public if such an ill-advised and dangerous proposal were suggested by the Administration.

#### **b. Additional Safety Problems with Mexico-Domiciled Motor Carriers.**

As the committee is well aware, Section 350 set forth numerous requirements for fulfillment by the U.S. DOT and for oversight and verification of completion by the Inspector General. The January 2005 IG report listed several major items that were unfinished or inadequate and still needed to be addressed by FMCSA. First and foremost, our motor carrier safety personnel from FMCSA must be allowed to conduct

on-site Safety Audits at each Mexico-domiciled motor carrier's place of business to assess its management controls, equipment safety, and driver qualifications. Next, Section 350 requires that a full CR must be performed before a carrier may be given permanent operating authority for long-haul commerce in the U.S. To the best of our knowledge, no Safety Audits yet have been performed and, of course, no CRs have been conducted so that Mexico-domiciled trucks are determined to be safe enough to have permanent registration.

I am not going to recite every Section 350 requirement for the committee this morning. However, I want to emphasize that there are serious concerns about several items in the long roster of Section 350 requirements and allied issues that must be resolved before the border can be opened to even limited long-haul commerce from Mexico.

*Information about Convictions and License Suspensions and Revocations of Drivers from Mexico is Unreliable*

A major issue of concern is the quality of the data transmitted to FMCSA by the states concerning driver records. In the January 2005 audit report on Mexico-domiciled motor carriers, the IG pointed out that data from the states were lacking on driver convictions and license suspensions of truck and bus operators from Mexico.

*Serious Questions on Drug and Alcohol Testing and Medical Examinations/Physical Fitness of Drivers from Mexico Are Not Resolved*

Issues regarding drug and alcohol testing and the physical fitness and medical standards applied to truck and bus drivers in Mexico as a condition of commercial driver licensure also remain active concerns. It appears as though the issue of drug and alcohol testing has not been resolved.

Section 350 requires documented proof that all cross-border foreign drivers are complying with all of the U.S. commercial driver requirements for drug and alcohol testing. This is particularly important for Licencia Federal de Conductor (LFC) drivers who are providing samples in Mexico and then sending them to U.S. labs for evaluation. The Inspector General stated in the January 2005 report that collection facilities and procedures in Mexico are not certified. This means that the security of the samples is unknown. Let me emphasize again to the committee that this is a major safety concern for all cross-border operations by Mexico-domiciled motor carriers, not just those few companies that are carefully selected to participate in a "pilot program." Even if the select group of trucking companies from Mexico have all drivers tested at approved U.S. drug and alcohol testing facilities, that does not signify completion of the pre-conditions of Section 350 or guarantee that all drivers crossing the border after the pilot program ends and the border is opened will be subject to U.S. drug and alcohol testing requirements.

In addition to the issues that are specifically relevant to Section 350, the safety community has serious concerns about the medical standards and physical fitness requirements for LFC holders. It is well-known and recently acknowledged by both

FMCSA and the states in a pending rulemaking action integrating the Commercial Driver License (CDL) with the federally required medical certificate that commercial drivers "doctor-shop" to find health care providers that will find them physically fit to operate a commercial motor vehicle in interstate commerce. 71 FR 66723 (Nov. 16, 2006). In fact, thousands of these drivers have disqualifying medical conditions that would prevent the person conducting the physical examination from signing off on the required medical certificate. Some of the disqualifying medical conditions listed in FMCSA's regulations are unquestionably major threats to public safety if a commercial driver operates a big rig or a motorcoach with these diseases or impairments.

The safety community is also deeply concerned over the quality of the medical examination and physical fitness requirements and process in Mexico for all LFC holders operating the U.S. Although this was not a specific, itemized requirement of Section 350, it has become a growing concern with the gradual realization over the past few years that fraudulent and invalid medical certification among even U.S. commercial drivers is a pervasive, chronic problem that FMCSA is just beginning to attempt to curtail at the strong urging of the National Transportation Safety Board. I ask the committee specifically to investigate this issue for all cross-border bus, motorcoach, and truck operations conducted by LFC holders in the U.S. We believe that there may be a similar problem in Mexico of drivers finding ways around medical examinations and fitness requirements for commercial licensure. If so, this threatens public safety here in the U.S.

*Excluding Hazardous Materials and Bus Long-Haul Operations Violates Sec. 350*

Apparently, DOT is not contemplating long-haul commerce in the U.S. either by Mexico-domiciled hazmat haulers or by bus or motorcoach companies immediately, but have not foreclosed such cross-border transportation in the future. Security issues for hazmat operations throughout the U.S. have not been satisfactorily resolved by the Transportation Security Administration. As for buses and motorcoaches coming into the U.S. from Mexico, the DOT IG's January 2005 report found that sufficient inspection resources are not available at all designated border crossing points for verifying bus driver commercial licenses and for inspecting buses that have expired Commercial Vehicle Safety Alliance decals. It appears that, as of March 2005, those inadequate bus inspection procedures had still not been corrected. The failure to address and complete these issues as required by Section 350 presents a legal prohibition that DOT cannot evade by excluding hazmat operators and buses from the pilot program. Section 350 expressly states that "[n]o vehicles owned or leased by a Mexican motor carrier may be permitted to operate beyond the commercial zones until all pre-conditions have been met. There is no exception for vehicles of motor carriers that participate in a putative pilot program.

*FMCSA Relies on Poor Data and a Defective Procedure for Identifying High-Risk Motor Carriers*

The next issue that needs to be addressed is the chronic problem of poor data quality supplied to FMCSA that it relies on to monitor commercial motor vehicle and motor carrier safety. The DOT IG and the GAO, in separate reports over the past

several years, including reports in 2004 and 2005, emphasized the unreliability of the safety data on motor carriers that FMCSA uses to operate its safety scoring algorithm, the Safety Status Measurement System, or SafeStat as it is commonly referred to.

The GAO report found that one-third of commercial vehicle crashes that the states are required to report to FMCSA were not reported, and those crashes that were reported were not always accurate, timely, or consistent. *Highway Safety: Further Opportunities Exist to Improve Data on Crashes Involving Commercial Motor Vehicles*, GAO-06-102, November 18, 2005. Three years ago, following a DOT Inspector General report pointing out how unreliable data were used by FMCSA, the agency removed the overall safety score for motor carriers from its web site. *Improvements Needed in the Safety Status Measurement System*, Report Number MH-2004-034, Office of the Inspector General, United States Department of Transportation, February 13, 2004. Those data are still missing from the agency's web site. In addition, the DOT IG found in that report that 50 percent of Mexico-domiciled motor carriers in the U.S. claimed that they had no power units in operation!

The Inspector General issued yet another report on FMCSA data quality in April 2006. *Significant Improvements in Motor Carrier Safety Program since 1999 Act but Loopholes for Repeat Violators Need Closing*, OIG Report Number MH-2006-046, April 21, 2006. The audit found that data quality is still seriously defective and that it undermines several important areas of FMCSA enforcement and substantially reduces the effectiveness of SafeStat to identify high safety risk motor carriers. The DOT IG points out that, although FMCSA adopted a regulation a few years ago requiring registered motor carriers to update their registration every 2 years, 192,000, or 27 percent, of the registered 702,277 motor carriers did not update their census data on both drivers and trucks despite the requirement of the 2002 regulation. In addition, the report found that forms used by the states to report crash data to FMCSA are still do not consistently define a large truck or a reportable crash resulting in confusion. These failings continue to undermine the reliable data that FMCSA needs. The 2006 report also found that FMCSA, despite the previous, February 2004 OIG oversight report, had not taken sufficient action to achieve full updates of motor carrier census data and standardize crash data requirements and collection procedures. Data quality is crucial because the combination of updated, timely census data and crash data is used by SafeStat to rank safety performance of motor carriers and target them for compliance reviews and inspections. The OIG stressed in this recent report that, without these critical data, FMCSA cannot accurately identify the high-risk motor carriers.

It remains to be seen what the Dot IG's next report, expected in less than two months, will find regarding the increased data quality and accuracy of SafeStat to identify risk-prone long-haul motor carriers operating throughout the U.S. The January 2005 report documented that **one-third** of the crashes that actually occurred were not reported to FMCSA from the states. The Inspector General's most recent findings also need to be matched against FMCSA's request for funding for FY2008 that, among other things, still acknowledges that inadequate data on motor carrier safety are being

provided by the states because the submissions involve either under-reporting, mistaken data entries, or late transmission to the agency.

It is doubtful that, even with timely, complete, accurate data reporting, FMCSA can identify the high-risk motor carriers. The other problem with the agency's safety monitoring system is the SafeStat system itself. This arcane method of scoring motor carrier safety has been repeatedly criticized, including by an Oak Ridge National Laboratory report on SafeStat. The Oak Ridge analysis showed that the basis of SafeStat ultimately is subjective, based upon expert consensus opinion or judgment, and therefore has no meaningful statistical relationship to the data used to operate the system's algorithm for detecting high safety risk motor carriers. K. Campbell, R. Schmoyer, H. Hwang, *Review of the Motor Carrier Safety Status Measurement System*, Final Report, Prepared for the Federal Motor Carrier Safety Administration, Oak Ridge National Laboratory, October 2004. As a result, SafeStat often tapped the wrong motor carriers as safety risks.

Safety organizations have also shown in comments to FMCSA rulemaking dockets that SafeStat is a bankrupt method of identifying dangerous motor carriers, particularly small motor carriers with only a few power units. In addition, the algorithm incorporates a relativist, peer-to-peer safety rating system that has no independent, objective standards for motor carrier safety indexed to specific goals of reducing both the rate and the numbers of annual motor carrier fatalities. But, sad to say, these are the data and this is the bankrupt system that DOT will rely on to monitor and gauge the safety of both long-haul and short-haul Mexico-domiciled motor carriers.

#### *Prospects for Compliance with Hours of Service Limits Are Poor*

Safety organizations are still not satisfied that DOT has a system that will prevent drivers coming into the U.S. from Mexico who are already fatigued and sleep-deprived and present a serious threat to highway safety. In addition, drivers in Mexico are not subject to separate hours of service restrictions specifically tailored for commercial drivers. Apparently, there is only a general working hours limit of eight hours per day that, as far as we can determine on the basis of anecdotal evidence, is not enforced.

Even if commercial drivers with LFCs operate in the U.S. within current hours of service limits, those limits are currently again under legal challenge because, among many other defects, FMCSA refuses to acknowledge that the dramatic increases in working and driving hours it forced on truck drivers in 2003 and again in 2005 inherently foster fatigue and sleep deprivation. Although the 2003 rule was overturned in a scathing opinion from the U.S. Court of Appeals for the District of Columbia Circuit in 2004, *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004), FMCSA was undeterred: it attempted to rehabilitate the same failed hours of service rule with some new rationalizations and reissued it in virtually the same form in 2005. That new regulation increases the working hours of a U.S. commercial driver by 40 percent over an 8-day tour of duty and driving hours by 28 percent over the same time span. Commercial drivers can now work 98 hours in eight days and drive 88 hours in 8 days.

Certain exemptions for short-haul operations in smaller trucks actually allow drivers to work over 100 hours in a week.

This is the so-called "safety" regime that drivers from Mexico will operate within, a regulation that actually fosters worn-out drivers pushed day after day to deliver loads under nightmare schedules forced on them by motor carrier officials and shippers.

The other major problem hobbling any meaningful compliance with U.S. hours of service limits, as liberal as they are, is FMCSA's refusal to require electronic on-board recorders (EOBRs) to record the actual driving time of commercial operators. Despite the fact that the agency was required by Congress, in Section 408 of the Interstate Commerce Commission Termination Act of 1995, Pub. L. 104-88, to address the problem of hours of service regulations by evaluating EOBRs, the agency procrastinated until it was compelled by the same appellate court in 2004 to adequately address the problem. The court acted because FMCSA had proposed adoption of EOBRs in the hours of service rulemaking proposal in 2000, 65 FR 25540 (May 2, 2000), but then had a change of heart after strong opposition from major sectors of the trucking industry. FMCSA terminated EOBR rulemaking in 2003 when it issued its first attempt at an amended hours of service regulation. 68 FR 22456 (April 28, 2003). Even then, the agency responded with only an advance notice of proposed rulemaking in September 2004 instead of proposing a long overdue EOBR regulation. 69 FR 53386 (Sept. 1, 2004).

EOBRs are of pivotal importance in arresting the epidemic of hours of service violations in the trucking industry. Several studies and surveys conducted by independent researchers, the Insurance Institute for Highway Safety, and the University of Michigan for FMCSA's 2000 rulemaking proposal to amend the hours of service rule have shown repeatedly over many years that hours of service violations are a pervasive, chronic phenomenon among truck drivers. Truck drivers themselves have a poor opinion of the paper logbooks . Record of Duty Status (RODS) . that current FMCSA regulation requires them to maintain if they are operating outside a 100 air miles radius from their work reporting location. Often referred to as "comic books," many truck drivers regularly violate hours of service working time, driving time, and minimum rest time limits and falsify the entries on their paper logbooks. Seasoned drivers also know how to create a paper trail of accessory documents, often demanded by motor carrier enforcement personnel conducting CRs, that just happen to support, or at least not to contradict, the entries in the log books. I use the plural here of "log books" not just to refer to all the RODS maintained by interstate truck drivers, but also the two and sometimes three different log books maintained by just one driver: one that really memorializes hours of service, one for enforcement officials, and yet another for the motor carrier the driver works for.

But despite widespread violation of even the excessive working and driving hours of the current hours of service regulation, FMCSA in its recent rulemaking proposal will not abate this epidemic of abuse. 72 FR 2340 (Jan. 18, 2007). The agency disregards all previous research and survey literature on the pervasive violation of hours of service

regulation and, instead, argues that EOBRs should be required only for the "worst offenders." These "worst offenders" are those who are detected in CRs as having at least 10 percent of their drivers found to have violated hours of service and then, within another two years, at least 10 percent are found again in a subsequent CR to have violated the regulation. Only then would the agency impose a requirement to install and use EOBRs to record driving time.

This is the agency that was just scathingly criticized by NTSB for its extraordinarily poor record of safety enforcement and oversight in the February 21, 2007, hearing on the horrific fire and consequent deaths of residents at an assisted living facility in Texas who were fleeing the approach of Hurricane Rita in a hired motorcoach. This is the agency that conducts only 7,000 to 11,000 CRs each year out of more 700,000 registered motor carriers, an effort, as I have already pointed out, that amounts to about 1.5 percent CRs each year. This the agency that has just submitted a budget request to Congress stating that it intends to conduct only 10,000 CRs in both FY2007 and FY2008. This is the agency that states in its EOBR rulemaking proposal that it forecasts that about **465 motor carriers each year would be required to install EOBRs**. Out of the largest figure of registered motor carriers that we have heard . cited as more than 900,000 by NTSB staff on February 21, 2007, during the NTSB hearing on the Hurricane Rita motorcoach catastrophe . this amounts to **five one-hundreds of one percent – 0.05% -- of registered motor carriers**. Even if I were to use the lower, published figure from FMCSA on the number of registered motor carriers -- about 702,000 -- the percentage of motor carriers required to use EOBRs would be **six one-hundreds of one percent – 0.06%**.

This proposed rule is so utterly ludicrous, so contemptuous of the need to curtail the epidemic of drivers falsifying their log books so they can drive until they literally fall asleep at the wheel, that FMCSA even has the gall in the preamble to argue that it could not find any health benefits for drivers using EOBRs and, therefore, driving within the legal limits of the current hours of service rule. But this is also in keeping with an agency that repeatedly denies that it could find any adverse health impacts from having dramatically increased the amounts of driving and working time each week for commercial drivers in its 2003 and 2005 final rules amending the hours of service regulation.

If DOT believes that, without EOBRs, it can ensure that long-haul trucks from Mexico will not violate hours of service limits, then it is deceiving the American people. The use of EOBRs in any cross-border long-haul operations by Mexico-domiciled motor carriers must be mandated. Without EOBRs, the risk of crashes from sleep-deprived, exhausted foreign drivers will be large.

*Compliance of Trucks and Buses Built in Mexico with the Federal Motor Vehicle Safety Standards is Still Unresolved.*

Finally, the issue of certification of compliance of trucks with the Federal Motor Vehicle Safety Standards (FMVSS) remains a real safety problem. Federal law requires that vehicles entering the U.S. market must comply with all safety standards that were

applicable in the year of their manufacture. FMCSA acknowledges that this requirement pertains to commercial vehicles manufactured in Mexico and driven into the U.S. to engage in commerce. The agency also acknowledges that few commercial vehicles built in Mexico prior to 1996 were built to U.S. safety standards and that even since 1996 some unknown percentage of commercial vehicles built in Mexico do not comply. For example, according to truck manufacturer data, between 5 and 20 percent of the trucks produced at plants in Mexico were not equipped with antilock braking systems (and slack adjusters), even though that requirement applied to U.S. truck production since March 1, 1997. The FMCSA admits that without a certification label affixed to the vehicle by the manufacturer, inspectors by relying on the vehicle identification number and the vehicle registration alone cannot be certain if trucks built in Mexican plants comply with U.S. standards. This means that trucks and buses that could not have been built and sold in the U.S. could be driven into the U.S. to engage in commerce and the carriage of passengers by Mexico-domiciled companies. This situation creates both a safety concern and an uneven playing field for U.S. manufacturers and motor carriers.

### **VIII. Any Pilot Program Permitting Mexico-Domiciled Motor Carriers to Operate Nationwide Must Comply with Section 4007 of TEA-21.**

In light of the many serious safety, legal and oversight concerns that continue to raise red flags and provide clear warnings against even a limited opening of the southern border, I firmly believe that the proposed pilot program cannot proceed.

If and when such a pilot program becomes appropriate, Congress has already determined the basic requirements that must apply to protect public safety. Section 4007 of Transportation Equity Act for the Twenty-First Century (TEA-21), codified at 49 U.S.C. § 31315(c), established the template for all pilot programs conducted by DOT. Section 4007 was enacted at the specific request of DOT which sought authority to conduct pilot programs to evaluate alternatives to existing regulations and innovative approaches to motor carrier, commercial motor vehicle, and driver safety. The announced border pilot program fits squarely within this description and must be governed by the requirements of that law.

Section 4007 requires that, at the outset, the Secretary must provide public notice and seek public comment on the proposed contours of the program and the merits of the trial. In order to proceed the Secretary must then make a determination, based on the totality of information and evidence, that the safety measures in the pilot program are designed to achieve an equal or greater level of safety than would be the case if there was no program. That is, DOT must make a showing that convincingly demonstrates that the pilot program approach can achieve the same or better level of safety than the *status quo*.

At that point, if the pilot program is to take effect, it must include several defining features:

- A scheduled life of no more than three years.

- A specific data collection and safety analysis plan that identifies a method for comparison, a reasonable number of participants necessary to yield statistically valid findings.
- An oversight plan to ensure that participants comply with the terms and conditions of participation.
- Adequate countermeasures to protect the health and safety of study participants and the general public.
- A plan to inform the states and the public about the program and to identify the participants both to safety compliance and enforcement personnel and to the public.

A specific data collection and safety analysis plan identifying a method for comparison and having sufficient statistical power from which to draw inferences has been the Achilles heel of previous FMCSA pilot program efforts. None of the previously proposed pilot programs were studies that would have survived peer review in the scientific community because they included poor data gathering protocols, lacked controlled comparison groups for gauging the safety impact of the pilot programs, failed to control the numerous confounders of field experiments, and generated insufficient statistical strength to draw inferences. FMCSA has a failed record of conducting scientifically sound and useful pilot studies.

In fact, FMCSA does not conduct pilot programs just for determining their safety effects. They are chosen to buttress policy preferences that the agency already has formed. Pilot programs conducted in the past by FMCSA have not been chosen to test innovative approaches to motor carrier safety or to evaluate whether some relaxation of portions of the Federal Motor Carrier Safety Regulations produce an equivalent or better safety result than compliance. Instead, these efforts have been geared in each instance to provide regulatory relief to a sector of the trucking industry or to foster trucking productivity, not improve safety. In constructing pilot programs, FMCSA handpicks the very best participants to ensure that the outcome of the trial will justify a policy choice that the agency already wants to advance. Pilot programs promoted by the agency are not scientific efforts to obtain objective information, but show trials conducted to provide cover for a preconceived policy choice.

Pilot programs cause great concern in the safety community because they are experiments with the public serving as guinea pigs on our highways. Although Section 4007 directs that there must be adequate countermeasures adopted to ensure the health and safety of both pilot program participants and the general public, there are no assurances that relaxing regulatory requirements or testing "innovative approaches" to motor carrier safety might not result in terrible tragedies. For this reason, it is imperative that the Committee take extra precautions, beyond the requirements in Section 4007, to ensure safety is the highest priority in the conduct of this pilot program. The Committee should, therefore, take the following steps:

- Ensure that DOT complies with Section 4007 in carrying out any pilot program;

- Require DOT to specify as part of the detailed description of the pilot program submitted for public comment the criteria it will use in exercising its authority to revoke participation in the program under Section 4007(c)(3);
- Require that the National Transportation Safety Board (NTSB) investigate every crash by a participating motor carrier, vehicle and driver that involves a fatality or injury;
- Require DOT to specify as part of the detailed description of the pilot program submitted for public comment the criteria it will use in exercising its authority to terminate the program under Section 4007 (c)(4); and,
- Require DOT to submit bimonthly reports to Congress on the pilot program including data on all crashes, fatalities, injuries, violations and OOS orders.

Thank you for this opportunity to voice our deep concerns over this initiative. I am happy to answer any questions you may have.

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