STATEMENT OF JACQUELINE S. GILLAN
VICE PRESIDENT
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ON

OVERSIGHT of MOTOR CARRIER TRANSPORTATION EFFORTS

BEFORE THE

SENATE COMMERCE, SCIENCE, and TRANSPORTATION

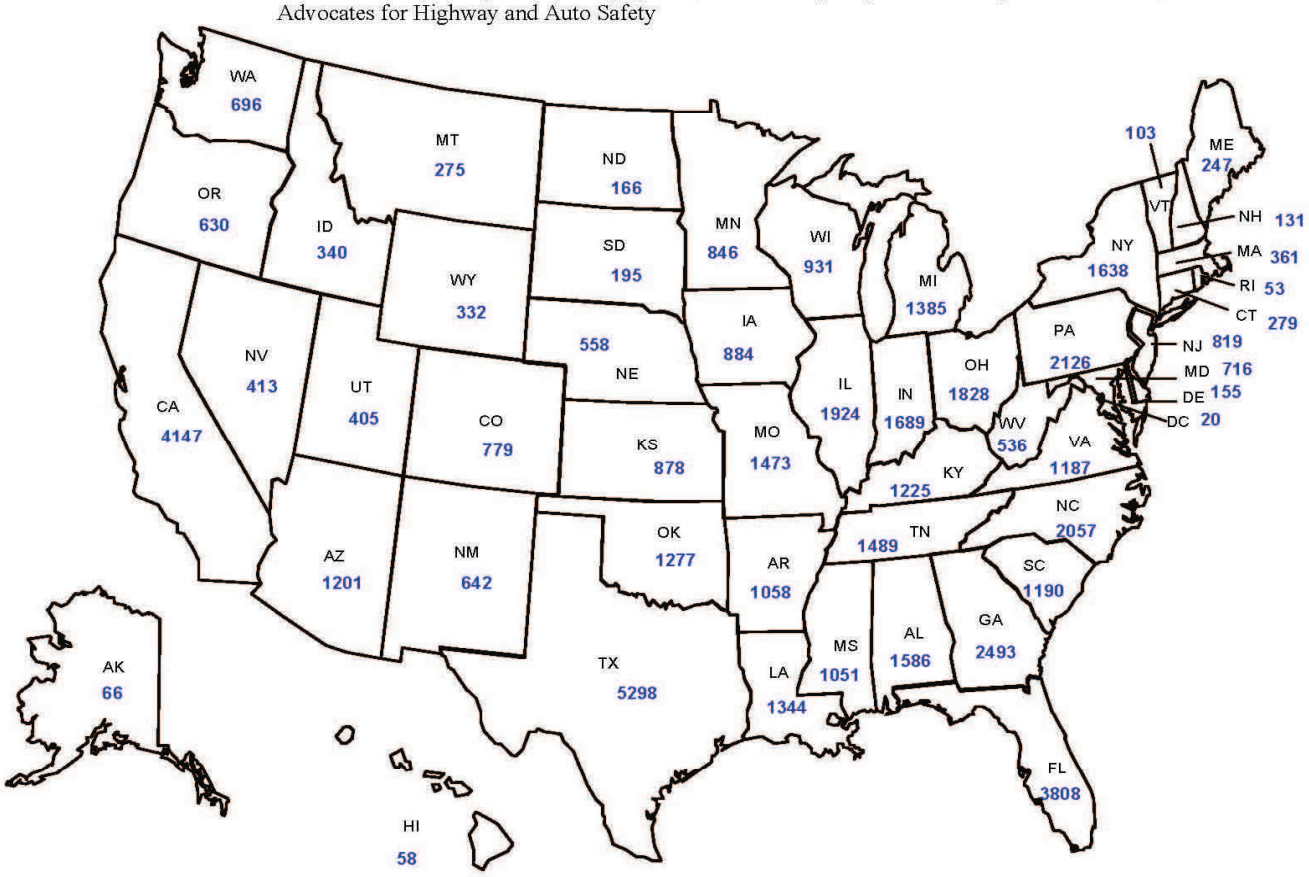
SUBCOMMITTE on SURFACE TRANSPORTATION and
MERCHANT MARINE INFRASTRUCTURE, SAFETY, and SECURITY

APRIL 28, 2010

FATALITIES IN CRASHES INVOLVING LARGE TRUCKS

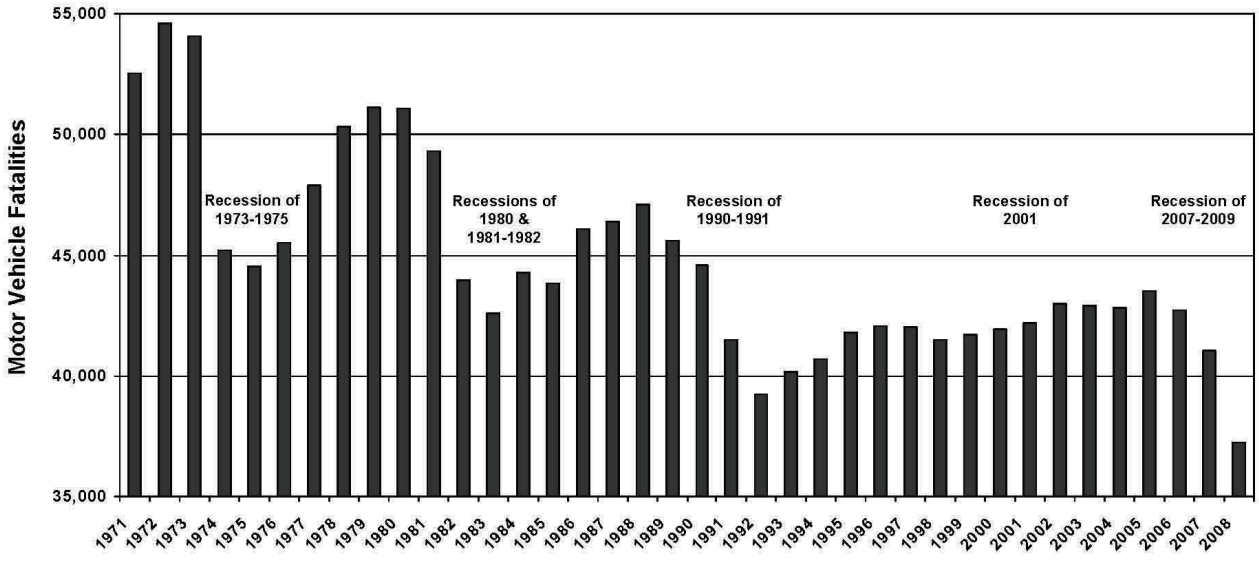
55,377 total fatalities from 1998-2008

Sources: Fatality Analysis Reporting System, National Highway Traffic Safety Administration; Advocates for Highway and Auto Safety



U.S. Recession Periods and Motor Vehicle Fatalities

Chart shows correlation between U.S. recessions and motor vehicle fatalities, 1971-2008.*



Year and Recession Period

*Motor vehicle fatality data only available through 2008.

Sources: The National Bureau of Economic Research, http://www.nber.org/cycles/cyclesmain.html; Fatality Analysis Reporting System (FARS), National Highway Traffic Safety Administration

Introduction

Good morning Chairman Lautenberg, Ranking Member Thune, and members of the Senate Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security. I am Jacqueline Gillan, Vice President of Advocates for Highway and Auto Safety (Advocates). Advocates is a coalition of public health, safety, and consumer organizations, and insurers and insurer agents that promotes highway safety through the adoption of safety policies and regulations, and the enactment of state and federal traffic safety laws. Advocates is celebrating 20 years as a unique coalition dedicated to improving traffic safety by addressing motor vehicle crashes as a public health issue.

This Subcommittee has been responsible for many of the motor carrier safety improvements that have been accomplished over the years, including establishment of a uniform commercial driver license (CDL) program, mandates for U.S. Department of Transportation (DOT) action on numerous safety rulemakings, strong oversight of the Federal Motor Carrier Safety Administration (FMCSA) plans and programs and recently, full Committee approval of the Motorcoach Enhanced Safety Act.

I welcome this opportunity to appear before you today to emphasize that there is still an unfinished safety agenda that needs your attention and your leadership.

I cannot emphasize enough the critical role that this Subcommittee and Congress must play in leading our nation to a safer, more rational use of its transportation resources. It will take leadership by Congress to implement a national, uniform approach to truck size and weights on our federally-assisted National Highway System in order to enhance safety and protect highway infrastructure; to stop enactment of piecemeal special interest exemptions from crucially important federal safety requirements; and finally, to get the federal regulatory safety agency, the FMCSA, off the sidelines and actively back on the field to improve motor carrier and highway safety.

The Annual Death Toll from Large Truck Crashes Remains Unacceptable

Over the decade from 1998 through 2007, the number of people killed in truck-involved crashes has averaged 5,145 fatalities.[1] In 2008, one of every nine people killed in a traffic crash was a victim of a large truck crash.[2] Annual deaths in large truck crashes are disproportionately represented in our annual traffic fatality data, with large truck deaths still accounting for about 11-12 percent of all annual highway fatalities, although large trucks are only three to four percent of registered motor vehicles.

Large, heavy trucks are dramatically overrepresented each year in severe crashes, especially fatal crashes. Although truck crash fatalities have declined in 2007 and 2008, this reduced death toll is strongly linked with a major decrease in truck freight demand, including substantially reduced truck tonnage starting in the latter part of 2007 and continuing through 2009.[3] Industry reports over the last several months have verified this decline in freight tonnage. The American Trucking Associations (ATA), for example, reported that for-hire tonnage fell in June 2009 by 13.6 percent over the freight transported in 2008, and freight analysts do not believe that the decline will stop until the

second half of 2010 at the earliest.[4] This is consistent with previous tonnage declines associated with economic recessions.

In terms of annual fatalities, I have attached to my testimony a chart that shows the strong relationship between economic recessions and declines in total highway deaths since 1971.[5] As pointed out by several authorities, including the Honorable David Strickland, Administrator of the National Highway Traffic Safety Administration (NHTSA), which collects and analyzes national fatality data, the unprecedented decline in deaths and injuries among all types of motor vehicles over the last few years is strongly linked to the recent downturn in the economy.[6] Just as personal travel will likely increase as the economy continues to improve, freight traffic will also resume its upward trend, which means more truck miles of travel each year that will likely translate into an increase in truck fatalities.

While the safety community welcomes the news of recent declines in truck crash fatalities it is not a reason to delay, defer or discard pushing forward with a strong motor carrier safety agenda. Aside from the distinct likelihood that truck deaths will increase as the economy and freight transportation improve, the fact is that the fatality rate for large trucks continues to outstrip the rate for light vehicles and passenger cars. In 2008, the fatality rate for occupants of passenger cars stood at 0.92 deaths per 100 million vehicle miles traveled (VMT) while the large truck fatality rate was 1.79 deaths per 100 million *truck* VMT – about *double* that of passenger cars.[7] The overall national traffic fatality rate for all traffic crashes was reported at 1.25 deaths per 100 million VMT.[8]

Several years ago, in a stealth move that appeared in FMCSA budget submissions to Congress, FMCSA attempted to camouflage the actual truck fatality rate by merging it with the much lower fatality rate for buses and motorcoaches. The agency then further diluted the very high large truck fatality rate by measuring the combined rate not against 100 million *truck* VMT, or even against the total VMT of all commercial motor vehicles, but against the much more generous figure of *all* annual VMT for all vehicles – even including motorcycles. As a result, rather than state the traditional rate as 1.79 deaths per 100 million *truck* VMT for 2008, FMCSA now boasts a rate of just 0.160 fatalities per 100 million VMT, which is an order of magnitude smaller and, conveniently, already exceeds the agency's ambitious 2011 target for fatality reduction.[9] This statistical claim distorts the traditional and fair means of measuring the truck fatality rate solely based on a truck exposure measure (*truck* VMT), and masks the extraordinary over-representation of large trucks in annual fatal crashes. It's amazing that the agency believes that Congress will be deceived by this shell game with numbers to mask the extraordinarily high large truck fatality rate.

<u>Recommendation</u>:

- ***FMCSA should be required to accurately assess and publicly release the large truck fatality rate by reporting the total number of truck-involved fatal crash deaths measured against annual truck vehicle miles traveled.***

The Safe Highways and Infrastructure Protection Act (SHIPA) Will Improve Safety, Protect Infrastructure, Conserve the Environment, Enhance Intermodalism

It is up to Congress to take action now that will improve safety, protect the long-term national investment in our crumbling highway and bridge infrastructure while also protecting the environment and providing a more level playing field for intermodal freight transportation. We are at a crucial juncture in highway and motor carrier safety in this Congress.

A pending bi-partisan Senate bill, S. 779, the *Safe Highways and Infrastructure Preservation Act of 2010*, or SHIPA, sponsored by Chairman Lautenberg, has the potential, if enacted, to dramatically improve the safety landscape for all motorists, including truck drivers. SHIPA will stop the relentless cycle of demands and pressure imposed on the states by the trucking interests for increased tractor-trailer lengths. If truck lengths are increased again beyond the industry "standard" of 53 feet, it would trigger a cascading effect of negative outcomes for safety, environmental protection, infrastructure protection, fuel use, the Highway Trust Fund, and a balanced, national transportation freight strategy.[10]

SHIPA is crucial for curtailing the growth of large trucks and their expansion to more and more highway miles off the nation's Interstate system. One of the two main objectives of the legislation is to freeze the length of truck trailers at a maximum of 53 feet. Promoters of much bigger, heavier trucks, such as supporters of current H.R. 1799,[11] would allow trucks weighing up to 97,000 pounds and more throughout the country and melt the 1991 freeze on longer combination vehicles (LCVs),[12] while using the specious argument that trucking will become safer because bigger, heavier trucks mean fewer trucks on the road. Increases in truck size and weights have never resulted in fewer trucks. In fact, allowing super-sized heavy trucks on more highways will make our roads and bridges more dangerous, not safer, and there will be more, not fewer, trucks than ever before.

Unfortunately, federal law since the 1982 Surface Transportation Assistance Act [13] mandates certain minimum truck sizes, weights, and configurations, but does not restrict the length of trailers and semi-trailers in truck combinations.[14] This has had two particularly pernicious consequences.

First, the states are pressured endlessly by the special interests to increase the length of the semi-trailers used with combination trucks. This has resulted in the standard semi-trailer increasing in length to 45 feet in the 1960s and 1970s, to 48 feet by the time the 1982 STAA was enacted, to 53 feet by the end of the 1990s, with many states now allowing 57 feet, and a few states even permitting 59- and 60-foot long trailers.

Second, increasing the volume of a trailer triggers the argument that some commodities in shorter trailers fall beneath the federal axle and gross weight limits on the Interstate highway system in federal law[15] or even the higher maximum weight limits allowed in many states on their non-Interstate highways. This claim is turned into an incessant drum beat to raise weight limits in order to take advantage of the increased volume of the

bigger, longer trailers. This strategy is carried out simultaneously at both state and Congressional levels to pressure both federal and state lawmakers. This is the upward "ratcheting" that special interests have been so successful at for decades.

The main argument advanced for the supposed advantages of longer, heavier trucks is that it will result in fewer trucks. Nothing is further from the truth. Since 1974, every time truck sizes and weights have been increased by state or by federal mandate, *the result has been more trucks than ever before*.[16] In fact, from 1972 to 1987 alone, the number of for-hire trucks *increased by nearly 100 percent*.[17] During this era, an increasing number of states adopted longer, wider, heavier trucks and trailers on their state highways and also interpreted their Interstate grandfather rights more liberally to grant more overweight permits to extra-heavy trucks.[18]

The result is predictable: trucks were bigger and heavier than ever before, and there were still *more of them* than ever before. The total increase in the number of trucks by 1992 was 128 percent over the 1972 baseline.[19] Longer, larger, heavier trucks kept multiplying. By 1997, the number of large trucks had grown to 174 percent more than 1972, and by 2002, the number of for-hire trucks had increased by 228 percent over the 1972 figure.[20] According to the Federal Highway Administration (FHWA) the number of trucks on the road today is at least 250 percent or more over 1972 figures.[21]

The two actions of putting the lid on truck lengths and freezing existing state weight practices for the entire NHS are complementary and both are crucial to achieving SHIPA's goal. While SHIPA extends current state and federal weight limits on the Interstate system to the non-Interstate highways on the National Highway System, it prohibits any further increases. This not only puts a ceiling on truck weights at their current levels, but it also recognizes and protects the states' existing grandfathered rights to allow certain differences in truck axle and gross weights than the maximum weight figure in federal law. SHIPA also restores FHWA to its traditional position as steward of state and federal size and weight limits for public safety and infrastructure protection.

Recommendation:

- ***Congress should enact S. 779, the SHIPA bill.***

Special Interest Exemptions Jeopardize Safety and Compromise Enforcement

Over the years, Congress has granted numerous statutory special interest exemptions from federal safety regulations including exemptions from the maximum driving and on-duty limits, as well as the logbook requirements, for motor carriers under the hours of service regulations, and from commercial driver physical qualifications and medical examinations.[22] These exemptions pose safety issues because they are untested and unproven deviations from established federal safety requirements. Enactment of exemptions on a piecemeal basis bypasses careful investigation and findings on the impact of these exemptions on safety. In addition, it creates a patchwork quilt of disparate regulatory exemptions that make it nearly impossible for enforcement authorities to determine the status of exempt drivers and vehicles and to effectively enforce federal safety requirements.

Advocates is gravely concerned that these exemptions detour from established safety requirements, are not based on research and scientific analysis, and pose increased safety risks for commercial operators and the public. Because they were established by statute rather than regulation, there has been no thorough examination of the safety consequences of these exemptions. It is time for the U.S. DOT to conduct a comprehensive evaluation of each exemption from safety rules.

Fortunately, the mechanism for review of these types of exemptions already exists in federal law. In 1998, Congress required U.S. DOT to review regulatory exemptions from safety requirements using reasonable, recognized screening criteria.[23] Under this provision, many special interest exemption requests addressing motor carrier safety regulations are reviewed using the expertise of DOT and FMCSA, rather than the lobbying clout of special interests. The process enacted by Congress allows the agency to carefully consider the safety requirements and implications of a proposed exemption and to determine if the exemption poses a problem for law enforcement.

Even FMCSA itself openly decried the exemptions practice in its 2000 proposed revision of the hours of service rule. The agency concluded that the existing multiple exemptions were not compatible with reform of the drivers' hours of service rule.[24] These exemptions are also opposed by the Commercial Vehicle Safety Alliance (CVSA) representing state law enforcement officials who are charged with ensuring compliance with federal motor carrier safety rules.

Congress has also granted similar special interest exemptions for truck size and weight limits. Most recently, Maine and Vermont have been granted special legislative exemptions as "pilot programs," which allow the operation of 100,000-pound trucks on the northern section of Maine's I-95 to the Canadian border, and of 120,000-pound trucks on all of Vermont's Interstate highways.[25] These exemptions were adopted despite reams of reliable evidence concerning the adverse safety effects and increased infrastructure damage that such excessively heavy combination trucks inflict on roads and bridges.

Safety organizations opposed these and other size and weight exemptions that have been enacted. Granting special interest requests for specific exemptions from the federal axle, and both gross and bridge formula weight limits in federal highway law undermines national uniformity, subjects roads and bridges to super-heavy weights that accelerate highway and bridge deterioration, and constitutes a serious and unacceptable threat to the traveling public who must operate their small passenger cars next to these unstable, overweight combination trucks.

Even U.S. DOT severely criticized the statutory adoption of exemptions only a few years ago because of the harm it does both to highway safety and infrastructure protection. In a massive 2004 study of the effects of overweight and extra-long tractor-trailer trucks, DOT determined that LCVs damage bridges more severely than "18-wheelers" and could have substantially more serious safety consequences. U. S. DOT concluded that a patchwork quilt of size and weight exemptions for specific states undermined a coherent, national policy of size and weight limits.[26]

Recommendations:

- ***U.S. DOT and FMCSA should be required to review all existing statutory exemptions from the federal motor carrier safety regulations to determine whether they are safe and enforceable, have contributed to increased risk of deaths and injuries, and to make recommendations to Congress about exemptions that pose an increased public safety risk.***
- ***All exemptions from motor carrier safety regulations should be subject to U.S. DOT and FMCSA review under § 31315.***
- ***Legislation should be adopted, similar to § 31315, that requires U.S. DOT and FMCSA to evaluate all requests for truck length exemptions.***

A Decade of Failed Leadership, Inadequate Oversight and Ineffective Safety Rules

Let me turn now to an analysis of FMCSA's performance and an appraisal of its first decade as a federal agency. The agency was established in 2000 with motor carrier safety as its primary mission and highest priority.[27] Over its first 10 years the agency compiled a poor track record that was at odds with its safety mission. FMCSA exhibited a stark failure of leadership and oversight of the motor carrier industry, an inability to issue effective safety regulations, and an inadequate enforcement policy.

While we continue to hope that FMCSA can finally be turned into an effective force for motor carrier safety under its new leadership, congressional direction, oversight and guidance will continue to be needed in order to improve the performance of the agency.

FMCSA Safety Oversight Issues

Failure to Implement NTSB Safety Recommendations:

One strong indication of FMCSA's job performance is whether the agency has implemented the numerous motor carrier safety recommendations issued by the National Transportation Safety Board (NTSB). Since it began issuing recommendations in 1968, NTSB has repeatedly called for commonsense and urgent safety actions by FMCSA and its predecessor agency, FHWA. NTSB has issued dozens of recommendations that address vehicle operating systems, equipment, commercial drivers, and motor carrier company safety administration and oversight. However, many of the recommendations were finally closed out in exasperation by NTSB because there was no response, the response was unsatisfactory, or the response was minimally adequate.

The NTSB's current list of "Most Wanted Transportation Safety Improvements" includes a number of safety recommendations for commercial motor vehicles.[28] NTSB has again placed two of the four FMCSA recommendations in the "Acceptable Response, Progressing Slowly" (yellow) category and two in the "Unacceptable Response" (red) category. The two recommendations that were deemed unacceptable have remained on the list as Code Red responses since 2008. One of these unacceptable responses on the 2010 Most Wanted List continues to indicate NTSB's long-term frustration with the U.S. DOT's failure to require electronic on-board recorders to corroborate commercial driver compliance with federal hours of service limits.[29]

Another example of the agency's failure to adopt reasonable NTSB recommended safety measures includes preventing motor carriers from operating if they are found to have violated *either* mechanical safety standards or driver safety standards. NTSB has listed the agency's failure to adopt this recommendation as an "Unacceptable Response."[30] Currently, FMCSA will consider a stop operations order for a motor carrier only if it finds certain violations of *both* mechanical and driver safety standards. A violation of only one of the two categories will not result in a stop operations order from the agency.

Recommendation:

- ***Congress should direct FMCSA to fulfill major NTSB safety recommendations on the current Most Wanted List and review and adopt previously issued NTSB motor carrier safety recommendations that have not yet been implemented.***

FMCSA Has Failed to Monitor and Ensure the Adequacy of State Motor Carrier Safety Inspection Programs:

The Secretary of Transportation is required to prescribe standards for annual inspection of motorcoaches and of trucks greater than 10,000 pounds gross vehicle weight in interstate commerce, or approve state inspection programs that are equally effective.[31] FMCSA last publicly addressed the state inspection system in a 2001 *Federal Register* notice indicating that 25 states have approved periodic inspection programs for trucks.[32]

More recent public information does not exist. A recent examination of the FMCSA web site revealed that there were no entries on state truck and motorcoach inspection programs, nor was there information on the current status of state compliance with the vehicle inspection and repair requirements, including any updated listing of states that may have instituted periodic commercial motor vehicle inspection programs since 2001.

FMCSA has no reports that are publicly available evaluating how comprehensive the commercial motor vehicle inspection program may be in each of the 25 states. Our information is that no audits have been performed and that none are planned. Timely information on state truck and motorcoach inspection programs – whether they are still current and how well and how often they inspect commercial motor vehicles for safety compliance – is not available to the public on FMCSA's web site.

Furthermore, while FMCSA allows motor carriers to "self-inspect" and annually certify that the mechanical inspection has been performed, it appears that the agency does not conduct routine audits to evaluate a representative sample of these state self-inspection programs.

It should be stressed that the minimum period for the required inspection is only once a year.[33] Since it is well known that inspection of commercial motor vehicles needs to be much more intensive and frequent than for personal or light motor vehicles, a once-a-year inspection regime is clearly no guarantee of safe trucks and motorcoaches. While reputable carriers may conduct more frequent inspections, others may not. Many companies even in states that have inspection programs can come into compliance just for an annual inspection, only to allow major mechanical and safety features of their vehicles to fall into dangerous disrepair soon after passing the annual inspection.

Although commercial motor vehicles are subject to random roadside inspections, they can go for long periods of time without being stopped for an inspection. Relying on roadside inspections to detect mechanical defects that pose threats to public safety is simply too late – those vehicles should never have been on the road from the start.

One example of the serious consequences that can occur as a result of weak oversight of state-run, state-approved, and company self-inspections involves the deadly 2008 Sherman, Texas motorcoach crash in which 17 people died and 39 were injured. The motorcoach was operated by Angel Tours, Inc., which had been stopped from operating by FMCSA just weeks earlier, but continued to operate under the name Iguala Busmex.

Among other federal violations, the NTSB's investigation of the crash found that the proximate cause of the crash was a failure of one of the retreaded tires on the front steering axle of the motorcoach. The retreaded tire failed, destabilizing the motorcoach, making it difficult to control, and facilitating its crash into the overpass guardrail. NTSB speculated that either the tire was not inspected properly by an extremely perfunctory pre-trip inspection, or that the tire was punctured in route to its destination. NTSB found that the motorcoach had been inspected by a Texas state government-certified private inspection company.[34] The private inspection cost $62.00, but failed to detect a number of mechanical defects including the retreaded tires on the steer axle, under-inflated tag-axle tires, wrong tax-axle wheels mounted, and a grossly contaminated brake assembly.

The Texas commercial motor vehicle state inspection program was approved by FMCSA in 1994. NTSB investigators concluded that there was no FMCSA quality control evaluations of agency-approved state programs, and no state oversight of the certified inspection companies.

We commend the Senate Commerce, Science and Transportation Committee for approving S. 554, the "Motorcoach Enhanced Safety act of 2009," originally introduced by Senators Brown (D-OH) and Hutchison (R-TX). This legislation, when enacted, will address some of the inspection oversight concerns with respect to motorcoaches. Similar action is needed regarding state inspection programs for trucks.

Recommendations:

- ***Congress should direct FMCSA to establish specific standards for state-authorized, state-operated inspection programs to determine how well they meet the requirements of the Federal Motor Carrier Safety Regulations.***
- ***Congress should direct FMCSA to conduct annual inspections of a sample of state-authorized or -operated truck inspection programs to determine their effectiveness .***
- ***Congress should direct FMCSA to audit motor carrier self-inspection programs in each state to determine how well trucks are being inspected and maintained for safe mechanical condition.***

FMCSA Regulatory Issues

Electronic On-Board Recorders – A Case Study of Bureaucratic Bungling:
It has been 15 years since Congress in 1995 directed the Secretary of Transportation to address the issue of Electronic On-Board Recorders (EOBRs).[35] After all this time, FMCSA has only recently produced a weak and ineffective EOBRs regulation which the agency itself admits will apply to less than one percent of motor carriers.[36]

There is strong support for EOBRs from many quarters. At a hearing before this Subcommittee held May 1, 2007, on the topic of EOBRs,[37] Senator Lautenberg said in his opening statement: "We need electronic on-board recorders in every truck on the road to ensure the safety of our truck drivers and our families who travel on the highways."[38] Similar sentiments were expressed by the President of CVSA.[39] The current Chair of NTSB, Deborah Hersman, has also repeatedly emphasized the need for a U.S. DOT requirement for EOBRs on all commercial motor vehicles.[40] As noted above, NTSB is resolute in continuing to list an EOBR mandate on its Most Wanted list and to deem the agency's response "Unacceptable."

Yet, FMCSA's response is an extraordinarily weak rule that will require only about 5,700 motor carriers to install and use EOBRs – but only after an hours of service (HOS) violation is discovered in the course of a Compliance Review (CR). This criterion immediately produces an extremely limited population of truck and motorcoach companies. Because FMCSA annually conducts CRs on only two percent of motor carriers registered with the agency, the chances of being caught violating HOS requirements are very remote, and the detection of violations will be based on examination of logbooks recording duty status, which are widely known to be regularly falsified by a large percentage of commercial drivers to conceal violations.

The rule has other serious defects, including the following:

- The EOBR Global Positioning System (GPS) function will record only at 60 minute intervals rather than at one minute intervals – a serious problem that allows carriers to evade fixed weigh stations, use illegal hazardous materials routes, and traverse bridges posted for reduced loads, without detection.
- Carriers required to install and use EOBRS will not have to provide certain supporting record of duty status (RODS) documents – which reduces the documentation that enforcement personnel need to determine whether drivers using sleeper berths complied with minimum off-duty time.
- The EOBRs default to "on-duty not driving status" when a commercial vehicle has been stationary for only five minutes. This allows time during intermittent vehicle movement in traffic congestion or while waiting in loading dock lines, to be recorded as non-driving time. As a result it will extend the drivers' shift beyond the maximum 11 consecutive hours allowed by regulation.
- EOBRs will not collect speed data thereby reducing the deterrent effect on speeding by commercial drivers and undermining the effectiveness of speed limit enforcement by public authorities.[41]

- FMCSA thoroughly fails to address the need for specific fail-safe controls to ensure that EOBRs are tamper-proof, and are protected with adequate, security control measures to limit access only to appropriate users.

Although FMCSA has indicated that another, expanded rule may be under consideration,[42] it appears that the timetable on any further action has already slipped from this year into next.

It is time for Congress to act. As mentioned before, this Committee has approved a comprehensive motorcoach safety bill that includes a mandatory requirement for EOBRs on all motorcoaches.[43] The House of Representatives has also included an EOBRs requirement for all commercial motor vehicles in the Transportation and Infrastructure Committee's draft Surface Transportation Authorization Act.[44] Advocates supports both of these measures.

Recommendations:

- ***Congress should pass the Motorcoach Enhanced Safety Act of 2009 mandating EOBRs on all passenger-carrying commercial motor vehicles under FMCSA jurisdiction.***
- ***Congress should enact legislation requiring the FMCSA to issue a universal EOBR regulatory requirement for all other commercial motor vehicles in interstate commerce.***

Truck Driver Hours of Service and Fatigue:

I am pleased to be able to testify today that the long running dispute over the truck driver HOS rule is on hold while a new rule is developed. This does not mean that we have relaxed our opposition or vigilance regarding the serious safety failings of the current HOS rule. However, we believe that the quickest way to improve safety and to get a better rule issued is to work with the new Administration to produce a rule that advances public safety and not only productivity.

The federal commercial driver HOS rule is of critical importance to truck safety. The HOS rule governs truck driver working hours, setting maximum limits for on-duty work time, the number of continuous hours of driving and work hours allowed per shift, weekly driving hours, and the minimum required off-duty rest time. Countless studies, and the National Truck and Bus Safety Summit of 1995, have concluded that excessive driving and work hours, and inadequate rest time, lead to driver fatigue which plays a substantial role in large truck crashes.

The current, unsafe HOS rule adopted in 2003 substantially increased maximum daily and weekly driving and working hours for truckers.[45] Driving time for each shift was increased to 11 from 10 consecutive hours of driving. Driver fatigue from this excessively long driving shift is increased further by allowing an additional three or more hours in each shift for other work including the loading and unloading of trucks.

The danger posed by these provisions to the health and safety of truck drivers and the motoring public are made even worse by the weekly "restart" provision. The restart undermines what previously was a "hard number" 60-hour weekly driving cap (70 hours for drivers on an 8-day schedule). Instead, the rule permits drivers to reset their accumulated weekly driving hours to zero at any point during the work week after taking only a 34-hour off–duty break, and then start a new tour of duty. This permits drivers

who use the restart provision to cram an extra 17 hours of driving into their schedule each week, actually operating their trucks for a total of 77 hours in seven calendar days instead of the previous limit of 60 hours. Drivers operating on an 8-day schedule can drive an extra 18 hours – a total of 88 driving hours instead of the previous limit of 70-hours.

The restart permits companies to squeeze these excessive "bonus" driving hours out of drivers. Instead of having a full weekend of 48 or more hours off duty for rest and recovery, which was required under the previous HOS rule, the restart permits motor carriers to compel drivers to cash in their rest time for extra driving hours. This dramatically increases truck driver crash risk exposure, yet FMCSA rationalized this dramatic increase in daily and weekly driving and work hours as just as safe as the previous HOS rules when drivers had more end-of-week rest time.

The current HOS rule was issued by FMCSA despite the findings of fact by the agency, and its predecessors, that crash risk significantly increases after eight consecutive hours of driving and that long driving and work hours promote driver fatigue. FMCSA also failed to properly take into account driver health impacts and scientific findings showing that more driving and working hours are dangerous and lead to an increased risk of crashes, especially among workers in industries with long hours of shiftwork who have little opportunity for rest and recovery. Advocates meticulously documented the science showing that the agency's selective use of research findings was designed to justify a regulatory outcome prior to any studies FMCSA marshaled to justify its expansion of driver working and driving hours.

These concerns were echoed by the U.S. Court of Appeals in two separate, unanimous decisions that vacated the current HOS rule and remanded the rule to the agency for changes. In each case, the Court questioned the basis for the agency's decision-making in allowing longer driving hours despite the safety threat, adverse health effects and the increased crash risk posed by the rule, indicating that the current HOS rule was not based on sound reasoning.[46] And despite back to back judicial decisions overturning the rule in each case, FMCSA refused to make changes to the maximum daily and weekly driving and work hours allowed by the rule.

On December 19, 2007, this Subcommittee held a hearing on the HOS rule. The record of that hearing documents the safety concerns about the HOS rule and its precarious legal status. In 2008, the FMCSA nevertheless defiantly reissued the same flawed HOS rule for a third time and, in 2009, Advocates, Public Citizen, the Truck Safety Coalition and the International Brotherhood of Teamsters filed a third lawsuit challenging the rule.[47]

In an effort to expedite the issuance of what safety advocates hope will be a new, safer HOS rule, and to allow the new administration to determine the right course on this issue, safety and labor organizations agreed to hold the lawsuit in abeyance while FMCSA develops a new rule. Under the terms of the settlement the agency has agreed to forward a draft proposed rule to the Office of Management and Budget by the end of this coming July and, after taking public comment, to issue a new final rule by August, 2011.[48]

Recommendation:

- ***The Committee should continue rigorous oversight of the activity and efforts of FMCSA to comply with the HOS legal settlement and to issue a new rule that enhances the health and safety of truck drivers and the traveling public.***

FMCSA's New Entrant Motor Carrier Program Lacks Critical Safeguards:
In the Motor Carrier Safety Improvement Act of 1999 (MCSIA),[49] the law that established the FMCSA, Congress directed the new agency to establish minimum requirements to ensure that new motor carriers are knowledgeable about the federal motor carrier safety standards (FMCSRs).[50] It also required consideration of the need to implement a proficiency examination.[51] National safety organizations called on the agency to require, prior to making a grant of temporary operating authority, a proficiency examination to determine how well new entrant motor carriers understand and are capable of complying with the FMCSRs and Hazardous Materials Regulations (HMRs), and whether they can exercise sound safety management of their fleet, drivers, and operations.

FMCSA's new entrant final rule lacked many important aspects of appropriate agency oversight of new truck and motorcoach companies, especially the need to mandate an initial safety audit of new carriers before awarding them temporary operating authority, and performing a CR at the end of the probationary period of temporary operating authority with an assigned safety rating.[52] Advocates and other safety organizations strongly urged FMCSA to adopt these and other stringent oversight and enforcement mechanisms as part of the new entrant program. However, these suggestions were ignored or summarily rejected.

Because the agency rule did not implement the statutory directives in the MCSIA, and rejected other reasonable safeguards for new entrants, Advocates filed a petition for reconsideration with the agency on January 14, 2008.[53] The petition emphasized that the final rule contains no data or other information demonstrating that the new entrant review procedure adopted by FMCSA will improve the operating safety of new entrants through their knowledge about and compliance with the FMCSRs and HMRs. The petition also pointed out that the rule did not include an evaluation of the merits of a proficiency examination for new entrants, even though the MCSIA required the agency to consider the need for such an examination.

FMCSA granted Advocates' petition in part as the basis for issuing an advance notice of proposed rulemaking (ANPRM) asking for preliminary data, views, and arguments on the need for a proficiency examination.[54] While this appears to be a positive step, FMCSA continues to insist that its efforts to determine the capabilities of new entrants are adequate, and that the agency has fulfilled the statutory direction to ensure that applicants for the new entrant program are "knowledgeable about applicable safety requirements *before* being granted New Entrant authority."[55] In fact, the agency has no verification of a new entrant's knowledge of or capability to comply with the FMCSR and HMR because it doesn't ask for any demonstration by the applicant. The only way to ensure

that high-risk carriers are not allowed to start operating is to test their knowledge, and check their equipment and drivers to prevent them from threatening public safety.

In addition, careful safety evaluation of new entrant applicant motor carriers before the start of operations and prior to an award of temporary operating authority will help the agency screen for "chameleon" or "reincarnated" motor carriers. These are companies that, as discussed below, went out of business or were forced to cease operations, but return under the guise of being "new entrants". They conceal the fact that they actually are continuing operations with the same officers and equipment under a false identity.

Recommendations:

- ***Congress should explicitly require the FMCSA to adopt a proficiency examination to determine how well a new entrant knows the FMCSRs and HMRs, and how capable it is to conduct safe operations.***
- ***Congress should mandate that FMCSA conduct a pre-authorization safety audit of new entrant motor carriers to determine the quality of their safety management, drivers, and equipment before awarding temporary operating authority.***

Nineteen Years After Congress Ordered Entry-Level Driver Training Standards, FMCSA Still Has Not Issued a Rule Requiring Behind-the-Wheel Driver Training: Congress originally directed the FHWA to establish training standards for entry-level drivers in 1991.[56] There followed a long and tortured history of intermittent rulemaking and two lawsuits, the first for failing to issue a rule,[57] and the second for issuing an entirely inadequate, illegal final rule in 2004.[58] In the second case, the U.S. Court of Appeals rendered a judgment against the FMCSA, taking the agency to task for not issuing a training standard that included an on-the-road, behind-the-wheel training component.

FMCSA reopened rulemaking with a new proposed rule published on December 26, 2007,[59] 16 years after the original, legislated deadline for agency action. While the proposed rule represents a minimal improvement over the unacceptable final rule it is seriously flawed.

First, the FMCSA reduced, without explanation, the minimum number of hours of instruction recommended by the 1985 Model Curriculum,[60] from the 320 hours or more of instruction to only 120 hours. Second, the agency provides no justification in the proposal of the content of the curriculum or the minimum number of hours of instruction that would be required by the proposed curriculum. Third, the agency requires the same curriculum for drivers of motorcoaches as for drivers of straight trucks. Moreover, all curriculum content is indexed to truck driving, with no specific training and skills for motorcoach operators such as responsibilities for passenger safety management including emergency evacuation and combating fires.

Finally, FMCSA's proposal impermissibly restricts the scope of the entry-level driver training in two ways. First, it restricts the mandatory training to operators of interstate trucks, buses, and motorcoaches that have commercial drivers licenses (CDL). Nothing in the law itself or the legislative history indicates any intent by Congress to exempt

entry-level CDL holders who operate exclusively in intrastate commerce from driver training.[61] Second, the proposed rule applies only to entry-level drivers with a CDL. Again, there is nothing in the law itself, or the statutory history, permitting FMCSA to exclude entry-level drivers of commercial vehicles who do not have or need a CDL from the training required for other commercial drivers.[62]

FMCSA's weak rulemaking proposal is inadequate and fails to improve the knowledge and operating skills of entry-level commercial motor vehicle drivers.

Recommendation:

- ***Congress should direct FMCSA to require a more comprehensive driver training curriculum and include all entry-level commercial motor vehicle drivers regardless of whether they have CDLs or operate in interstate commerce.***

FMCSA Enforcement Issues

Compliance Safety Analysis 2010 – Unknown and Untested:
FMCSA has argued that enforcement rigor will be substantially increased when its new enforcement methodology, Comprehensive Safety Analysis 2010 (CSA2010), is fully implemented. Because CSA2010 for the first time will apply real-time roadside inspection data to motor carrier oversight and enforcement, there is some reason to believe that this may improve the agency's currently limited, bureaucratic approach to motor carrier compliance reviews and enforcement interventions. But, at the present time, most of the information needed to assess how effective CSA2010 could be is incomplete and not available to the public.

FMCSA has not finished its nine state pilot-testing of the new system. When reports on the pilot tests are completed, and released for public review and comment, a preliminary evaluation will be possible. Although FMCSA currently is encouraging motor carriers to assess how they rate using trial evaluations of their safety management performance, the results of these tests also will not be available to the public until later this year.[63]

The Government Accountability Office (GAO) has stated that it could not evaluate the quality of FMCSA's overall CSA2010 effort until the major actions associated with the operational tests of the new system were completed in June 2010.[64]

In addition, the agency is still conducting a feasibility study on using police accident reports to determine motor carrier crash accountability before the crash data are entered into the new Carrier Safety Management System (CSMS) that is to replace the existing Safety Status Measurement System (SafeStat). Until this analysis is completed, the agency will continue to follow its current policy under SafeStat: the crash data will be displayed publicly, but the CSMS assessment of a motor carrier's crash history will not.[65] At this time, critical information about the findings of the feasibility study, its direction or emphasis, and how police accident report data would be weighted or entered into the calculus of the CSMS to determine safety performance ratings is not available.

In the meantime, until CSA2010 is implemented incrementally in all states through 2011, FMCSA will still conduct safety fitness audits using traditional CRs. As a result, any definitive evaluation of the effectiveness of CSA2010 will not be possible until the full system is implemented.

It is important to note, however, several safety concerns regarding a bias that is built into the agency's new CSMS, on which CSA2010 relies, that will skew the resulting enforcement efforts. The new system will still not ensure that mechanical problems will have parity with driver violations for stopping dangerous carriers from operating unsafe trucks or motorcoaches. FMCSA's decision to place heavy emphasis on driver behavior as the core principle behind CSA2010[66] ignores the fact that mechanical defects are dramatically under-reported.

Studies[67] show that of the nearly 1,000 truck crashes investigated by FMCSA, fully 55 percent of them had one or more mechanical problems, and almost 30 percent had at least one condition that would trigger an out of service (OOS) order, that is, a directive to the truck and driver to stop operating. It was also found that just a brake OOS violation increased the odds of a truck being assigned the critical reason for precipitating the crash by 1.8 times. The implications are clear: FMCSA's approach to using its new enforcement metrics in CSA2010 will result in an unbalanced, excessive emphasis on driver as opposed to vehicle violations.

One consequence of the heavy emphasis on driver behavior over vehicle mechanical violations will be that, in practice, the agency is not accommodating NTSB's recommendation that violations of either mechanical or driver requirements alone should trigger a stop operations order.[68]

The over-emphasis on driver behavior over mechanical defects has another collateral consequence when it comes to hours of service enforcement. Because of the current necessity to rely on the use of driver logbooks that are so often falsified that they are known as "comic" books, violations of HOS rules are often missed in roadside inspections. A high percentage of drivers are able to repeatedly conceal hours of service violations by manipulating the entries in their logbooks. Even with supplementary documents available to law enforcement, such as toll and fuel receipts, truck drivers can still make their logbooks entries appear to be valid. If the CSMS is overly reliant on driver violations, and enforcement personnel remain unable to accurately detect this major source of violations, then the data and accuracy of CSA2010 will be questionable, and its capability to adequately address ongoing driver and carrier violations will be suspect.

For this reason, Advocates reiterates the need for Congressional action to direct FMCSA adoption of a universal EOBR regulatory requirement. Only the use of EOBRs can address this potential problem in the CSA2010 approach.

However, Advocates also regards the overwhelming emphasis on driver issues, not mechanical issues, for measuring compliance and rating motor carrier safety performance as a critical flaw of CSA2010.

Recommendations:

- ***FMCSA should be directed to re-evaluate the imbalanced approach to motor carrier violations in CSA2010 that relies too heavily on driver behavior.***
- ***Congress should direct the GAO to assess:***
  - ***the accuracy and deterrent value of safety performance findings generated by CSMS;***
  - ***the progress of CSA2010 and whether the effort is proceeding in the right direction;***
  - ***whether safety performance will be evaluated in a more timely and meaningful manner than the current Compliance Review regime; and***
  - ***whether the system will detect a much higher percentage of dangerous motor carriers that either need major and immediate reforms to their safety management or to stop operating.***

FMCSA Still Not Imposing Maximum Penalties Allowed by Law:

FMCSA still avoids getting tough with motor carrier violators and we hope there will be a change with the new leadership. The agency still evades the imposition of tough penalties that would send a message to all truck and motorcoach companies that the agency means business. Congress indicated in the agency's authorizing law that civil penalties had not been sufficiently used to deter violations.[69] Stiffer penalties than are currently levied against offending motor carriers would provide a strong deterrence to prevent other companies from committing serious violations.

FMCSA administers civil penalties allowed under the civil penalties section of the transportation code.[70] Despite the fact that this section has been amended a number of times in an effort to strengthen the legally allowed penalties, the statute affords the agency considerable discretion in setting the amount of penalties to be imposed and requires at the threshold only modest maximum penalties. Motor carriers – the trucking, motorcoach, and bus companies – are liable for a maximum penalty of $10,000 for each offense, while the motor carrier employees who are actually responsible for committing the violations are subject to no more than a fine of $2,500 per offense.[71]

Historically, the agency has through its policies and interpretations limited the penalties it has imposed. For example, Congress made it clear in the agency's enabling legislation that FMCSA was supposed to assess maximum financial penalties for commission of certain acute or chronic motor carrier safety regulatory violations after the commission of two offenses or a pattern of violations.[72] However, the GAO found that the agency did not assess maximum fines for a pattern of violations.[73] The same GAO report also found that the agency misinterpreted the statutory basis for imposing maximum fines, assessing maximum fines only after a third violation rather than following a second violation.

Even after FMCSA corrected its policy,[74] the modified enforcement policy is not as tough as it looks. A number of roadblocks keep the agency from imposing maximum penalties for a

"pattern" of violations. First, a "pattern" of violations must be those that occur when the FMCSA discovers two or more critical and/or acute violations in each of three or more different regulatory parts (i.e., a minimum of six acute and/or critical violations). In practice, the agency again restricted the assessment of monetary penalties to fewer violators.

Second, the revised policy again limits maximum penalties for a pattern of violations only if the carrier has had prior "contact" with FMCSA or a state enforcement authority.[75] This means that a previous CR had been carried out or that the carrier had undergone a new entrant motor carrier exit audit (performed before FMCSA accords permanent operating). But FMCSA specifically excludes the more numerous roadside inspections as the basis for providing the necessary prior contact even though the driver and carrier clearly are informed about violations of safety rules and regulations.

A third condition is that FMCSA must also judge that it is reasonably likely that previous contact with the agency, through a CR or a new entrant safety audit, "alerts" the carrier to FMCSA's enforcement and regulatory jurisdiction over certain motor carrier violations. This in itself is a startling criterion because it directly implies that the agency may not be able to impose civil penalties for violations, even repeat violations, on motor carriers who are or claim to be unaware that their interstate operations fall under FMCSA's jurisdiction. This means that the carrier has never been adequately informed of its responsibilities as an interstate motor carrier, or of the agency's authority to impose penalties. Ensuring that every motor carrier, starting with new entrants, is aware of this information and the agency's power to impose penalties for rule violations should be a routine agency responsibility and failure to do so is appalling and unacceptable.

One aspect of the new policy is even less demanding than previous policy. Under the previous fines provision, proposed maximum penalties could not be settled for less than the amount assessed. However, under the new policy, all penalties, including patterns and two repeated violation penalties may be settled with FMCSA suspending a part of the assessed penalty for a variety of reasons. Also, the criteria for assessing maximum penalties are limited. Maximum penalties will be only applied in cases where an acute, not a critical, violation is discovered during an investigation within six years of a previously closed case that contained a finding of violation of a critical or acute regulation in the same FMCSRs and/or HMRs part. Violations of different parts of the FMCSRs or HMRs do not count.

These examples of enforcement policies show that even when FMCSA obeys the letter of the law, it can find a way to use agency discretion to undermine both the standards for imposing fines as well as the amount of the fines themselves.

Finally, FMCSA admits in its updated study on the effectiveness of monetary penalties that it cannot determine whether the changed penalty structure and amounts of fines have a beneficial effect on motor carrier violation rates and on motor carrier safety.[76] Part of the problem is that the agency has imposed substantially different amounts of fines from year to year. Even after the maximum penalty amount was increased, average non-recordkeeping penalties plummeted from $5,066 in 2000 to $2,938 in 2006.[77] The latter

figure is only a little more than 29 percent of the maximum permitted by law. It is clear that raising penalty ceilings in federal legislation while allowing broad agency discretion in the amounts of penalties actually imposed does not ensure that violations trigger stiff penalties or promote deterrence.

Recommendations:

- ***Congress should request a GAO study of FMCSA's imposition of penalties for motor carrier safety violations to determine:***
  - ***whether the current higher maximum penalty amounts are actually deterring motor carriers from committing violations;***
  - ***the extent to which FMCSA has reduced or compromised penalty amounts in a manner that results in lower penalties per violation and per motor carrier;***
  - ***the extent to which motor carriers regard current levels of imposed penalties as acceptable costs of doing business rather than as a deterrent; and***
  - ***whether setting statutory minimum required penalties is necessary and appropriate, and to recommend such minimum amounts.***

FMCSA Does Not Have a Reliable Method to Detect Illegally "Reincarnated" or "Chameleon" Motor Carriers from Restarting Operations under a False Identity: At present, it is simply unknown what is the number of illegally operating carriers that have restarted their trucking and motorcoach companies as new entrants to mask prior operations, and to avoid paying large fines and complying with out of service orders.

It has become increasingly apparent that FMCSA's methods of detecting whether a motor carrier is legitimately registered with the agency and has legal operating authority are unreliable and unsafe. Thousands of motor carriers subject to heavy fines from repeated, past violations and even given stop operations orders sink out of sight and then re-appear as supposed new entrants seeking registration and initial operating authority from FMCSA.

In 2008, the horrific crash of a motorcoach in Sherman, Texas, resulted in the deaths of 17 passengers and injuries to the driver and the other 38 passengers. As referenced previously in this testimony, the motorcoach was operated by Angel Tours, which had been stopped from operating by FMCSA just weeks prior to the crash but continued to operate under the new name Iguala Busmex. Angel Tours had an extremely poor safety record and had been ordered by the agency to cease operations.[78]

The NTSB investigation found that the numerous safety violations of the motorcoach and its drivers were a continuation of the company's exceptionally poor safety record when it registered with FMCSA as a new company. NTSB determined that FMCSA processes for vetting new entrant carriers through the use of its New Applicant Screening Program were inadequate for identifying the motorcoach company as an operation that had deceptively re-incorporated – a "reincarnated" or "chameleon" carrier – to evade agency enforcement actions. That failed screening process had allowed hundreds of motorcoach and trucking companies to escape detection as illegal, new motor carriers.

In a separate study, GAO tried to determine the number of motorcoach carriers registered with FMCSA as new entrants in FY2007 and FY2008 that are substantially related to previous companies or are, in fact, the same companies that have "reincarnated" themselves as new operations. GAO found 20 motorcoach companies that had re-appeared as new companies from old companies, representing about nine percent of 220 interstate motorcoach companies that FMCSA placed out of service during those two fiscal years. (These 220 companies are part of the approximately 4,000 motorcoach companies registered with FMCSA in FY 2008.) According to GAO, this percentage is probably an underestimation of the number of "chameleon" carriers in operation that have disguised their prior, unsafe operations to hide their reincarnation from the agency.

FMCSA officials admitted to GAO that until the 2008 motorcoach crash in Sherman, Texas, reincarnating was easy to do and hard to detect. In fact, five of the 20 carriers identified by GAO were still operating in May 2009, and GAO referred them to the agency for investigation. GAO also found another 1,073 trucking companies that appeared to be reincarnated "chameleon" carriers, which FMCSA had not detected.[79] Although FMCSA has instituted a new process for detecting such carriers, GAO has not evaluated its effectiveness.

A follow-up study is badly needed to determine whether FMCSA's new procedures for detecting "reincarnated" carriers has made substantial inroads on the number of illicit trucking and motorcoach companies currently operating as new companies.

Recommendations:

- ***Congress should direct FMCSA to require the principal officers of each new entrant motor carrier to declare, on the new entrant application, under penalties for perjury, that the new entrant is not a reincarnated or previously operating motor carrier with a different DOT registration number;***
- ***GAO should conduct a follow up investigation to assess whether the FMCSA's new process for detecting "reincarnated" carriers is effective.***

Conclusion

Creation of a new federal agency to oversee motor carrier and motorcoach safety has not resulted in the rigorous oversight and enforcement that Congress directed and the public expected. Safety goals are not met but merely changed, rulemakings are routinely overturned in legal challenges because of faulty reasoning and illegal underpinnings, enforcement is sporadic and weak, and unsafe carriers and drivers continue to operate with near impunity. Every year thousands are killed and over 100,000 injured in truck crashes, every month on average there is a serious motorcoach crash, and every day tough safety regulations to combat driver fatigue, improve enforcement and train new commercial drivers are delayed. While we hope the new leadership team at DOT will set this agency on a new course, it will still be necessary for Congress to conduct constant oversight and provide clear direction to this agency if we expect any strong and sustained progress in reducing deaths and injuries. Advocates thanks you for your leadership and looks forward to working with you on advancing motor carrier safety.

End notes

[1] *Large Truck and Bus Crash Facts 2007*, FMCSA-RRA-09-029, Federal Motor Carrier Safety Administration (FMCSA) (Jan. 2009).

[2] *Traffic Safety Facts – Large Trucks*, DOT HS 811 158, National Highway Traffic Safety Administration (NHTSA) (2009).

[3] *See, e.g.*, *http://www.glgroup.com/News/Leading-Indicator---2008-North-America-Freight-Market--Truck-Build-Numbers-Down---2009-Predicted-To-Be-Worse-With-2010-30689.html*, demonstrating 7 consecutive quarterly declines in truck freight tonnage through the third quarter of 2009. Also *see*, http://www.ttnews.com/articles/basetemplate.aspx?storyid=22609, " ATA's Costello Hopeful Freight Levels Have Bottomed Out," *Transport Topics*, Aug. 27, 2009, and a similar, earlier report in *Transport Topics*, March 2, 2009.

[4] *Freight Tonnage Continues to Decline*, Martin's Logistics Blog, Aug. 3, 2009. http://logistics.about.com/b/2009/08/03/freight-tonnage-continues-to-decline.htm. Also *see, e.g.*, http://www.glgroup.com/News/Leading-Indicator---2008-North-America-Freight-Market--Truck-Build-Numbers-Down---2009-Predicted-To-Be-Worse-With-2010-30689.html, demonstrating 7 consecutive quarterly declines in truck freight tonnage through the third quarter of 2009. Also *see*, http://www.ttnews.com/articles/basetemplate.aspx?storyid=22609, demonstrating 7 consecutive quarterly declines in truck freight tonnage through the third quarter of 2009. Also *see*, http://www.ttnews.com/articles/basetemplate.aspx?storyid=22609, "ATA's Costello Hopeful Freight Levels Have Bottomed Out," *Transport Topics*, Aug. 27, 2009, and a similar, earlier report in *Transport Topics* (March 2, 2009).

[5] *U.S. Recession Periods and Motor Vehicle Fatalities, 1971-2008*, Advocates for Highway and Auto Safety (2010).

[6] "While these latest trends are encouraging, we do not expect them to continue once the country rebounds from its current economic hardships." Administrator Strickland emphasized that with an improving economy, more driving will result with high crash risk exposure. *Budget Estimates Fiscal Year 2011*, Statement from the Administrator, at 1-2, National Highway Traffic Safety Administration (Jan. 2010).

[7] *Traffic Safety Facts 2008*, DOT HS 811 170, NHTSA (2010).

[8] *Id.*

[9] *Budget Estimates Fiscal Year 2011*, at I-1, FMCSA (Jan. 2010).

[10] Companion bill in the House of Representatives is H.R. 1619, introduced by Rep. James McGovern (D-MA).

[11] *Safe and Efficient Transportation Act of 2008*, introduced by Rep. Michael Michaud (D-ME).

[12] Title 23 U.S.C. § 127(d).

[13] P. L. No. 110-53

[14] Title 23 U.S.C. § 127.

[15] *Id.*

[16] For example, the states began to allow bigger, heavier trucks on their non-Interstate highways in the early 1970s. The Federal-Aid Highway Act in 1978, Pub. L. 95-599 (Nov. 6, 1978), authorized the states to allow substantial increases in truck weights on Interstate highways and bridges. Subsequently, the Surface Transportation Assistance Act of 1982 (1982 STAA), Pub. L. 97-424 (Jan. 6, 1983), pre-empted state size and weight restrictions both on and off the Interstate systems by enacting new, higher federal size and weight limits. Those new limits applied to a designated National Network consisting of several hundred thousand miles of interconnected, primary highways, most of which had never had any federal control on truck size and weight. Many states gave up fighting after this sweeping act of federal pre-emption and simply extended the new, higher weight and size limits to all or most of their highways. Many other exemptions from the Interstate weight restrictions were enacted in the Surface Transportation

and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17 (April 2, 1987); the Truck and Bus Safety and Regulatory Reform Act of 1988, Pub. L. 100-690 (Nov. 18, 1988); and the the Motor Carrier Safety Act of 1990, § 15, Sanitary Food Transportation Act of 1990, Pub. L. 101-500 (Nov. 3, 1990); and the Motor Carrier Safety Act of 1991, Title IV, Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240 (Dec. 18, 1991).

[17] *Truck Inventory and Use Survey*, U.S. Bureau of the Census, 1974, 1982, 1987.

[18] This increasingly liberal interpretation of grandfather rights in many states was the result of a major amendment in the 1982 STAA that excluded the Federal Highway Administration from overseeing and enforcing state weight limits on the Interstate highway system. The amendment allowed the states to determine for themselves the force and effect of their grandfather rights to vary axle and gross weights, and bridge load formulas, from the requirements of 23 U.S.C. § 127.

[19] *Truck Inventory and Use Survey, op. cit.*, 1992.

[20] *Vehicle Inventory and Use Survey* (formerly the *Truck Inventory and Use Survey*), U.S. Bureau of the Census (1997).

[21] *Highway Statistics 2008*, Federal Highway Administration (FHWA) (Jan. 5, 2010).

[22] *See, e.g.*, Transportation Efficiency Act for the 21st Century (TEA-21), P.L. 105–178 (June 9, 1998) (eliminated major federal safety regulations governing drivers of utility service vehicles); National Highway System Designation Act of 1995, P. L. 104–5 (Nov. 28, 1995) (exempted drivers transporting agricultural commodities and farm supplies from maximum driving time, maximum duty time, and minimum off-duty time hours of service requirements, and allowed drivers of ground water well drilling rigs, of construction materials and equipment, and of utility service vehicles to use a 24-hour restart for each new work week rather than the minimum required layover time after a tour of duty).

[23] TEA-21, § 407, *codified* at 49 U.S.C. § 31315(b).

[24] 65 FR 22540 (May 2, 2000). *See, e.g.*: "The FMCSA has found no sleep or fatigue research that supports any of the current exceptions or exemptions, including the 24-hour restart provisions authorized by the NHS Act." *Id.* at 25559.

[25] Sections 194(a) and 194(d), Fiscal Year 2010 Transportation, Housing, and Urban Development Consolidated Appropriations Act of 2009, P.L. 111-117 (Dec. 16, 2009).

[26] *Western Uniformity Scenario Analysis*, U. S. Department of Transportation (April 2004).

> In recent years a number of *ad hoc*, State-specific exemptions from federal truck size and weight laws have been enacted. For instance, TEA-21 contained special exemptions from federal size and weight limits in four States, Colorado, Louisiana, Maine, and New Hampshire. The Department does not support this kind of piecemeal approach to truck size and weight policy. It makes enforcement and compliance with truck size and weight laws more difficult, it often contributes little to overall productivity, it may have unintended consequences for safety and highway infrastructure, and it reduces the willingness to work for more comprehensive solutions that would have much greater benefits.

Id. at XI-3.

[27] The Motor Carrier Safety Improvement Act of 1999 (MCSIA), P. L. 106-159 (Dec. 9, 1999), *codified at* 49 U.S.C. § 113(b).

[28] Available at http://www.ntsb.gov/recs/mostwanted/federal_issues.htm. The current, 2010 Most Wanted Transportation Safety Improvements for motor carriers include the following issues:

- Prohibit Cell Phone Use by Motorcoach Drivers: Acceptable Response Proceeding Slowly
- Require Electronic Onboard Data Recorders to Maintain Accurate Carrier Records on Driver Hours of Service: Unacceptable Response.
- Improve the Safety of Motor Carrier Operations: Action Needed by FMCSA.
- Prevent Medically Unqualified Drivers from Operating Commercial Vehicles: Action Need by FMCSA.

- Prevent Collisions by Using Enhanced Vehicle Safety Technology: Acceptable Response, Proceeding Slowly.
- Enhance Protection for Motorcoach Passengers: Action Needed by NHTSA.

[29] For the past 30 years, the Safety Board has advocated the use of on board data recorders to increase HOS compliance. In 1977, the Board issued its first recommendation on the use of on board recording devices for commercial vehicle HOS compliance, in response to FHWA's withdrawal of an advance notice of proposed rulemaking (NPRM) concerning the installation of tachographs. NTSB then urged FHWA to mandate the use of on board recorders in NTSB's 1990 safety study, *Fatigue, Alcohol, Drugs, and Medical Factors in Fatal-to-the-Driver Heavy Truck Crashes* after concluding that on board recording devices could provide a tamper-proof mechanism to enforce the HOS regulations. That request for a mandate has been re-issued periodically by NTSB since 1990. Since 2007, NTSB has raised the need for an EOBR mandate to its Most Wanted List.

[30] According to NTSB:

> The NTSB reiterates Safety Recommendation H-07-3 and both reiterates and reclassifies Safety Recommendation H-99-6 to the Federal Motor Carrier Safety Administration * * * Change the safety fitness rating methodology so that adverse vehicle or driver performance-based data alone are sufficient to result in an overall unsatisfactory rating for a carrier. (H-99-6).

www.ntsb.gov/recs/letters/2009/H09_32_41.pdf. (Jan. 4, 2010).

[31] 49 C.F.R. Part 396; MCSIA, § 210, *codified at* 49 U.S.C. § 31142.

[32] 66 FR 32863 (June 18, 2001). *See also* prior notice issued by the FHWA, 63 FR 8516 (Feb. 19, 1998).

[33] 49 U.S.C. § 31142.

[34] The company name is "Five-Minute Inspection, Inc," R. Accetta, *Motorcoach Run Off Bridge and Rollover Sherman, Texas, August 8, 2008*, PowerPointPresentation, Office of Highway Safety, NTSB, Oct. 30, 2009. *http://www.ntsb.gov/events/2009/sherman-tx/introduction.pdf*.

[35] Sec. 408 of the Interstate Commerce Commission Termination Act of 1995, P.L. 104–88 (Dec. 29, 1995).

[36] Electronic On-Board Recorders for Hours-of-Service Compliance, Final Rule, 64 FR 17208 (Apr. 5, 2010).

[37] U.S. Senate Committee on Commerce, Science and Transportation. Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security. Electronic On-Board Recorders (EOBR's) and Truck Driver Fatigue Reduction. 110th Cong. Washington: May 1, 2007.

[38] Sen. Lautenberg, Frank. Statement to the U.S. Senate Committee on Commerce, Science and Transportation. Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security. Electronic On-Board Recorders (EOBR's) and Truck Driver Fatigue Reduction. 110th Cong. Washington: May 1, 2007.

[39] "EOBR technology is proven. More than 50 countries have mandated Electronic Data Recorders for driving and standby time recording and/or speed and distance recording." Captain John E. Harrison. Statement to the U.S. Senate Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security. Electronic On-Board Recorders (EOBR's) and Truck Driver Fatigue Reduction. 110th Cong. Washington: May 1, 2007.

[40] Chairman Deborah Hersman, statement to the Transportation and Infrastructure Committee, Subcommittee on Highways and Transit, Motor Carrier Safety: The Federal Motor Carrier Safety Administration's Oversight of High Risk Carriers, 110th Cong. Washington: July 11, 2007.

[41] It also undermines the safety management of carriers by reducing critical information about whether their trucks and motorcoaches are illegally speeding. Under current FMCSA regulation, AOBRs are required to record vehicle speeds, so this policy choice by FMCSA is weaker than the current agency rule.

[42] *Motorcoach Safety Action Plan*, U.S. Department of Transportation, DOT HS 811 177, November 2009.

[43] S. 554, § 12(a).

[44] *See* § 4036, Surface Transportation Authorizing Act of 2009, House Committee on Transportation and Infrastructure, Committee Print, available at http://transportation.house.gov/.

[45] Hours of Service of Drivers; Drivers Rest and Sleep for Safe Operations; Final Rule, 68 FR 22455 (Apr. 28, 2003).

[46] *Owner-Operator Independent Drivers Ass'n v. FMCSA*, 494 F.3d 188 (D.C. Cir. 2007); *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004).

[47] Petition for Review, filed March 2009, *Public Citizen et al., v. FMCSA*, No. 09-1094 (D.C. Cir.)

[48] *Id., see* Settlement Agreement dated Oct. 26, 2009 and Order dated March 3, 2010.

[49] P. L 106–159 (Dec. 9, 1999).

[50] Section 210 of MCSIA added 49 U.S.C. § 31144(g) which directed the establishment of regulations requiring each owner or operator with new operating authority to undergo a safety review within 18 months of starting operations.

[51] MCSIA, § 210(b).

[52] 73 FR 76472 (Dec. 16, 2008).

[53] Advocates for Highway and Auto Safety, Jan. 14, 2008, "Petition for Reconsideration Filed with the Federal Motor Carrier Safety Administration Regarding the Order Issued on New Entrant Motor Carriers Safety Assurance Process, 49 CFR Parts 365, 385, 386, and 390, 73 Federal Register 76472 *et seq.*, December 16, 2008."

[54] New Entrant Safety Assurance Process; Implementation of Section 210(b) of the Motor Carrier Safety Improvement Act of 1999, advance notice of proposed rulemaking, 74 FR 42833 (Aug. 25, 2009).

[55] *Id.* at 42834 (emphasis supplied).

[56] ISTEA, § 4007(a).

[57] *See* settlement agreement dated February, 2003, *In Re Citizens for Reliable and Safe Highways v. Minetta*, No. 02-1363 (D.C. Cir. 2003).

[58] *Advocates v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005).

[59] 73 FR 73226 (Dec. 26, 2008).

[60] *Model Curriculum for Training Tractor-Trailer Drivers*, FHWA 1985.

[61] The original legislation creating the commercial driver license (CDL) explicitly required that CDLs must be issued to both interstate and intrastate commercial drivers. FMCSA has no statutory basis for the unilateral exclusion of intrastate CDL holders from required entry-level driver training. In addition, Congress has specifically emphasized the need for *greater* uniformity in motor carrier safety regulation in Sec. 203 of the Motor Carrier Safety Act of 1984.

[62] The provision in the Intermodal Transportation Efficiency Act of 1991 and accompanying legislative history cannot be construed to abbreviate the scope of required entry-level training only to drivers of commercial motor vehicles who also have CDLs.

[63] 75 FR 18256 (April 9, 2010).

[64] GAO letter to Senator Frank Lautenberg dated Dec. 20, 2007GAO-08-242R, at 9, Motor Carrier Safety (Dec. 20, 2007).

[65] *Id.* at 18258.

[66] *See*, 71 FR 61131 (Oct. 17, 2006). Also *see*, www.csa2010.fmcsa.dot.gov. Primary data sources available to researchers and enforcement authorities contain very little information on vehicle mechanical condition, but lots of detailed information about driver condition and behavior. In addition, available

crash data systems are not designed to support any analysis of how mechanical defects played a role in CMV crashes. All well-known crash data sets, such as the Fatality Analysis Reporting System (FARS), the General Estimates System (GES), and state crash files maintained and sent to FMCSA as part of each state's requirements under its State Enforcement Plan to qualify for Motor Carrier Safety Improvement Program (MCSAP) funds, are based on police reports. These data sets, unsurprisingly, contain very low percentages of various mechanical defects as contributing to reported crashes.

Officers on crash scenes do not engage in forensic work to detect mechanical failures. Police crash reports concentrate overwhelmingly on supposed driver errors or violations as the proximate reasons for the crash occurrences. If a report does contain mechanical or equipment failure information, it probably will involve an obvious, catastrophic failure and not deterioration of vehicle performance in key operating systems that cannot be detected by enforcement personnel at the crash scene. This disregard of mechanical defect involvement in CMV crashes is even more likely in injury or property-damage-only crashes.

Empirical data highlights the paradox of the radical under-reporting of CMV mechanical defects: roadside inspections, such as the annual Commercial Vehicle Safety Alliance (CVSA) Roadcheck repeatedly and consistently show high rates of mechanical defects and out of service orders issued for such defects. For example, CVSA's Roadcheck 2009 found an average of 1.12 vehicle violations in every roadside inspection, and 26.1 inspected trucks were placed out of service for mechanical/equipment violations. http://www.cvsa.org/news/2009_press.aspx. Severe under-reporting of mechanical defects that contribute to crashes has been borne out by several investigations. (Massie and Campbell 1996). It is clear that without special, in-depth studies keying on mechanical defects, crash data sets available for research cannot accurately identify the role of mechanical problems contributing to large truck crashes.

[67] A. McCartt, *et al.*, "Use of LTCCS Data in Large Truck Underride Study," Insurance Institute for Highway Safety, Society of Automotive Engineers 2010 Government/Industry Meeting, Washington, D.C., Jan. 26-29, 2010.

[68] [To FMCSA] "Change the safety fitness rating methodology so that adverse vehicle and driver performance-based data alone are sufficient to result in an overall unsatisfactory rating for the carrier" NTSB Rec. H-99-6, Feb. 26, 1999.

[69] MCSIA, § 3(2).

[70] 49 U.S.C. § 521(b).

[71] *Id.* at § 521(b)(2)(A).

[72] MCSIA, § 222 states:

> *(b) ESTABLISHMENT.—The Secretary— * * **
> *(2) shall assess the maximum civil penalty for each violation of a law referred to in subsection (a) by any person who is found to have committed a pattern of violations of critical or acute regulations issued to carry out such a law or to have previously committed the same or a related violation of critical or acute regulations issued to carry out such a law.*

[73] *Motor Carrier Safety: Federal Agency Identifies Many High-risk Carriers but Does not Assess Maximum Fines as often as Required by Law*, GAO-07-584, Aug. 2007.

[74] 74 FR 14184 (Mar. 30, 2009).

[75] *Id.* The information is contained in a prefatory note inserted into the updated Recommendations for Executive Action section of the Aug. 28, 2007, GAO study. This later insert is itself undated, but it cites FMCSA's March 2009 supplemental policy published in the FR on assessing maximum fines that revises the agency's characterization of a "pattern of violations" and what violations constitute a "two strikes" ruling by the agency.

[76] FMCSA states in its study of civil penalties:

> [I]t was determined during the original analysis that it is not possible to isolate the effects of the revisions to the civil penalty schedule on carrier behavior from other elements of the CR program or other FMCSA programs (e.g., the roadside inspection program). Other actions that could be taken against a carrier as a result of a CR include: placing a carrier out of service (OOS) for reasons other than nonpayment of fines, and determining that a carrier is unfit to operate. Also, it is not possible to isolate the effects of TEA-21 penalty revisions from other civil penalty revisions that follow in later years. Therefore, the 2004 study focused primarily on the impact of the changes in the revised civil penalty schedule on the dollar amount of the fines assessed to the carrier and on the number of violations assessed.

Analysis of FMCSA's Revised Civil Penalties (1995–2006): A Follow-up Study, FMCSA, U.S. Department of Transportation, Aug. 2009, at v.

[77] *Id.*, Table 4, at 11.

[78] *Highway Accident Report – Motorcoach Run-Off-The-Bridge and Rollover, Sherman Texas, Aug. 8, 2008*, NTSB/HAR-09/02, http://www.ntsb.gov/publictn/2009/har0902.htm.

[79] *Motor Carrier Safety: Reincarnating Commercial Vehicle Companies Pose Safety Threat to Motoring Public – Federal Safety Agency Has Initiated Efforts to Prevent Future Occurrences*, GAO-09-924, July 2009.