ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

STATEMENT OF JACQUELINE S. GILLAN
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ADVOCATES FOR HIGHWAY AND AUTO SAFETY
BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
ON
U.S. DEPARTMENT OF TRANSPORTATION'S
CROSS-BORDER PILOT PROGRAM

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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.

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

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

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 been made in reaching those benchmarks, not all of the requirements of Section 350 have been fulfilled. Bus

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

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 five months after the Secretary was confirmed and four 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

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[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.).

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;
- 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

[15] Sec. 350(a)(10)(A)-(E).
[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).

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 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 Driver 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

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[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 US Vehicles Inspected Which Carrier Intends to Operate in the US" for Trinity Industries.
[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 Driver 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.

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,

[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).

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 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.

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

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 doctrine of equitable interpretation in very similar circumstances explicitly to fulfill congressional intent.

Just over one 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.

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

[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).

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% . . . 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.

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*

[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.

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.

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[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, s*ee infra* note 24, withdrew from the Pilot Program as of Feb. 1, 2008.