No. _____

In The
Supreme Court of the United States

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. By statute enacted in 1998 Congress unambiguously precluded any individual from operating a commercial motor vehicle without a commercial drivers license issued under federal standards. Under the "last-in-time" rule historically used to establish precedence between conflicting treaties and acts of Congress under the Supremacy Clause, this unambiguous provision should have been viewed as abrogating a conflicting provision in a 1991 executive agreement with Mexico providing for mutual recognition of each nation's commercial drivers' licenses. The Court of Appeals ruled otherwise holding that conditions placed in two appropriations bills amended the unambiguous language of the 1998 statute. Did the Court of Appeals' decision disturb the equilibrium between Congress and the Executive Branch under the Supremacy Clause by: (1) finding by implication Congressional intent to repeal or amend an unambiguous statute, and (2) elevating executive agreements to a position higher than acts of Congress by imposing upon Congress a more burdensome threshold for abrogation?

2. 49 U.S.C. § 31302(a) forbids individuals from operating commercial motor vehicles without a valid commercial driver's license issued in accordance with U.S. law. Did the Court of Appeals err by failing to address the canon of statutory construction holding that repeal of a statute by implication is not favored, and by failing to recognize that this canon applies with even greater force when the claimed repeal rests solely on appropriations acts?

LIST OF PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner:

Owner-Operator Independent Drivers Association, Inc.

Petitioner Owner-Operator Independent Drivers Association, Inc. does not have a parent corporation or a non-wholly owned subsidiary that would be required to be listed pursuant to Supreme Court Rule 29.6.

Respondents:

Anthony Foxx, Secretary, U.S. Department of Transportation; Anne S. Ferro, Administrator, Federal Motor Carrier Administration; and United States of America.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1-19), denying Petitioners' Petition for Review challenging the lawfulness of a pilot program authorized by the Federal Motor Carrier Safety Administration ("FMCSA") is reported at 724 F.3d 206. The notice of the FMCSA (App. 20-117) may be found at 76 Fed. Reg. 40420 (July 8, 2011).

JURISDICTION

The federal courts have subject matter jurisdiction under 28 U.S.C. §§ 1331 and 2342(3)(A). The causes of action alleged in the Petition for Review arose under 49 U.S.C. §§ 13902(a), 31135(b) and (c), and 49 C.F.R. Part 381.300 Subparts C through E.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The D.C. Circuit's order denying Petitioner's petition for rehearing en banc was entered on July 26, 2013. App. 118. This petition is timely filed pursuant to Sup. Ct. R. 13.1 and 13.3.

STATUTORY PROVISIONS INVOLVED

Petitioner relies upon 49 U.S.C. § 31302, which states: "No individual shall operate a commercial motor vehicle without a valid commercial drivers

license issued in accordance with [49 U.S.C.] section 31308."

The Court of Appeals' opinion relies upon two appropriations statutes: (1) the Department of Transportation and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-87, § 350(1)(B)(viii), 115 Stat. 833, 864(a) (2001); and (2) the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Pub. L. No. 110-28, § 901(b)(2)(B)(v), 121 Stat. 112 (2007).

STATEMENT OF THE CASE

A. Introduction

Petitioner, Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), is a trade association comprised of more than 150,000 members consisting primarily of individuals who operate commercial motor vehicles within the United States and Canada. The purpose of the Association is to promote the general commercial, professional, legislative, regulatory, safety and other interests of its membership. Respondents are governmental agencies and officials of the United States.

OOIDA challenges the authority of the Federal Motor Carrier Safety Administration ("FMCSA") to conduct a "pilot program" allowing Mexico-domiciled trucking companies to operate trucks throughout the United States driven by individuals who do not hold

valid commercial drivers licenses ("CDL's") issued under federal standards.

B. Course Of Proceedings

On December 17, 1992, the leaders of the United States of America, Canada, and the United Mexican States gathered to sign the North American Free Trade Agreement ("NAFTA"), an agreement regulating trade in goods and services. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). On November 20, 1993, Congress officially approved the NAFTA agreement. The legislation implementing NAFTA specifically provides: "nothing in this Act shall be construed – (A) to amend or modify any law of the United States, including any law regarding . . . (iii) motor carriers or workers safety. . . ." North American Free Trade Implementation Act, Pub. L. No. 103-182, Title I, § 102(a)(2)(A)(iii), 107 Stat. 2057 (1993).

Transborder trucking services are governed by NAFTA Article 1202(1) which provides that "[e]ach Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers." *Id.* The obligation described in Article 1202(1) is known as "national treatment." *Id.* The United States has undertaken no obligation under NAFTA to provide exemptions or waivers from the application of U.S. trucking laws or regulations to Mexico-domiciled motor carriers except insofar as such exemptions or

waivers may also be available to U.S.-domiciled motor carriers.

In 1991, a Memorandum of Understanding ("MOU") was entered into between the United States of America and the United Mexican States which provided for the mutual recognition of commercial drivers licenses between the two countries.[1] This MOU was executed by the U.S. Secretary of Transportation and the Mexican Secretary of Communications and Transportation. The MOU was not entered into pursuant to the Constitution's Treaty Clause, U.S. Const. art. II, § 2, cl. 2. Subsequently, in 1998, 49 U.S.C. § 31302 was amended to provide unambiguously that: "No individual shall operate a commercial motor vehicle without a valid commercial driver's license issued in accordance with Section 31308." Commercial Driver's License Requirement, Pub. L. No. 105-178, Title V, § 4011(b)(1), 112 Stat. 407 (1998). Additional changes to driver qualification standards were subsequently enacted in 1999. 49 U.S.C. § 31310. The issue thus presented is whether, under the Supremacy Clause, these later-enacted, unambiguous statutory provisions abrogated conflicting provisions of the earlier-enacted MOU.

In 2001, because of safety concerns, Congress prohibited FMCSA from expending funds to process

[1] A copy of the MOU may be found as Appendix A to implementing regulations published by the Federal Highway Administration in 1992. Commercial Driver's License Reciprocity with Mexico, 57 Fed. Reg. 31454-02 (July 16, 1992).

applications for operating authority until additional safety measures were adopted. Department of Transportation and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-87, § 350(1)(B)(viii) and 2, 115 Stat. 833, 864 (2001) ("Section 350"). Section 350, Safety of Cross-Border Trucking Between United States and Mexico, has been reenacted in each subsequent Department of Transportation appropriations act since 2002.

On May 1, 2007, FMCSA proposed a so-called "Demonstration Project" similar to the pilot program at issue here. Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 23883 (May 1, 2007). Three weeks later, Congress enacted the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Pub. L. 110-28, 121 Stat. 183 (2007), 49 U.S.C. § 13902 (Historical and Statutory Notes) (hereafter "Section 6901"). Section 6901 limited the ability of the Department of Transportation to obligate or expend funds to grant operating authority to Mexico-domiciled motor carriers until a variety of procedures had been followed and disclosures given together with public notice and the opportunity to comment.

Petitioner here and other interested parties challenged FMCSA's 2007 Demonstration Project in court. Congress, however, cut off funding for the project and, as a result, the suit was dismissed as moot. *Sierra Club v. Dep't of Transp.*, 563 F.3d 897, 898 (9th Cir. 2009).

On April 13, 2011, FMCSA published a Notice and Request for Comments in anticipation of launching a pilot program to test the efficacy of issuing operating authority to Mexico-domiciled motor carriers to operate beyond the commercial zones on the U.S. side of the border with Mexico. Pilot Program on NAFTA Long-Haul Trucking, 76 Fed. Reg. 20807-02 (April 13, 2011). The April 2011 Notice disclosed that FMCSA would accept compliance with specific Mexican rules governing drug testing, medical qualifications and commercial driver's licenses in lieu of compliance with corresponding U.S. statutes and regulations. 76 Fed. Reg. at 20814-16.

On July 8, 2011, FMCSA announced completion of final agency action under 49 U.S.C. § 31315(c) implementing a pilot program allowing certain Mexico-domiciled motor carriers to haul shipments throughout the United States if they originated in or are destined for Mexico. App. 20-117. The pilot program implements FMCSA's proposal to provide special accommodations to Mexico-domiciled motor carriers and drivers by permitting them to comply with Mexican laws and regulations governing commercial driver's licenses, driver's medical qualifications and drug testing rather than to comply with several U.S. statutes and regulations.

FMCSA, relying on the 1991 MOU with Mexico, decided to allow Mexican drivers to operate commercial motor vehicles under Licencia Federal de Conductor (LF) issued by Mexico rather than a CDL

meeting the requirement of U.S. statutes and regulations. App. 59-61.

OOIDA filed a petition for review with United States Court of Appeals for the District of Columbia Circuit challenging FMCSA's reliance on the MOU as legal justification for the pilot program. OOIDA argued before the Court of Appeals that FMCSA's assertion conflicted with the well-established proposition that the unambiguous provisions of a later enacted statute abrogate the conflicting provisions of earlier international agreements. The Court of Appeals denied OOIDA's petition in a decision issued on April 19, 2013. OOIDA's petition for rehearing was denied in an order entered on July 26, 2013.

This Petition raises two issues. First, by holding that two appropriations acts provided FMCSA with the authority to permit individuals to operate in this country under Mexican CDLs, the Court of Appeals impermissibly repealed by implication Section 31302's unambiguous bar on operating without a CDL issued under federal standards. Second, this repeal by implication of the unambiguous provisions of Section 31302 constituted a *de facto* resolution of the abrogation issue by injecting a contrived ambiguity into the later-enacted statute.

REASONS FOR GRANTING THE WRIT

Under the Supremacy Clause of the Constitution, acts of Congress and treaties stand on the same footing and are made of like obligation under the law. If an act of Congress and a treaty are in conflict, the one enacted last in time will control the other. *Reid v. Covert,* 354 U.S. 1, 18 (1957); *Chae Chan Ping v. United States,* 130 U.S. 581, 602-03 (1889); *Whitney v. Robertson,* 124 U.S. 190, 194 (1888). Where the subsequent statute is ambiguous, that ambiguity will be resolved in a way making the later enacted statute consistent with the prior international agreement. *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 62 (D.C. Cir. 2011).

In this case, the terms of 49 U.S.C. § 31302, the later enacted statute, are clear and unambiguous: "No individual shall operate a commercial motor vehicle without a valid commercial driver's license issued in accordance with [49 U.S.C.] Section 31308." "The language of the statute is entirely clear, and if it is not what Congress meant then Congress has made a mistake and Congress will have to correct it." *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring in the judgment).

Here, the Court of Appeals ignored the precedents of this Court and, drawing upon references to Mexican commercial driver's licenses in two appropriations acts, it effectively repealed or amended the unambiguous language in Section 31302. Repeal of a statutory provision by implication is not favored and will not be found unless an intent to repeal is clear

and manifest. *Rodriguez v. Unites States*, 480 U.S. 522, 524 (1987) (citation and internal quotation omitted). This rule applies with even greater force when the claimed repeal rests solely on an appropriations act. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 190 (1978). Instead of reading the appropriations bills' provision to be consistent with current statutes, as required on traditional canons of statutory interpretation, the court construed them to result in partial statutory repeal.

This Petition focuses upon the critical point of intersection between a longstanding canon of statutory construction (which the Court of Appeals ignored) and the equilibrium between Congress and the Executive Branch over which the Supremacy Clause stands guard. Under the approach taken by the Court of Appeals, Congress can no longer rely on the complete lack of ambiguity in the legislative language it adopts. Here, inconclusive references made in two appropriations acts are used to undercut the clear and unambiguous language of Section 31302. The result is that an obscure 1991 executive agreement with Mexico, never ratified by the Senate, is seen to trump a later enacted statute. "Distorting statutory language simply to avoid conflict with treaties would elevate treaties above statutes in contravention of the Constitution." *Fund for Animals v. Kempthorne,* 472 F.3d 872, 879 (D.C. Cir. 2006).

The D.C. Circuit appears poised to make additional changes to its Supremacy Clause jurisprudence. Petitioner here is also the petitioner in a related case

now pending before the D.C. Circuit. That case involves a later enacted and concededly unambiguous statutory provision requiring all drivers to be able to document their physical qualifications to drive through medical certificates issued by individuals listed on a national registry of medical examiners. The question presented in this related case is whether that statute abrogated provisions in the same 1991 MOU as is at issue here. *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, No. 12-1264 (D.C. Cir., filed June 18, 2012) (Petition for Rehearing En Banc pending). In that case, a divided panel of the Court of Appeals rejected the "last-in-time" rule and instead adopted a rule which required that Congress make a "clear statement" that it intended to repudiate the government's obligations under a previously negotiated treaty. *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 724 F.3d 230 (D.C. Cir. 2013). The majority opinion establishes a presumption against implicit abrogation of international agreements that applies even where conflicting statutory enactments are facially unambiguous. A dissenting opinion argues that the majority opinion's new formulation violates the Supremacy Clause and is in conflict with a number of this Court's decisions interpreting that clause. *Id.* at 239-42 (Sentelle, J., dissenting).

In addition, the Court of Appeals' ruling, which held that two appropriations bills repealed by implication an unambiguous federal statute, is squarely in conflict with the precedent of this Court. Under

the canon of construction disfavoring repeals by implication, courts are cautioned not to read one congressional enactment as implicitly repealing or suspending an earlier one. The Court of Appeals, by "[r]ead[ing] all the relevant statutes together," failed to apply the well-established canon of statutory construction. App. 9.

The D.C. Circuit is tampering with long established Supremacy Clause jurisprudence in important ways that warrant supervision by this Court. The Court of Appeals is not acting with due care in managing the delicate balance that must be struck under the Supremacy Clause when an international agreement negotiated by the Executive Branch and an act of Congress are in conflict. The Petition for Writ of Certiorari should be granted.

ARGUMENT

I. The Court Of Appeals Ignored Governing Canons Of Statutory Construction By Holding That Two Appropriations Acts Repealed An Unambiguous Substantive Statute

A. Governing Canons Of Statutory Construction

Under the canon of construction disfavoring repeals by implication, courts are reluctant to read one congressional enactment as implicitly repealing or suspending an earlier one. *See Rodriguez v. United*

States, 480 U.S. 522, 524 (1987) ("It is well settled, however, that repeals by implication are not favored, and will not be found unless an intent to repeal is 'clear and manifest.'") (citations and internal quotation marks omitted).

Courts "will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citations and internal quotation marks omitted). "[I]t is the duty of the courts, absent clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (citations and internal quotation marks omitted).

This Court has held that "[t]he doctrine disfavoring repeals by implication applied with full vigor when the subsequent legislation is an *appropriations* measure." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978) (emphasis in original). Indeed, the Court held that "[t]his is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Id.* (emphasis in original). The Court reasoned that while "both substantive enactments and appropriations measures are 'Acts of Congress,' . . . the latter have the limited and specific purpose of providing funds for authorized programs." *Id.*

As a result, "we are guided by the well-settled principle that while appropriations acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not." *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). In fact, "the established rule is that, when appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly." *Id.*, quoting *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984).

B. The Court Of Appeals Ignored The Well-Settled Rule That Appropriations Acts Should Rarely Be Used To Repeal Or Amend Substantive Statutory Provisions

Here, although invited to do so by Petitioner, the Court of Appeals did not engage in an analysis regarding whether the appropriations acts repealed the earlier statute by implication. Instead, the Court of Appeals "[r]ead all the relevant statutes together," and failed to consider, or mention, the issue of repeal by implication by an appropriations statute. App 9.

49 U.S.C. § 31302 is clear and unambiguous: "No individual shall operate a commercial motor vehicle without a valid commercial drivers license issued in accordance with [49 U.S.C.] section 31308." App 7-8. Notably, the Court of Appeals recognized that "Section 31302 and 31308 alone might prohibit Mexican

truckers from using their Mexican commercial driver's licenses. . . ." App. 8. However, the Court of Appeals concluded that "two subsequent statutes made clear that Mexican commercial driver's licenses are permissible." App. 8. By holding that two appropriations statutes conditioning the spending power of DOT allowed for the use of Mexican commercial driver's licenses, the Court of Appeals implicitly found that these appropriations statutes repealed the unambiguous prohibitions set forth in Section 31302. The effect of the Panel's decision was to rewrite Section 31302 to read: "No individual [except a Mexican-domiciled driver holding a valid Mexican commercial driver's license] shall operate a commercial motor vehicle without a valid commercial driver's license issued in accordance with section 31308."

While these appropriations statutes may have broadly addressed the subject of Mexican trucks, neither appropriations statute contains language repealing the statutory requirements for a CDL in Section 31302. Rather, both statutes contain certain conditions which must be fulfilled prior to FMCSA issuing regulations permitting a pilot program.

The first statute the Court of Appeals relied upon was the Department of Transportation and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-87, 115 Stat. 833 (2001). This statute lacks any direct authorization to repeal Section 31302. Instead, the statute stated that "if " FMCSA complied with several conditions FMCSA could seek authorization for a pilot program. According to the Court of Appeals,

however, section 350(1)(B)(viii) of this 2001 Appropriations Act "requires the [FMCSA] to verify that each Mexican truck driver has the proper qualifications, 'including a confirmation of the validity of the Licencia de Federal de Conductor [the Mexican-issued commercial driver's license] of each driver.' "[2]

The second statute relied upon by the Court of Appeals was also an appropriations statute. The U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act was enacted in 2007. Pub. L. No. 110-28, 121 Stat. 112 (2007). A provision of this statute, section 6901(b)(2)(B)(v), required the Secretary of Transportation to publish "a list of Federal motor carrier safety laws and regulations, including commercial driver's license requirements, for which the Secretary of Transportation will accept compliance with a corresponding law or regulation as the equivalent with the United States law or regulation. . . ." *Id.* The provision is merely a disclosure requirement, not a repeal of the existing CDL statute. Because the Secretary has existing

[2] App. 8. The Court of Appeals noted that sections 31302 and 31308 were initially enacted in the 1990's. It is, however, also important to note that these sections were amended once again in 2005 together with companion provisions of Title 49 addressing the creation and administration of a national federal/state commercial driver's license regulatory regime. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, "SAFETEA-LU", Pub. L. No. 109-59, 119 Stat. 1144 (2005). There is no mention in this 2005 statute of any amendment to Section 31302 by a 2001 appropriations statute.

authority to accept alternate forms of compliance with U.S. motor carrier safety *rules* under 49 U.S.C. § 31315, Section 6901 can be read to refer to that authority and need not, and should not, be interpreted to create new authority to accept non-compliance with existing *statutes*. 49 U.S.C. § 31315 does not give the Secretary authority to accept alternate compliance with Section 31302.

The Court of Appeals concluded that these two statutes, "enacted in two separate public laws directly addressing the issue of Mexican trucks – reflect Congress's decision to allow Mexican truckers with Mexican commercial driver's licenses to drive on U.S. roads." App. 9. The Court of Appeals failed to conduct the proper statutory analysis. Neither appropriations statute contained language that constituted a "clear and manifest" intent to repeal the statutory requirements for a CDL in Section 31302. The Court of Appeals decision does not point to a single word in either appropriations bill that would support repeal of the unambiguous language of section 31302 forbidding operation of a commercial motor vehicle by an individual who does not hold a valid commercial driver's license issued in accordance with section 31308. Not only is there no clear indication that Congress intended the appropriations statutes to repeal the licensing requirements in Section 31302, the evidence suggests the opposite. In fact, both appropriation statutes contained additional conditions that FMCSA was required to fulfill prior to allowing a pilot program. Neither statute can be

viewed as an attempt to replace the conditions under which Mexican drivers should be allowed to operate in this country.

In this case, the appropriations bill Section 350 requirement that the Secretary ensure that drivers from Mexico have a current valid Mexican license can easily be read within the restrictive purposes of Section 350 to impose a requirement upon Mexican drivers that is in addition to all existing requirements under U.S. law, including the requirement to have a U.S. CDL under 49 U.S.C. § 31302. This interpretation gives effect to both statutes. There is no clear unambiguous language in Section 350 directing or authorizing the Secretary to accept Mexican CDL's in conflict with the existing U.S. statutory requirement to have a U.S. CDL. If there was such language in this 2001 appropriations bill, there would have been no need for Congress to "repeal" Section 31302 again in 2007.

Section 6901(b)(2)(B)(v) of Pub. L. 110-28 became law on May 25, 2007, less than four weeks after the FMCSA published a notice announcing a previous Demonstration Project on Mexican trucks. 72 Fed. Reg. 23883 (May 1, 2007). Lawmakers concerned over a possible Mexican truck program passed Section 6901 to restrict the conditions under which the Secretary could commence such a program. Congress did not grant the Secretary the extraordinary authorization to waive his statutory and regulatory motor carrier safety responsibilities as the Panel suggests. Nothing in Section 6901 suggests that Congress

intended to permit FMCSA to deviate from requiring full compliance with existing motor carrier safety statutes and regulations.

Nothing in Section 6901 or previous appropriations section 350 suggests that Congress intended to permit the Secretary to deviate from requiring full compliance with existing motor carrier safety statutes and regulations. 49 U.S.C. §§ 13902(a)(1) and (4). And, nothing in the *additional* requirements imposed under Section 6901 overcomes the "very strong presumption that appropriations acts do not amend substantive law . . . " *Calloway v. District of Columbia*, 216 F.3d at 9 (internal citation omitted).

Indeed, as this Court has recognized, "we are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Pittsburgh & Lake Erie R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989).

The Court of Appeals read all of the statues together and made no reference to the canon disfavoring repeal of a statute by implication nor to the limited role given to appropriations acts in this process.

II. The Court Of Appeals Decision Upsets The Equilibrium Between Congress And The Executive Branch Under The Supremacy Clause

The Court of Appeals' repeal/amendment of 49 U.S.C. § 31302 by implication has important implications for the resolution of the conflict between that statute and the 1991 MOU with Mexico. It has long been held that, under the Supremacy Clause, where there is a conflict between an unambiguous Act of Congress and a preexisting international agreement, the last-in-time rule applies resulting in abrogation of conflicting provisions of the international agreement. *See Breard v. Greene*, 523 U.S. 371, 376 (1998).

The Supremacy Clause of the Constitution provides that: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It is well-settled that the Supremacy Clause places treaties and statutes on equal footing, which is why courts have always evaluated conflicts between statutes and treaties using the last-in-time rule. *See Chew Heong v. United States*, 112 U.S. 536, 549-50 (1884); *S. African Airways v. Dole*, 817 F.2d 119, 126 (D.C. Cir. 1987). As this Court explained: "The Constitution gives [a treaty] no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date." *Edye v. Robertson*, 112 U.S. 580, 599 (1884).

As a result, under the Supremacy Clause, if statutes or treaties are inconsistent with other statutes or treaties, the last-in-time rule applies, and the most recent statute or treaty controls. *See Breard,* 523 U.S. at 376; *Reid v. Covert*, 354 U.S. 1, 18 (1957); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

In this case, the Court of Appeals misapplied a cardinal rule of statutory construction thereby injecting contrived ambiguity into Section 31302. Once the inappropriate repeal/amendment of Section 31302 by implication is corrected, the Supremacy Clause requires abrogation of conflicting provisions of the 1991 MOU.

The Court of Appeals' decision disturbs the equilibrium between the Executive Branch and Congress under the Supremacy Clause by imposing upon Congress a more burdensome threshold for abrogation of Executive Branch agreements. No longer is it enough for Congress to enact unambiguous statutory language as it did in Section 31302. Now Congress must scour appropriations acts for any hint of inconsistency with proposed substantive legislation. Disfavor of repeal by implication is put to one side allowing prior executive agreements to prevail when Congress has not jumped through the hoops created by the Court of Appeals. This should not be the rule. "Distorting statutory language simply to avoid conflicts with treaties would elevate treaties above statutes in contravention of the Constitution." *Fund for Animals v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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October 24, 2013

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 6, 2012 Decided April 19, 2013
Reissued July 26, 2013

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
RESPONDENTS

OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC.,
PETITIONER

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, ET AL.,
RESPONDENTS.

On Petitions for Review of an Order of the
Federal Motor Carrier Safety Administration

Barbara J. Chisholm argued the cause for petitioners International Brotherhood of Teamsters, et al. With her on the briefs were Stephen P. Berzon, Jonathan Weissglass, Diana S. Reddy, and Scott L. Nelson.

Paul D. Cullen, Sr. argued the cause for petitioner Owner-Operator Independent Drivers Assn., Inc. With him on the briefs were Joyce E. Mayers and Paul D. Cullen, Jr.

Michael P. Abate, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were Tony West, Assistant Attorney General at the time the brief was filed, Ronald C. Machen, Jr., U.S. Attorney, David C. Shilton, John L. Smeltzer, and Michael S. Raab, Attorneys, Paul M. Geier, Assistant General Counsel, Federal Motor Carrier Safety Administration, and Peter J. Plocki, Deputy Assistant General Counsel.

Randolph D. Moss and Brian M. Boynton were on the brief for *amicus curiae* California Agricultural Issues Forum in support of respondents. Seth T. Waxman entered an appearance.

Stephan E. Becker and Daron T. Carreiro were on the brief for amicus curiae The United Mexican States in support of respondents.

Before: HENDERSON, ROGERS, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge*, KAVANAUGH.

KAVANAUGH, *Circuit Judge*: Pursuant to statute, the Federal Motor Carrier Safety Administration recently authorized a pilot program that allows Mexico-domiciled trucking companies to operate trucks throughout the United States, so long as the trucking companies comply with certain federal safety standards. Two groups representing American truck drivers, the Owner-Operator Independent Drivers Association and the International Brotherhood

of Teamsters, contend that the pilot program is unlawful. We disagree and deny their petitions for review.

I

Before 1982, trucking companies from Canada and Mexico could apply for a permit to operate in the United States. In 1982, concerned that Canada and Mexico were not granting reciprocal access to American trucking companies, Congress passed and President Reagan signed a law that prohibited the U.S. Government from processing permits for companies domiciled in those two countries. The trucking dispute between the United States and Mexico has lingered since then.

The United States and Mexico attempted to resolve the impasse when negotiating the North American Free Trade Agreement. After NAFTA took effect in 1994, the U.S. Government announced a program that would gradually allow Mexico-domiciled trucking companies to operate throughout the United States. Soon thereafter, however, the U.S. Government announced that Mexico-domiciled trucking companies would be limited to specified commercial zones in southern border states.

Mexico then complained to a NAFTA arbitration panel about that limited access. The panel ruled that the United States had to allow Mexico-domiciled trucking companies to operate throughout the United States. But the panel also explained that the United

States could require those companies to comply with the same regulations that apply to American trucking companies. The panel also ruled that if the United States failed to allow Mexico-domiciled trucks to operate throughout the United States, Mexico would be permitted to impose retaliatory tariffs.

In response, Congress passed and President George W. Bush signed a law that authorized the Federal Motor Carrier Safety Administration, part of the Department of Transportation, to grant permits to Mexico-domiciled trucking companies so long as the trucking companies complied with U.S. safety requirements. *See* Pub. L. No. 107-87, § 350, 115 Stat. 833, 864 (2001). As the U.S. Government worked to establish a permitting regime, Congress passed and President Bush signed another law requiring the Department of Transportation to implement a pilot program to ensure that Mexico-domiciled trucks would not make the roads more dangerous. *See* U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, Pub. L. No. 110-28, § 6901, 121 Stat. 112, 183 (2007).

In 2007, the FMCSA instituted a pilot program, but Congress passed and President Obama signed a law that expressly defunded the program before it was completed. *See* Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 136, 123 Stat. 524, 932 (2009). After Mexico imposed $2.4 billion in retaliatory tariffs in response, Congress passed and President Obama signed a law reinstating funds for the program. *See generally* Consolidated Appropriations Act

of 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009). In 2011, the agency again instituted a pilot program, *see* 76 Fed. Reg. 40,420 (July 8, 2011), which the Drivers Association and the Teamsters now challenge on multiple legal grounds.

II

The initial question is whether the Drivers Association and the Teamsters have standing to challenge the pilot program. The Government argues that the groups lack Article III standing, prudential standing, and organizational standing. We disagree.

To establish Article III standing, a plaintiff or petitioner must demonstrate that it has suffered injury in fact; that its injuries are fairly traceable to the allegedly unlawful conduct; and that a favorable ruling would redress its injuries. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Here, both the Drivers Association and the Teamsters have suffered an injury in fact under the doctrine of competitor standing. The competitor standing doctrine recognizes that "economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Sherley v. Sebelius,* 610 F.3d 69, 72 (D.C. Cir. 2010) (quotation marks and alteration omitted). Because the pilot program allows Mexico-domiciled trucks to compete with members of both these groups, the Drivers Association and the Teamsters have suffered an injury in fact. The causation

and redressability requirements of Article III standing are easily satisfied because, absent the pilot program, members of these groups would not be subject to increased competition from Mexico-domiciled trucks operating throughout the United States.

The Drivers Association and the Teamsters also meet the prudential standing "zone of interests" test. To establish prudential standing under the zone of interests test, the groups' asserted injuries "must be arguably within the zone of interests to be protected or regulated by the statute[s]" that they allege were violated. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2199, 2210 (2012) (quotation marks omitted). As the Supreme Court recently emphasized, the prudential standing test "is not meant to be especially demanding." *Id.* (quotation marks omitted). It "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (quotation marks omitted).

In authorizing the pilot program, Congress balanced a variety of interests, including safety, American truckers' economic well-being, foreign trade, and foreign relations. These trucking groups are plainly within the zone of interests of the statutes governing the pilot program.

Finally, the Drivers Association and the Teamsters both have organizational standing. An organization has standing to seek injunctive relief if at least one of its members would have standing and if the issue is germane to the organization's purpose. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 342-43 (1977). Both groups satisfy these requirements: Their members are hurt by increased competition, and the groups exist to protect the economic interests of their members.

We therefore conclude that both groups have standing to challenge the pilot program.

III

On the merits, we first consider the Drivers Association's arguments.

The Drivers Association advances seven distinct arguments that the pilot program violates various statutes and regulations. We find none to be persuasive.

First, the Drivers Association contends that the pilot program unlawfully allows Mexico-domiciled truckers to use their Mexican commercial drivers' licenses. The Drivers Association says that the pilot program thus violates a federal statute that provides: "No individual shall operate a commercial motor vehicle without a valid commercial driver's license issued in accordance with section 31308." 49 U.S.C. § 31302. Section 31308, in turn, requires the

Secretary of Transportation to set "minimum uniform standards for the issuance of commercial drivers' licenses . . . *by the States*." *Id.* § 31308 (emphasis added). The Drivers Association contends that, working together, Sections 31302 and 31308 require all truck drivers operating in the United States to have commercial drivers' licenses issued by a State, and Mexico obviously is not a state.

The relevant portions of Sections 31302 and 31308 were initially enacted in the 1990s. *See* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 4011, 112 Stat. 107, 407 (1998); Pub. L. No. 103-272, § 1(d), 108 Stat. 745, 1020 (1994). Even if Sections 31302 and 31308 alone might prohibit Mexican truckers from using their Mexican commercial drivers' licenses, two subsequent statutes made clear that Mexican commercial drivers' licenses are permissible. A statute enacted in 2001 requires the Federal Motor Carrier Safety Administration to verify that each Mexican truck driver has the proper qualifications, "including a confirmation of the validity of the Licencia de Federal de Conductor [the Mexican-issued commercial driver's license] of each driver." Pub. L. No. 107-87, § 350(1)(B)(viii), 115 Stat. 833, 864 (2001). A second statute enacted in 2007 requires the Secretary of Transportation to publish "a list of Federal motor carrier safety laws and regulations, *including the commercial drivers[']* *license requirements,* for which the Secretary of Transportation will accept compliance with a corresponding Mexican law or regulation as the equivalent to compliance with the

United States law or regulation." U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, Pub. L. No. 110-28, § 6901(b)(2)(B)(v), 121 Stat. 112, 184 (2007) (emphasis added). Those two statutes – enacted in two separate public laws directly addressing the issue of Mexican trucks – reflect Congress's decision to allow Mexican truckers with Mexican commercial drivers' licenses to drive on U.S. roads.

The Drivers Association would have us find that those two laws are worthless surplusage. Reading all of the relevant statutes together, as we must, we think the more sensible conclusion is that Congress decided that Mexico-domiciled truckers with Mexican commercial drivers' licenses could drive on U.S. roads and that a Mexican commercial driver's license would be considered the essential equivalent of a state commercial driver's license for purposes of this statutory scheme. We therefore conclude that the pilot program allows Mexican truck drivers to use their Mexican-issued commercial drivers' licenses.

Second, the Drivers Association argues that the pilot program violates a statute governing medical certificates for truckers. Under that statute, the Secretary of Transportation must ensure that "the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely" and that the physical exams required of truckers are performed by examiners who have received adequate training and are listed on a national registry. *See* 49 U.S.C. §§ 31149(c)(1)(A)(i), (d).

The Secretary has fulfilled that requirement by finding that issuance of a Mexican commercial driver's license, which requires a physical examination every two years, provides "proof of medical fitness to drive." 49 C.F.R. § 391.41(a)(1)(i). Moreover, the requirement that the examiner be listed on a national registry has not yet taken effect. *See* 77 Fed. Reg. 24,104, 24,105 (April 20, 2012).

Third, the Drivers Association contends that the pilot program violates federal regulations establishing procedures for drug testing. By regulation, all drug tests must be processed at certified laboratories. *See* 49 C.F.R. § 40.81. The Drivers Association contends that the pilot program violates this regulation because the program allows for specimens to be collected in Mexico. But nothing in the regulation prohibits collection of the specimens in foreign countries so long as they are processed at a certified lab. Because the specimens collected under the pilot program must be sent to certified labs for processing, the pilot program complies with the cited drug testing regulations.

Fourth, the Drivers Association claims that the three previously discussed parts of the pilot program allow Mexico-domiciled trucks to comply with Mexican law instead of U.S. law. And because trucking companies may receive a permit to operate in the United States only if they comply with applicable U.S. law, *see* 49 U.S.C. § 13902(a)(1), the Drivers Association argues that the Secretary may not grant a permit to any company participating in the pilot

program. However, as we have already explained, U.S. law permits Mexican truckers to use their Mexican commercial drivers' licenses and to rely on those licenses as proof of medical fitness to drive. And the pilot program's drug-testing rules are valid under U.S. law. The pilot program therefore does not substitute compliance with Mexican law for compliance with U.S. law; as a result, this catchall argument by the Drivers Association is unavailing.

Fifth, the Drivers Association asserts that the agency granted "exemptions" to Mexico-domiciled trucking companies without following the proper statutory procedures. The statutory procedures cited by the Drivers Association for granting exemptions from safety regulations are contained in subsection (b) of 49 U.S.C. § 31315. But the statute makes clear that pilot programs such as this one need not go through the separately listed procedures for exemptions. *See* 49 U.S.C. § 31315(c). Therefore, this argument fails.

Sixth, the Drivers Association argues that the agency failed to meet its obligation to publish a list of safety laws and regulations for which it "will accept compliance with a corresponding Mexican law or regulation as the equivalent to compliance with the United States law or regulation" and that the agency failed to explain "how the corresponding United States and Mexican laws and regulations differ." U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, § 6901(b)(2)(B)(v). But the agency in fact published

such an analysis in the Federal Register. *See* 76 Fed. Reg. 20,807, 20,814 (April 13, 2011). The agency therefore satisfied that requirement.

Seventh, the Drivers Association contends that the pilot program is not "designed to achieve a level of safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved through compliance with" applicable safety laws and regulations. 49 U.S.C. § 31315(c)(2). The Drivers Association claims that the pilot program fails that requirement because it allows Mexico-domiciled truckers to rely on their commercial drivers' licenses, accepts those licenses as proof that a driver is medically fit to drive, and includes less stringent drug-testing procedures. However, as previously explained, federal statutes, not the pilot program, enable Mexico-domiciled truckers to use their commercial drivers' licenses, and the pilot program complies with applicable U.S. drug-testing regulations. And the agency reasonably concluded that those requirements are designed to achieve an equivalent level of safety. Hence, the Drivers Association's arguments fail.

IV

Having concluded that the pilot program withstands all of the Drivers Association's challenges, we now turn to the six additional arguments advanced by the Teamsters.

First, the Teamsters argue that the pilot program is unlawful because not all Mexico-domiciled trucks

are required to display a decal certifying that the truck complies with American safety standards. *See* 49 U.S.C. §§ 30112, 30115. But that decal requirement applies only if the trucks are "import[ed] into the United States" or are "introduce[d] . . . in interstate commerce" within the meaning of the Motor Vehicle Safety Act. 49 U.S.C. § 30112(a)(1). The agency concluded that the requirement does not apply to this class of Mexican trucks because the trucks are regularly driven into and out of the United States; they are not, in the agency's view, either imported or introduced in interstate commerce. We must uphold the agency's interpretation of "import" and "introduce . . . in interstate commerce" unless Congress has unambiguously spoken to the contrary or unless the agency's interpretation is an unreasonable interpretation of an ambiguous statutory provision. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

In our view, the agency reasonably concluded that the ordinary meaning of "import" is "to bring (wares or merchandise) into a place or country from a foreign country in the transactions of commerce." WEBSTER'S NEW INTERNATIONAL DICTIONARY SECOND EDITION 1250 (1945). That definition would apply to Mexico-domiciled trucks only if the trucks – not the items they carry – were brought into the country as commercial goods. That interpretation conforms to the longstanding rule that "vessels have been treated as *sui generis,* and subject to an entirely different set of laws and regulations from those applied to imported

articles." *The Conqueror,* 166 U.S. 110, 118 (1897). Because the trucks themselves are the instrumentalities of commerce and not wares or merchandise, it was reasonable for the agency to conclude that the trucks are not imported within the meaning of this statute.

The agency also reasonably concluded that the trucks are not introduced in interstate commerce within the meaning of the Act. The Act defines "interstate commerce" as "commerce between a place in a State and a place in another State or between places in the same State through another State." 49 U.S.C. § 30102(a)(4). That definition does not include cross-border traffic between Mexico and the United States. Congress could have included foreign commerce in this definition, but it did not.

The Teamsters cite *National Association of Motor Bus Owners v. Brinegar*, where this Court interpreted a definition of interstate commerce in a different statute to include all vehicles "on a public highway upon which interstate traffic is moving." 483 F.2d 1294, 1311 (D.C. Cir. 1973) (Robinson, J., controlling opinion). But *Brinegar* did not interpret the statute at issue in this case and did not involve foreign commerce and thus that case did not reach the question presented here. *See id.* at 1305. As a result, *Brinegar* does not foreclose the agency's interpretation of interstate commerce. In any event, even if Mexico-domiciled trucks transporting goods between the United States and Mexico are "introduce[d] . . . in interstate commerce," the safety decal requirement

still does not apply to those trucks because the safety decal requirement does not apply to the "introduction or delivery for introduction in interstate commerce of a motor vehicle or motor vehicle equipment after the first purchase of the vehicle or equipment in good faith other than for resale." 49 U.S.C. § 30112(b)(1). The Mexico-domiciled trucks at issue in this case are driven into the United States to transport goods. The trucks themselves are not being resold. For that reason as well, the safety decal requirement simply does not apply to these trucks.

Second, the Teamsters contend that the vision tests given to Mexican truck drivers require them to recognize only the color red while American truck drivers are required to recognize red, yellow, and green. However, the Teamsters' argument is foreclosed by *International Brotherhood of Teamsters v. Peña*, where this Court upheld the determination that Mexican medical standards need not be identical to American standards. *See* 17 F.3d 1478, 1484-86 (D.C. Cir. 1994). Here, the agency adequately explained its determination that the Mexican medical standards, some of which are more stringent than the American standards, would provide a level of safety at least equivalent to the American standards taken as a whole.

Third, the Teamsters assert that the pilot program is unlawful because Mexico has not granted U.S.-domiciled trucks "simultaneous and comparable authority" to operate in Mexico. *See* U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq

Accountability Appropriations Act of 2007, § 6901(a)(3). The Teamsters acknowledge that Mexico has granted U.S.-domiciled trucks *legal* authority to operate in Mexico, but complain that, as a practical matter, it is very difficult for American trucks to operate in Mexico. Because the statute requires Mexico to grant only legal authority to American trucks, the Teamsters' argument fails.

Fourth, the Teamsters argue that the pilot program impermissibly grants credit to trucking companies that participated in the 2007 pilot program. Under the relevant regulation, the agency may "grant permanent operating authority to a Mexico-domiciled carrier no earlier than 18 months after the date that provisional operating authority is granted." 49 C.F.R. § 365.507(f). The agency credits any time spent in the previous pilot program toward the 18 months required under this pilot program. The Teamsters argue that interpretation is impermissible. But the text of the regulation does not prohibit the agency from crediting a company for time that it participated in the 2007 program. We therefore cannot say that the agency's interpretation is incorrect, much less unreasonably so.

Fifth, the Teamsters contend that the pilot program does not include a "reasonable number of participants necessary to yield statistically valid findings." 49 U.S.C. § 31315(c)(2)(C). But this argument fails because an unlimited number of trucking companies may participate in the program. Whether Mexico-domiciled trucking companies ultimately

avail themselves of the opportunity is outside the agency's control. The agency has therefore met its obligation to include a sufficient number of participants so as to yield valid results. The Teamsters also argue that the program cannot yield statistically valid findings because it focuses on the number of inspections rather than the number of participants, and because it presumes that Mexico-domiciled trucking companies are as safe as their American counterparts. However, the Teamsters do not explain why the agency's approach is flawed, and in light of the degree of deference we give to the agency's statistical methodology, we cannot conclude that the program will yield invalid findings. *See Alaska Airlines, Inc. v. Transportation Security Administration,* 588 F.3d 1116, 1120 (D.C. Cir. 2009).

Sixth, the Teamsters contend that the agency violated the National Environmental Policy Act, which requires agencies to analyze the environmental impact of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). In this case, the Act required the agency to prepare a document called an Environmental Assessment. *See* 40 C.F.R. § 1501.4(b). The agency did so.

In *Department of Transportation v. Public Citizen*, the Supreme Court held that the agency was not responsible under NEPA for evaluating the environmental effects of the President's decision to allow Mexican trucks on U.S. roads. *See* 541 U.S. 752, 765-70 (2004). The Teamsters accept that holding. But

they try to argue that the agency still had discretion to restrict the pilot program so as to mitigate the environmental impacts. The Teamsters identified several alternatives the agency should have pursued. But, as the agency has explained, the short and dispositive answer to the Teamsters' argument is that the agency lacks authority to impose the alternatives proposed by the Teamsters and those alternatives would go beyond the scope of the pilot program. *See* Final Environmental Assessment of the Pilot Program on NAFTA Long-Haul Trucking Provisions, Docket No. FMCSA-2011-0097, at 6, 7-10 (Sept. 2011) (describing agency's discretion and rejecting alternatives the agency lacks discretion to implement).

In addition, the Teamsters contend that the agency released its environmental analysis too late. An agency's analysis must be released "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). The Teamsters argue that the agency violated this requirement because it published its Environmental Assessment after it had already issued a final notice of intent to proceed with the pilot program. However, the Teamsters have not identified any aspect of the pilot program that the agency could have designed differently to reduce the environmental impacts, and the agency completed its Environmental Assessment before authorizing any Mexico-domiciled trucking companies to operate under the program. Any technical error was therefore harmless and not grounds for vacating or remanding. *See*

Nevada v. Department of Energy, 457 F.3d 78, 90 (D.C. Cir. 2006).

* * *

We deny the petitions for review.

So ordered.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No FMCSA-2011-0097]

Pilot Program on the North American Free Trade Agreement (NAFTA) Long-Haul Trucking Provisions

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; response to public comments.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) announces its intent to proceed with the initiation of a United States-Mexico cross-border long-haul trucking pilot program to test and demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States beyond the municipalities in the United States on the United States-Mexico international border or the commercial zones of such municipalities (border commercial zones).

DATES: This notice is effective July 8, 2011.

ADDRESSES: You may search background documents or comments to the docket for this notice, identified by docket number FMCSA-2011-0097, by visiting the:

- *eRulemaking Portal:* http://www.regulations.gov. Follow the online instructions for reviewing documents and comments. Regulations.gov is available electronically 24 hours each day, 365 days a year; or.

• *DOT Docket Room:* Room W12-140 on the ground floor of the DOT Headquarters Building at 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's Privacy Act System of Records Notice for the DOT Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.

FOR FURTHER INFORMATION CONTACT: Marcelo Perez, FMCSA, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. Telephone (202) 366-9597; e-mail marcelo.perez@dot.gov.

SUPPLEMENTARY INFORMATION: On April 13, 2011, FMCSA published a notice in the **Federal Register** announcing its plans to initiate a pilot program as part of FMCSA's implementation of the NAFTA cross-border long-haul trucking provisions in compliance with section 6901(b)(2)(B) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, and requested public comments on those plans. FMCSA reviewed, assessed, and evaluated the required safety measures as noted in the notice, and considered all

comments received on or before May 13, 2011, in response to the April 13, 2011, notice. Additionally, to the extent practicable, FMCSA considered comments received after May 13, 2011. Once the U.S. Department of Transportation's (DOT) Inspector General completes his report to Congress required by section 6901(b)(1) and the Agency completes any follow up actions needed to address issues raised in the report, FMCSA will proceed with the pilot program. FMCSA made changes and clarified elements of the program as a result of comments to the docket. For example, the Agency will include International Registration Plan (IRP) and International Fuel Tax Association (IFTA) information in its pre-authority safety audit (PASA) process; posted the Mexican regulations in both English and Spanish in the docket for this notice; elaborated on the inspection of available vehicles operating in the United States during the compliance review (CR); and confirmed that the PASA information will be published in the **Federal Register**.

As indicated in the April 13, 2011, **Federal Register** notice, this pilot program will not include operations that transport placarded amounts of hazardous materials or passengers. In addition, on May 31, 2011, Mexico published its regulations that will govern a U.S. motor carrier's application for authority to operate in Mexico. In its regulations, Mexico specifies several types of transportation services, vehicles, and operations as ineligible for authority to operate into Mexico. These include oversized or overweight goods,

industrial cranes, vehicle towing or rescue, or packaging and courier services. Mexico is allowing U.S. motor carriers of international freight to operate into Mexico. Mexico has excluded these services, vehicles, and operations from the program because they are not classified as, or pertinent to, freight operations in Mexico; rather these types of operations are subject to separate operating authority requirements than freight motor carriers. While the United States does not distinguish between these types of freight operations, in order to comply with the reciprocity requirements of section 6901(a)(3), the United States will not issue authority to Mexico-domiciled motor carriers to transport oversized or overweight goods, industrial cranes, or operate vehicle towing, rescue or packaging and courier services in this pilot program.

Legal Basis

Section 6901(a) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 [Pub. L. 110-28, 121 Stat. 112, 183, May 25, 2007] (2007 Appropriations Act) provides that before DOT may obligate or expend any funds to grant authority for Mexico-domiciled trucks to engage in cross-border long-haul operations, DOT must first test granting such authority through a pilot program that meets the standards of 49 U.S.C. 31315(c). In accordance with 49 U.S.C. 31315(c)(2), in proposing a pilot program, the Secretary of Transportation (Secretary) has general authority to conduct pilot programs "that are designed to achieve a level of

safety that is equivalent to, or greater than, the level of safety that would otherwise be achieved * * * .."

In a pilot program, DOT typically collects specific data for evaluating alternatives to the regulations or innovative approaches to safety while ensuring that the goals of the regulations are satisfied. A pilot program may not last more than 3 years, and the number of participants in a pilot program must be large enough to ensure statistically valid findings. Pilot programs must include an oversight plan to ensure that participants comply with the terms and conditions of participation, and procedures to protect the health and safety of study participants and the general public. A pilot program may be initiated only after DOT publishes a detailed description of it in the **Federal Register** and provides an opportunity for public comment. Accordingly, on April 13, 2011, the Agency published a notice announcing its intention to conduct a pilot program and soliciting comment (76 FR 20807). This document responds to comments to the April 13, 2011 notice and provides additional information about the planned pilot program as requested by commenters. While a pilot program may provide temporary regulatory relief from one or more regulations to a person or class of persons subject to the regulations, or a person or class of persons who intends to engage in an activity that would be subject to the regulations (49 U.S.C. 31315(c)(1) and (2)), in this pilot program DOT does not propose to exempt or relieve Mexico-domiciled motor carriers from any FMCSA safety regulation or evaluate any less

stringent alternatives to existing regulation. Mexico-domiciled motor carriers participating in the program will be required to comply with the existing motor carrier safety regulatory regime plus certain additional requirements associated with acceptance into and participation in the program.

Section 6901(a) of the 2007 Appropriations Act, the terms of which have been incorporated in each subsequent DOT appropriations act, also provides that this pilot program must comply with section 350 of the Department of Transportation and Related Agencies Appropriations Act, 2002 [Pub. L. 107-87, 115 Stat. 833, 864, December 18, 2001] (section 350). Section 350 prohibited FMCSA from using funds made available in the 2002 DOT Appropriations Act to review or process applications from Mexico-domiciled motor carriers to operate beyond the border commercial zones until certain preconditions and safety requirements were met. The terms of section 350 have also been incorporated in each subsequent DOT appropriations act. Section 350(a)(1) required FMCSA to perform a PASA of any Mexico-domiciled motor carrier before that motor carrier is allowed to engage in long-haul operations in the United States. Vehicles the motor carrier will operate beyond the border commercial zones that do not already have a Commercial Vehicle Safety Alliance (CVSA) decal are required to pass an inspection at the border port of entry and obtain a decal before being allowed to proceed. Section 350(a)(4) also required DOT to give a distinctive identification number to each

Mexico-domiciled motor carrier that would operate beyond the border commercial zones to assist inspectors in enforcing motor carrier safety regulations. Additionally, every driver who will operate in the United States must have a valid commercial driver's license issued by Mexico. Section 350(c)(1) also required DOT's Office of the Inspector General (OIG) to conduct a comprehensive review of the adequacy of inspection capacity, information infrastructure, enforcement capability and other specific factors relevant to safe operations by Mexico-domiciled motor carriers; and section 350(c)(2) required the Secretary to address the OIG's findings and certify that the opening of the border poses no safety risk. The OIG was also directed to conduct similar reviews at least annually thereafter. A number of the section 350 requirements were addressed by FMCSA in rulemakings published on March 19, 2002 (67 FR 12653, 67 FR 12702, 67 FR 12758, 67 FR 12776) and on May 13, 2002 (67 FR 31978).

Section 136 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2009 [Division. I of the Omnibus Appropriations Act, 2009, Pub. L, 111-8, 123 Stat. 524, 932, March 11, 2009] (2009 Appropriations Act) prohibited DOT from expending funds made available in the 2009 Appropriations Act to establish, implement, or continue a cross-border motor carrier pilot program to allow Mexico-domiciled motor carriers to operate beyond the border commercial zones. The Transportation, Housing and Urban Development, and Related

Agencies Appropriations Act, 2010 [Division A of the Consolidated Appropriations Act, 2010, Pub. L. 111-117, 123 Stat. 3034, December 16, 2009] (2010 Appropriations Act) did not bar DOT or FMCSA from using funds on a cross-border long-haul program; but, pursuant to section 135 of the 2010 Appropriations Act (123 Stat. at 3053) did retain the requirements of section 6901 and section 350. Section 1101(a)(6) of the Full-Year Continuing Appropriations Act, 2011 [Pub. L. 112-10, division B, 125 Stat. 102, 103, April 15, 2011] (2011 Appropriations Act), makes funding available for DOT and other Federal agencies during Fiscal Year (FY) 2011 under the authority and conditions specified in the 2010 Appropriations Act.

Section 6901 of the 2007 Appropriations Act also provided that simultaneous and comparable authority to operate within Mexico must be made available to U.S. motor carriers. Further, before the required pilot program may begin, in accordance with section 6901(b)(1), the Department's OIG must submit a report to Congress verifying that DOT has complied with the requirements of section 350(a). DOT must take any actions that are necessary to address issues raised by the OIG and must detail those actions in a report to Congress. Section 6901(c) also directed the OIG to submit an interim report to Congress 6 months after the initiation of a cross-border long-haul Mexican trucking pilot program and a final report after the pilot program is completed. The statute further specified that the report address the program's adequacy as a test of safety. Also, as a precondition to

beginning the pilot program, section 6901 of the 2007 Appropriations Act requires that DOT provide an opportunity for public comment by publishing in the **Federal Register** information on the PASAs conducted. DOT must also publish, for comment, the standards that will be used to evaluate the pilot program. The Agency must also provide a list of Federal motor carrier safety laws and regulations, including commercial driver's license (CDL) requirements, for which the Secretary will accept compliance with corresponding Mexican law or regulation as the equivalent to compliance with the U.S. law or regulation including an analysis of how the corresponding United States and Mexican laws and regulations differ. Further discussion of relevant U.S. and Mexican safety laws and regulations is provided later in this notice.

Background

Introduction

Before 1982, Mexico- and Canada-domiciled motor carriers could apply to the Interstate Commerce Commission (ICC), a former independent Federal agency responsible for regulating, *inter alia,* motor carrier operations and safety for authority to operate within the United States. As a result of complaints that U.S. motor carriers were not allowed the same access to Mexican and Canadian markets that motor carriers from those nations enjoyed in this country, the Bus Regulatory Reform Act of 1982 [Pub. L. 97-261, 96

Stat. 2201, September 20, 1982] imposed a moratorium on the issuance of new operating authority to motor carriers domiciled, or owned or controlled by persons domiciled in Canada or Mexico. While the disagreement with Canada was quickly resolved, the issue of trucking reciprocity with Mexico was not.

Currently, most Mexico-domiciled motor carriers are allowed to operate only within the border commercial zones typically extending up to 25 to 50 miles into the United States. Every year, Mexico-domiciled commercial motor vehicles (CMVs) cross into the United States about 4.5 million times. Mexico granted reciprocal authority to 10 U.S.-domiciled motor carriers to operate throughout Mexico during the time of FMCSA's previous demonstration project, which was conducted between September 2007 and March 2009. Four of these motor carriers continue to operate in Mexico.

Trucking issues at the United States-Mexico border were not fully addressed until NAFTA was negotiated in the early 1990s. NAFTA required the United States to incrementally lift the moratorium on licensing Mexico-domiciled motor carriers to operate beyond the border commercial zones. On January 1, 1994, President Clinton modified the moratorium and the ICC began accepting applications from Mexico-domiciled passenger motor carriers to conduct international charter and tour bus operations in the United States (Memorandum for the Secretary of Transportation, "Determination Under the Bus Regulatory Reform Act of 1982," 59 FR 653, January

6, 1994). On December 13, 1995, the ICC published a rule and a revised application form for the processing of Mexico-domiciled property motor carrier applications (Form OP-1(MX)) (60 FR 63981). The ICC rule anticipated the implementation of the second phase of NAFTA, providing Mexico-domiciled motor carriers of property access to California, Arizona, New Mexico and Texas, and the third phase, providing access throughout the United States. However, at the end of 1995, the United States announced an indefinite delay in opening the border to long-haul Mexico-domiciled long-haul motor carrier operations.

In 1998, Mexico filed a claim against the United States under NAFTA dispute resolution provisions alleging that the United States' refusal to grant authority to Mexico-domiciled trucking companies constituted a breach of the United States' NAFTA obligations. On February 6, 2001, the arbitration panel, convened pursuant to NAFTA dispute resolution provisions, issued its final report and ruled in Mexico's favor, concluding that the United States was in breach of its obligations and that Mexico could impose tariffs on U.S. exports to Mexico up to an amount commensurate with the loss of business resulting from the lack of U.S. compliance. The arbitration panel noted that the United States could establish a safety oversight regime to ensure the safety of Mexico-domiciled motor carriers entering the United States, but that the safety oversight regime could not be discriminatory and must be justified by safety data.

After President Bush announced the intent to resume the process for opening the border in 2001, Congress enacted section 350, as discussed in the "Legal Basis" section of this notice. FMCSA took various steps to comply with section 350, including the issuance of new regulations applicable to Mexico-domiciled long-haul motor carriers (67 FR 12702, 12758, March 19, 2002). These regulations were challenged on environmental grounds in litigation that was ultimately decided in FMCSA's favor by the U.S. Supreme Court (*Department of Transportation v. Public Citizen,* 541 U.S. 752 (2004)).

In November 2002, then Secretary Norman Mineta certified, as required by section 350(c)(2), that authorizing Mexico-domiciled motor carrier operations beyond the border commercial zones did not pose an unacceptable safety risk to the American public. Later that month, President Bush modified the moratorium to permit Mexico-domiciled motor carriers to provide cross-border cargo and scheduled passenger transportation beyond the border commercial zones. (Memorandum of November 27, 2002, for the Secretary of Transportation, "Determination Under the Interstate Commerce Commission Termination Act of 1995," 67 FR 71795, December 2, 2002). The Secretary's certification was made in response to the June 25, 2002, DOT OIG report on the implementation of safety requirements at the United States-Mexico border. In a January 2005 follow-up report, the OIG concluded that FMCSA had sufficient staff, facilities, equipment, and procedures in place to

substantially meet the eight section 350 requirements that the OIG was required to review. These reports are available in the docket for this notice.

Former Secretary Mary Peters and Mexico's former Secretary of the Secretaria de Communicaciones y Transportes (SCT) Luis Téllez Kuenzler announced a demonstration project to implement certain trucking provisions of NAFTA on February 23, 2007. The demonstration project was initiated on September 6, 2007, after the DOT complied with the conditions imposed by section 6901 of the 2007 Appropriations Act, as discussed in the "Legal Basis" section of this notice. The demonstration project was initially expected to last 1 year (72 FR 23883, May 1, 2007). On August 6, 2008, FMCSA announced that the demonstration project was being extended from 1 year to the full 3 years allowed by 49 U.S.C. 31315(c)(2)(A) (73 FR 45796) after Secretaries Peters and Téllez exchanged letters on the extension.

On March 11, 2009, President Obama signed into law the 2009 Appropriations Act. Section 136 of the 2009 Appropriations Act provides that:

> [N]one of the funds appropriated or otherwise made available under this Act may be used, directly or indirectly, to establish, implement, continue, promote, or in any way permit a cross-border motor carrier pilot program to allow Mexican-domiciled motor carriers to operate beyond the commercial zones along the international border between the United States and Mexico,

> including continuing, in whole or in part, any such program that was initiated prior to the date of the enactment of this Act (123 Stat. at 932).

In accordance with section 136, FMCSA terminated the cross-border demonstration project that began on September 6, 2007. The Agency ceased processing applications by prospective project participants and took other necessary steps to comply with the provision. (74 FR 11628, March 18, 2009). In light of the termination, two consolidated lawsuits challenging the project and pending before the U.S. Court of Appeals for the Ninth Circuit were dismissed as moot.

On March 19, 2009, Mexico announced that it was exercising its rights under the 2001 NAFTA Arbitration Panel decision to impose retaliatory tariffs for the failure to allow Mexico-domiciled motor carriers to provide long-haul service into the United States. The tariffs affect approximately 90 U.S. export commodities at an estimated annual cost of $2.4 billion. The President directed DOT to work with the Office of the U.S. Trade Representative and the Department of State, along with leaders in Congress and Mexican officials, to propose legislation creating a new cross-border trucking program, and to address the legitimate safety concerns of Congress while fulfilling our obligations under NAFTA. Secretary Ray LaHood met with numerous members of Congress to solicit their input. FMCSA tasked its Motor Carrier Safety Advisory Committee (MCSAC) with providing

advice and guidance on essential elements that the Agency should consider when drafting proposed legislation to permit Mexico-domiciled motor carriers beyond the border commercial zones. The MCSAC final report on this tasking is available on the FMCSA MCSAC Web page at http://mcsac.fmcsa.dot.gov/Reports.htm. Additionally, DOT formed a team to draft principles that would guide the creation of the draft legislation.

President Obama signed the 2010 Appropriations Act on December 16, 2009, which contained no prohibitions against using FY 2010 funds to conduct a cross border long-haul program (unlike the 2009 Appropriations Act) and retained requirements specified in section 350 and section 6901 of the 2007 Appropriations Act.

On April 12, 2010, Secretary LaHood met with Mexico's former Secretary of SCT, Juan Molinar Horcasitas, and announced a plan to establish a working group to consider the next steps in implementing a cross-border trucking program. On May 19, 2010, President Obama and Mexico's President Felipe Calderon Hinojosa issued a joint statement acknowledging that safe, efficient, secure, and compatible transportation is a prerequisite for mutual economic growth. They committed to continue their countries' cooperation in system planning, operational coordination, and technical cooperation in key modes of transportation.

The Initial Concept Document and the Preliminary Agreement

On January 6, 2011, Secretary LaHood shared with Congress and the Government of Mexico an initial concept document for a cross-border long-haul Mexican trucking pilot program that prioritizes safety, while satisfying the U.S. international obligations. On the same day, the Department posted the concept documents on its Web site for public viewing (http://www.dot.gov/affairs/2011/dot0111.html). The initial concept document was the starting point for renewed negotiations with Mexico; and the United States commenced discussions with the Government of Mexico on January 18, 2011. The preliminary agreement between DOT and SCT is reflected in the program description and described below.

On March 3, 2011, President Obama met with Mexico's President Calderon and announced that there is a clear path forward to resolving the trucking issues between the United States and Mexico.

On April 13, 2011, FMCSA published notice of the pilot program on NAFTA Long-Haul Trucking Provisions in the **Federal Register** (76 FR 20807) and the comment period ended May 13, 2011.

The Agency explained that the pilot program will allow Mexico-domiciled motor carriers to operate throughout the United States for up to 3 years, and that U.S.-domiciled motor carriers will be granted reciprocal rights to operate in Mexico for the same period. Participating Mexico-domiciled motor carriers

and drivers must comply with all applicable U.S. motor carrier safety laws and regulations, as well as other applicable U.S. laws and regulations, *inter alia,* those concerned with customs, immigration, vehicle emissions, employment, vehicle registration, and vehicle/fuel taxation.

The Agency explained that the safety performance of the participating motor carriers will be tracked closely by FMCSA and its State partners, a Federal Advisory Committee Act group, and the OIG. The Agency will monitor and evaluate the data from the pilot program as a test of the granting of authority to Mexico-domiciled motor carriers to conduct long-haul operations in the United States. FMCSA indicated that it anticipated participating motor carriers may be able to convert their provisional status under the pilot program to "permanent" authority under the pilot program after operating 18 months and successfully completing a compliance review (CR). This "permanent" authority under the pilot program, in turn, may be converted into standard permanent authority upon completion or termination of the pilot program. It should be noted that the Agency will be maintaining its oversight strategies and resources that have been reviewed by the OIG during the previous demonstration project and the OIG's other reviews of the Agency's compliance with section 350. The April 13th notice outlined how the Agency would maintain those strategies and augment them with new strategies to address stakeholder input. This

notice responds to comments on those previous and augmented strategies.

As indicated in the April 13, 2011, **Federal Register** notice, this pilot program will not include operations that involve the transport of placarded amounts of hazardous materials or passengers. As noted in the "Summary" section of this notice, Mexico's regulations identify other types of CMV operations and services as ineligible for authority to operate into Mexico. These include the transportation of oversized or overweight goods, industrial cranes, vehicle towing or rescue, or packaging and courier services. Mexico is allowing U.S. motor carriers of international freight to operate into Mexico. In order to comply with the reciprocity requirements of section 6901(a)(3) of the 2007 Appropriations Act, the United States will not issue authority to Mexico-domiciled motor carriers to transport oversized or overweight goods, industrial cranes, or operate vehicle towing, rescue, or packaging and courier services in this pilot program.

Discussion of Comments

The notice and comment process for all pilot programs is required by statute (49 U.S.C. 31315) with the intent of providing all interested parties with the opportunity to review information published by the Agency and to comment on the specific details about any proposed pilot program. As of June 1, 2011, FMCSA received 2,254 comments or docket

submissions in response to the April 13, 2011, notice. Over 1,000 comments were submitted by individuals on behalf of the International Brotherhood of Teamsters (Teamsters).

There were three recurring submissions from individuals that made up the majority of the comments. These commenters expressed concerns about the violence in Mexico and indicated that the pilot program will negatively impact U.S. jobs at a time when unemployment is high. Approximately 1,000 of the comments were submissions by individuals suggesting that the Agency should abandon the idea of a pilot program. Generally, these comments did not include information concerning the technical details of the Agency's proposal (*e.g.,* specific safety oversight procedures or processes), economic or legal aspects of the pilot program, or any other information supporting the view that the program should not be pursued. While FMCSA is not responding to these comments individually, the Agency believes that its responses to the substantive comments received address the brief comments submitted by these individuals.

Moreover, the purpose of this pilot program is to test the granting of authority to Mexico-domiciled motor carriers to conduct long-haul operation in the United States, in order to evaluate the ability of Mexico-domiciled motor carriers to operate safely in the United States beyond the border commercial zones as part of DOT's implementation of the NAFTA land transportation provisions. While FMCSA acknowledges these commenters' concerns, the issues are

beyond the scope of the pilot project in that they do not relate to the safe operation of CMVs by Mexico-domiciled motor carriers or compliance with U.S. motor carrier safety regulations. Therefore, these comments will not be addressed in this notice.

The remaining comments were from members of Congress, companies, organizations, associations, and individuals expressing their views on specific details about the pilot program.

The Agency's announcement of its intent to proceed with the program is based on its consideration of all data and information currently available, including information submitted by the commenters.

The Agency received substantive comments from: Advocates for Highway and Auto Safety (Advocates); Teamsters; the American Trucking Associations (ATA); California Trucking Association (CTA); the Owner-Operator Independent Drivers Association (OOIDA); International Registration Plan (IRP), the Border Trade Alliance (BTA), the American Association for Justice (AAJ), Werner Enterprises, and the Truck Safety Coalition (Coalition) – a partnership with Citizens for Reliable and Safe Highways and Parents Against Tired Truckers. In addition, comments were received from several U.S. Representatives and Senators.

General Support for the Pilot Program

Many commenters supported the pilot program and recognized its importance in meeting U.S. obligations under NAFTA. U.S. companies and their representative associations that have been negatively impacted by the tariffs imposed by the Government of Mexico as a result of the termination of the previous demonstration project also expressed their strong support for the program. Companies negatively impacted by the tariffs included Oceanspray, Kraft Foods, Con Agra, Campbell Soup Company, American Frozen Foods Institute, National Cattlemen's Beef Association, National Potato Council, North American Equipment Dealers Association, the Grocery Manufacturers Association, Association of Food, Beverage and Consumer Products Companies, Distilled Spirits Council of the United States, Fresh Produce Association of the Americas, Mars, National Association of State Departments of Agriculture, the Snack Food Association, and Tysons Food. These commenters expressed their support for the pilot program as the means to remove the tariffs that have negatively impacted their industries.

Supporters of the pilot program include U.S. Representatives Mike Thompson and Reid Ribble. Representative Thompson stated,

> The proposal the Administration crafted includes important protections to ensure trucks crossing the border are operating safely on our roadways and under our environmental standards, allowing us to monitor

> and inspect vehicles before they are approved for cross-border trucking operations. I believe implementation of this revised pilot program provides a clear path toward the elimination of these harmful retaliatory tariffs and normalization of trade between our two countries, while also ensuring the integrity of our roadways.

Thirteen commenters – including the U.S. Apple Association, the National Council of Farmer Cooperatives and the National Association of State Departments of Agriculture – referenced the Congressional Research Service and/or OIG reports that concluded during the previous 18-month pilot program, Mexican trucks were as safe as – if not safer than – their U.S. counterparts and were subject to far more inspections.

U.S. Representative Doc Hastings and 29 congressional colleagues provided a letter in support of the pilot program, stating,

> As you know, Mexico imposed $2.6 billion in retaliatory tariffs on 99 U.S. agricultural and manufacturing products more than two years ago, after the United States halted a cross-border trucking program that was designed to bring the United States into compliance with our international obligations in a matter consistent with U.S. law. Since then, Mexico has rotated the tariffs to cover additional products, and Mexican officials have made clear they are prepared to do so yet again.

These tariffs have already cost tens of thousands of U.S. jobs and over $4 billion to U.S. job creators, at a time when our economy is already struggling. It is imperative for U.S. workers and exporters that these tariffs be eliminated. Mexico has agreed to suspend fifty percent of the tariffs across the board once the new cross-border trucking pilot program is officially instituted and remaining tariffs once the first permit is issued under the program. The success of this pilot program is, thus, critical for U.S. workers and exporters – and for U.S. economic recovery.

This letter concluded with the statement that,

In short, we have long believed that the United States can strengthen its economy by resolving this major issue with one of our largest trading partners – in a manner that fully ensures the safety of U.S. highways. This pilot program and its substantial safeguards are prudent and responsible. We strongly encourage you to move forward with finalizing and implementing this plan as soon as possible. These tariffs have done irreparable damage to our local economies, and U.S. workers, farmers, manufacturers, and other exporters simply cannot afford any further delays.

The United States-Mexico Chamber of Commerce stated,

> In 2010, Mexico and the United States enjoyed a nearly $400 billion trade relationship, and 70 percent of it travels by truck in an antiquated transportation system that requires three trucks and three drivers to do the job of one. This not only bloats producer and consumer prices by hundreds of millions of dollars a year. It also fails to fulfill the benefits (particularly lower transportation costs) that accrue from U.S.-Mexico proximity – a key NAFTA advantage. Doing so now clearly would boost U.S. and North American competitiveness against economic rivals and result in still more jobs.

The Cato Institute advised,

> The failure of Congress to allow implementation of the NAFTA trucking provisions has proven costly to the United States in three important ways.

First, U.S. failure to comply has deprived our economy of the efficiencies of moving goods across our mutual border at lower cost. With the ban in place, trucks approaching the border are required to unload their cargo into warehouses in so-called commercial zones within 25 miles of the border, only to have that cargo reloaded onto short-haul vehicles and then onto domestic trucks for final delivery. This inefficient system causes delays, increased pollution and added costs at busy border crossings such as Calexico East;

San Ysidro; Nogales, Ariz.; and Laredo, Texas. Because more than 70 percent of U.S. trade with Mexico travels by truck, the ban on cross-border trucking imposes an additional $200 million to $400 million in transportation costs each year, according to the U.S. Department of Transportation.

Second, failure to comply has exposed U.S. exporters to perfectly legal sanctions imposed by the Mexican government. Under the provisions of NAFTA, and after waiting patiently for more than a decade, the Mexican government imposed sanctions in 2009 on more than $2.4 billion in U.S. exports affect 100 products, from Washington apples to Iowa pork. The sanctions would be lifted in two stages as the U.S. government implements the proposed program to comply with Annex I.

Third, failure to comply has compromised the U.S. government's reputation as a good citizen of the global trading system. Simply put, the U.S. government has failed to keep its word to our Mexican neighbors. Our government has been in flagrant violation of a major trade agreement for more than 15 years. This breach of trust has undermined the U.S. government's standing to challenge other governments, from Mexico to China to the European Union, who may also be in violation of various trade agreements. The Obama administration's promise to more vigorously "enforce" our rights in the World Trade Organization and other agreements will lack credibility as long as the U.S. government fails to comply

with such clear commitments as the trucking provisions of NAFTA.

For all these reasons, the U.S. government should act as quickly and as thoroughly as possible to implement the proposed regulations to bring our nation into compliance with our mutually beneficial agreement with our Mexican neighbors on cross-border trucking.

General Opposition to the Pilot Program

Most of the individual commenters to the April 13 notice expressed concerns about the following:

(1) The U.S. Government's funding of the electronic monitoring devices for participating Mexico-domiciled motor carriers;

(2) Mexico's standards for CDLs;

(3) The accuracy and completeness of Mexico's driver records;

(4) Compliance with hours-of-service requirements; and

(5) Comparable access for U.S. motor carriers.

U.S. Senator John D. Rockefeller and U.S. Representative Peter A. DeFazio both noted the economic impacts of NAFTA. Representative DeFazio expressed concern that "the Administration is not launching a pilot program, but rather starting the full liberalization of cross-border trucking without having fully

addressed the concerns raised by members of Congress surrounding safety, security, and job impacts that will necessarily arise." Representative DeFazio further suggested "that the U.S. should renegotiate U.S. NAFTA Annex I (I-U-21) * * * thus eliminat[ing] the requirement to open our borders to Mexican trucks."

U.S. Representative Bob Filner and U.S. Senator Mark Pryor also expressed concerns about the pilot program. Representative Filner's concerns included traffic congestion at our land port-of-entry and the impact on border wait times. He stated that, "Many of my constituents already have to wait in lines several hours each day to cross the border * * * . We simply do not have enough Border Patrol and Immigration and Customs Enforcement agents at the border to deal with the existing traffic or the heavy burden of the proposed program."

U.S. Representative Duncan Hunter, Jr. and 43 additional members of Congress co-signed a letter to the Secretary communicating their concerns about safety, the costs of electronic monitoring devices, and violence in Mexico. A copy of each congressional letter is available in the docket for this notice.

1. Operating Authority Under the Pilot Program

The Coalition stated that the pilot program participants should not be granted permanent authority before completion of the pilot program and evaluation of the results. The Coalition stated that,

"Granting permanent operating authority before the Pilot Program is completed undermines the purpose of the experiment and data collection and puts the public at serious risk."

Representative DeFazio questioned how the Agency could comply with 49 U.S.C. 31315, which requires DOT to immediately revoke the participation of any motor carrier or driver who fails to comply with the terms and conditions of the pilot program, if the Agency is granting permanent authority.

OOIDA challenged the Agency's statutory authority for issuing operating authority. OOIDA averred that 49 U.S.C. 13902 precludes FMCSA from accepting compliance with certain Mexican laws and regulations in lieu of compliance with U.S. laws and regulations. OOIDA stated, "FMCSA is simply not authorized to issue operating authority to any motor carrier (U.S. or Mexican) unless that carrier agrees to comply with applicable U.S. statutes and regulations." To support its position, OOIDA quoted a statement in the November 27, 2002, Memorandum of the President for the Secretary of Transportation, "Determination Under the Interstate Commerce Commission Termination Act of 1995," (65 FR 71795, November 27, 2002), which terminated a moratorium on issuing operating authority to Mexico-domiciled motor carriers:

> Motor carriers domiciled in Mexico operating in the United States will be subject to the same Federal and State laws, regulations,

and procedures that apply to carriers domiciled in the United States.

Advocates questioned whether FMCSA will be granting temporary operating authority to any participating Mexico-domiciled long-haul motor carriers before they are accepted into the pilot program. Advocates also stated that it opposes the granting of any operating authority, including temporary authority, in advance of FMCSA's publication of a notice in the **Federal Register** describing its data and information on completed PASAs and its analysis of public comments in response to the notice concerning the completed PASAs. Advocates also requested "that the agency publish all the PASAs of all the participating motor carriers in advance of the start of the Pilot Program and before any motor carriers are granted temporary operating authority."

FMCSA Response: FMCSA's Authority to Issue Operating Authority. Title 49 U.S.C. 13902(a) directs FMCSA to grant operating authority to motor carriers that comply with all applicable safety regulations and financial responsibility requirements. As discussed in the "Legal Basis" section above, section 6901(a) of the 2007 Appropriations Act requires that before FMCSA may obligate or expend any funds to grant authority for Mexico-domiciled motor carriers to engage in cross-border long-haul operations, it is required to first test granting such authority through a pilot program that meets the standards of 49 U.S.C. 31315(c). By expressly providing for pilot programs in 49 U.S.C. 31315(c), and requiring FMCSA to first test

the granting of long-haul authority to Mexico-domiciled motor carriers through a pilot program, Congress clearly contemplated that motor carriers participating in a test meeting the conditions of section 31315(c) would lawfully be granted operating authority under 49 U.S.C. 13902(a). Furthermore, the pilot program satisfies the fundamental statutory standard of equivalent safety protection and all other pilot program requirements. The safety-equivalence standard in section 31315(c) requires that the pilot program be designed to achieve a safety level equal to that prevailing under existing Federal Motor Carrier Safety Regulations (FMCSRs). The pilot program does not relax U.S. regulations for participants. Rather, it simply implements the presidential order lifting geographic limitations on cross-border trucking for a limited number of Mexico-domiciled motor carriers and imposes additional layers of safety monitoring upon those motor carriers. Existing Federal regulations already recognize and accept the Mexican Licencia Federal de Conductor (LFC) as equivalent to the U.S. CDL, (§ 383.23(b) and footnote) and pursuant to these regulations, thousands of LFC holders have driven Mexican trucks into the United States since their adoption in 1992 and continue to do so today. In all other significant respects, U.S. requirements apply with full force to participants in the pilot program. The Agency, by showing that the pilot program satisfies the standard of equivalent safety protection imposed by 49 U.S.C. 31315(c), satisfies the requirements of 49 U.S.C. 13902(a).

Permanent Operating Authority under the Pilot Program. Some commenters seemed to misapprehend the reference to "pilot program permanent authority" in the April 13, 2011 notice. That authority is not the same as standard permanent authority; will not continue after the expiration of the pilot program (unless converted into standard permanent authority); and may be revoked at any time if the operator fails to comply with the terms and conditions of the pilot program.

All operating authority granted under the pilot program will be subject to the terms and conditions of the pilot program. Under the pilot program, participating motor carriers will have the opportunity to operate under three successive stages of monitoring. Stage 1 will begin when the motor carrier is issued a provisional operating authority. The motor carrier's vehicles and drivers approved for long-haul transportation will be inspected each time they enter the United States for at least 3 months. This initial 3-month period may be extended if the motor carrier does not receive at least three vehicle inspections. FMCSA will also conduct an evaluation of the motor carrier's performance during Stage 1.

Mexico-domiciled motor carriers may be permitted to proceed to Stage 2 of the pilot program after FMCSA completes an evaluation of the motor carrier's performance in Stage 1. During Stage 2, the motor carrier's vehicles and drivers participating in the pilot program will be inspected at a rate comparable to other Mexico-domiciled motor carriers that

cross the United States-Mexico border. The motor carrier's safety data will be monitored to assure the motor carrier is operating in a safe manner. Within 18 months after a Mexico-domiciled motor carrier is issued provisional operating authority, FMCSA will conduct a CR on the motor carrier. If the motor carrier obtains a satisfactory safety rating, has no pending enforcement or safety improvement actions, and has operated under provisional authority for at least 18 months, the provisional operating authority will become permanent, moving the motor carrier into Stage 3.

Stage 3 of the pilot program includes participating Mexico-domiciled motor carriers that have successfully operated for an 18-month monitoring period, have a satisfactory safety rating from a CR, and have no pending enforcement or safety improvement actions. Motor carriers that advance to Stage 3 of the pilot program will operate under permanent operating authority under, and fully subject to the requirements of, the pilot program. Granting this permanent operating authority under the pilot program does not restrict the Agency's authority to remove from the program any motor carrier that fails to comply with terms and conditions of the pilot program. Under 49 U.S.C. 31315, FMCSA may revoke participation in the pilot program of a motor carrier, CMV, or driver for failure to comply with the terms and conditions of the pilot program.

The successive stages in the pilot program are intended to be consistent with the Agency's regulations promulgated in 2002 related to Mexico-domiciled

motor carriers operating beyond the border commercial zones (49 CFR part 365, subpart E). Those regulations provide for a Mexico-domiciled motor carrier to be initially granted provisional operating authority and be subject to increased monitoring. The authority, by definition, is provisional because it will be revoked if the motor carrier is not assigned a satisfactory safety rating following a CR conducted during an 18-month safety monitoring period established in the regulations. Under these regulations, if, at the end of 18-months of monitoring the motor carrier's most recent safety rating is satisfactory and the motor carrier does not have any pending enforcement or safety improvement actions, the Mexico-domiciled motor carrier's provisional operating authority becomes permanent. However, this authority is still subject to revocation as detailed above. Section 6901 requires FMCSA to first test the granting of operating authority for long-haul operation by Mexico-domiciled motor carriers through a pilot program. An important component and improvement of this pilot program is that by using the progressive stages of monitoring, the Agency is able to test the full range of its regulations while effectively monitoring Mexico-domiciled motor carriers to ensure the safety of long-haul operations and that such operations are conducted in compliance with all applicable laws and regulations.

In accordance with section 6901(c), within 60 days after the conclusion of the pilot program, the OIC is required to review the program and submit to Congress a final report addressing whether FMCSA has established sufficient mechanisms to determine

whether the pilot program is having any adverse effects on motor carrier safety, and whether Federal and State monitoring and enforcement activities are sufficient to ensure that participants in the pilot program are in compliance with all applicable laws and regulations. Only at the conclusion of the pilot program will Mexico-domiciled motor carriers that participated in the pilot program and advanced to the Stage 3 permanent authority in the pilot program be eligible to convert their pilot program permanent authority to standard permanent authority. FMCSA has not yet developed the procedures for such conversions, but anticipates the procedures will establish an administrative process that would occur once the pilot program ends.

Granting of Provisional Operating Authority. The Agency may have caused some confusion in the April 13, 2011, notice when it stated that "the Agency will publish a summary of the application as a provisional grant of authority in the FMCSA Register." FMCSA will review and act on applications for authority in the pilot program in accordance with applicable regulations. The Agency's rules governing applications for authority are codified in 49 CFR part 365. FMCSA is required under its regulations to publish a summary of each application for motor carrier operating authority, regardless of the applicant's country of domicile, as a preliminary grant of operating authority for public notice in the FMCSA Register (49 CFR 365.109(b) and 365.507(d)). For prospective pilot program participants, such publication will occur only

after the motor carrier successfully completes the PASA and FMCSA approves the application. Such publication of the application as a preliminary grant of authority in the FMCSA Register is not an issuance of temporary authority, but a notice to the public to permit interested parties wishing to oppose the authority to submit a protest to FMCSA. A preliminary grant of authority cannot become effective or active operating authority for a minimum of 10 days after publication. If a motor carrier successfully completes the PASA and FMCSA approves its application, the Agency will publish a summary of the application as a preliminary grant of authority in the FMCSA Register at: http://li-public.fmcsa.dot.gov/LIVIEW/pkg_html.prc_limain. To review these notices, select "FMCSA Register" from the pull down menu.

The FMCSA emphasizes that the public has the opportunity to comment in response to the FMCSA Register on every operating authority application that the Agency proposes to grant and that motor carriers may not operate during the comment period. Any member of the public may protest a motor carrier's application on the grounds that the motor carrier is not fit, willing, or able to provide the transportation services for which it has requested approval. FMCSA must consider all protests before determining whether to grant provisional operating authority to the motor carrier. The Agency's regulations regarding protests, codified at 49 CFR part 365 subpart B, set forth the procedures for protesting

operating authority requests, including requests filed by U.S.- and Canada-domiciled motor carriers.

As required by section 6901(b)(2)(B)(i) of the 2007 Appropriations Act, 2007, FMCSA will also publish in the **Federal Register**, and solicit comment on comprehensive data and information relating to the PASAs of motor carriers domiciled in Mexico that are granted authority in the pilot program to operate beyond the border commercial zones. Therefore, the public has two opportunities to comment on Mexico-domiciled motor carriers' applications: (1) In response to the application summary information posted on the FMCSA Register, and in response to the **Federal Register** notice required by section 6901(b)(2)(B)(i) of the 2007 Appropriations Act. Provisional authority will not be granted until these processes and their respective notice periods are complete.

While FMCSA will publish information on the results of the PASA in the **Federal Register** for public comment for each motor carrier before granting the motor carrier provisional operating authority, FMCSA is not able to publish the results of the PASAs for all motor carriers that may ultimately apply to participate in the pilot program before the program begins. FMCSA will have no way of knowing at the beginning of the pilot program all of the motor carriers that may decide to apply to participate in the program during its three year duration and, therefore, could not publish the results of all PASAs before beginning the pilot program. Additional motor carriers that apply to participate in the pilot program

after it begins will also be subject to PASAs, and the results of those PASAs will be published in the **Federal Register** before any such motor carrier is granted provisional operating authority.

2. Pilot Program Improperly Exempts Mexico-Domiciled Motor Carriers From Safety Laws and Regulations

OOIDA contends that accepting Mexican standards and regulations in lieu of U.S. statutes and regulations results in an exemption, and that FMCSA has failed to follow its authority and regulations for exemptions. OOIDA stated that, "Excusing compliance with U.S. regulations for the duration of its pilot program certainly qualifies as 'temporary regulatory relief' for a person or class of persons subject to those regulations." OOIDA asserts that this, therefore, requires the Agency to follow the procedures for granting exemptions from U.S. regulations and deprives interested parties procedural protections.

FMCSA Response: This pilot program does not provide Mexico-domiciled motor carriers with exemptions from any statutory requirements or any of the Agency's regulations or make them eligible for any existing exemption. To the contrary, motor carriers participating in the program will be subject to existing statutory requirements and regulations, including the regulations mandating the PASA (49 CFR 365.507(c)). Additionally, because no exemptions from or new approaches to statutory requirements and safety regulations are being employed in the pilot

program, the level of safety oversight that will be achieved in the program is the same or greater than would otherwise be achieved if Mexico-domiciled motor carriers were granted authority to operate beyond the border commercial zones outside of the context of a pilot program.

As to the issue of driver's license equivalency, the Agency has long recognized Mexico's LFC as equivalent to the CDL issued by U.S. State driver licensing agencies that follow the Federal standards under 49 CFR Parts 383 and 384. The Mexican LFC is recognized as a valid substitute for the CDL and is the basis for a signed international agreement under which the United States and Mexico have recognized each other's commercial driver's licenses, a decision that was upheld on judicial review (*Int'l. Brotherhood of Teamsters v. Peña*, 17 F.3rd 1478 (DC Cir. 1994)). The Agency has also long recognized Mexico's physical qualification standards. These are not exemptions, but well-established alternative means of meeting U.S. standards that pre-date the pilot program. Indeed, every day, thousands of Mexican drivers safely operate Mexico-domiciled trucks in the United States under these rules.

Neither the Government of Mexico nor any Mexico-domiciled motor carrier has requested that FMCSA consider granting an exemption from U.S. safety requirements for participating motor carriers, and the Agency is not seeking public comment on any forms of regulatory relief. The continued honoring of reciprocity agreements concerning the acceptance of

the Mexican LFC and the medical certification should not be construed as granting regulatory relief. Nor is the allowance of specimen collections on the Mexican side of the border, in accordance with U.S. requirements, a form of regulatory relief.

All tests musts must be performed in accordance with the Department's controlled substances and alcohol testing regulations (49 CFR part 40), which require that specimens be processed at U.S. laboratories certified to conduct such tests.

3. Equivalency of United States-Mexico Laws and Regulations Governing Safety

Advocates, Teamsters, the Coalition and OOIDA all challenged the equivalency of U.S. and Mexican safety laws. Advocates asserted that "[r]egulatory differences that affect vehicle operation must be reconciled before commencement of Pilot Program." Advocates questioned the equivalence of CDLs, disqualification violations, and drug testing.

Several commenters requested clarification of the Agency's system to monitor performance of Mexico-licensed drivers and expressed concerns about the accuracy and completeness of the Mexican LFC and Mexican State license information.

Teamsters also noted that there are no drug testing laboratories in Mexico that are certified by the U.S. Department of Health and Human Services. OOIDA and Teamsters both requested additional

information regarding the training regime for Mexican personnel to follow U.S. procedures for drug and alcohol testing collection and chain of custody.

Teamsters noted that the medical qualification standard for vision is different in Mexico than in the United States, as Mexico requires red-vision only. OOIDA encouraged the Agency to provide additional information on the Mexican medical certification requirements.

Multiple commenters asked how information about violations in personal vehicles in Mexico would be obtained and used by FMCSA.

OOIDA and Advocates both believe that FMCSA has an obligation to post more information about the equivalent laws and regulations and to provide copies of the Mexican regulations in English.

FMCSA Response: CDLs. As noted above, in 1991, the Secretary and his counterpart in Mexico entered into an agreement on the matter of driver license reciprocity. The agreement is in the form of a memorandum of understanding (MOU) and was reproduced as Appendix A to a final rule issued in 1992 by FMCSA's predecessor agency, the Federal Highway Administration (FHWA). (*Commercial Driver's License Reciprocity with Mexico,* 57 FR 31454 (July 16, 1992)). The primary purpose of the MOU was to establish reciprocal recognition of the CDL issued by the States to U.S. operators and the LFC issued by the government of the United Mexican States (*i.e.,* by the national government of Mexico, not by the

individual Mexican states). In light of the agreement, the FHWA determined that an LFC meets the standards contained in 49 CFR part 383 for a CDL. (49 CFR 383.23(b)(1) and footnote) FHWA also stated in the July 16, 1992 final rule:

> It should be noted that Mexican drivers must be medically examined every 2 years to receive and retain the Licencia Federal de Conductor; no separate medical card [certificate] is required as in the United States for drivers in interstate commerce. As the Licencia Federal de Conductor cannot be issued to or kept by any driver who does not pass stringent physical exams, the Licencia Federal de Conductor itself is evidence that the driver has met medical standards as required by the United States. Therefore, Mexican drivers with a Licencia Federal de Conductor do not need to possess a medical card while driving a CMV in the United States.

(57 FR 31455)

The Agency's determination that a Mexico-domiciled driver with an LFC does not need to possess a separate medical certificate is based on the fact that the medical examination necessary to obtain the LFC meets the standards for an examination by a medical examiner in accordance with FMCSA regulations, and would therefore meet the requirements of 49 U.S.C. 31136(a)(3).

While FMCSA recognizes that U.S. CDL regulations have been amended since 1991, those changes relate almost exclusively to the types of offenses that would result in disqualification of licenses and to the administration of the licensing program (*i.e.,* how information is reported and shared among the States). There have been no major changes to the U.S. knowledge and skills testing until issuance of a May 9, 2011 final rule implementing the CDL Learner's Permit processes titled, "Commercial Driver's License Testing and Commercial Learner's Permits Testing," (76 FR 26854). States have 3 years to implement the provisions of that rule. The United States will address the changes in U.S. CDL regulations with Mexico during the updating of the 1991 CDL MOU that is currently underway.

With respect to the changes relating to disqualifying offenses (49 CFR part 383, subpart D), FMCSA is not relying on Mexico's disqualifying offenses. During the PASA, FMCSA will review violation information from a driver's U.S. record, LFC record, and Mexican State license record to determine if the driver is qualified to drive in the United States, based on the current disqualification requirements for a U.S. CDL holder. FMCSA will also review Mexican State license records for violations in a personal vehicle that would result in suspension or revocation in the United States. After the PASA, these sets of records will be reviewed annually by FMCSA to ensure continued compliance.

FMCSA does, however, recognize the concern about the on-going acceptance of the existing CDL MOU. In the Agency's efforts to update the MOU, on February 16, 2011, a delegation of FMCSA and DOT representatives toured SCT's commercial driver's licensing office in Mexico City, Districto Federal, Mexico. The review of the commercial driver's licensing office showed that the LFC is issued in a manner similar to that employed by U.S. State commercial drivers licensing offices. Applicants are required to present documentation to verify their identity and place of residence. Additionally, applicants are required to provide documentation that they have passed the required psycho-physical examination. The drivers licensing office verifies this information by accessing the SCT's medical units' database. Applicants are also required to provide a training certificate from an SCT-certified training school.

On February 17, 2011, a delegation of FMCSA, CVSA, and the American Association of Motor Vehicle Administrators (AAMVA) representatives toured the commercial driver's licensing office in Monterrey, Nuevo Leon, Mexico. The delegation observed the same processes as were seen in Mexico City. In addition, the delegation toured an SCT-certified training school in Monterrey. The tour included a description of the classroom, simulator, maintenance shop, and behind the wheel training. The training school operator described the driver testing procedures.

FMCSA will be undertaking additional site visits to Mexican driver training, testing, and licensing

locations prior to beginning the pilot program to review Mexico's on-going compliance with the terms of the current MOU. Reports of these visits will be posted on the FMCSA pilot program Web site at http://www.fmcsa.dot.gov.

FMCSA's statement that Mexico-domiciled drivers and motor carriers will be subject to the same standards as U.S. drivers and motor carriers does not mean that U.S. standards must be applied to Mexico-domiciled drivers and motor carriers while operating in Mexico. The Agency does not have authority to apply U.S. standards to driver or motor carrier actions occurring in Mexico, *i.e.,* it has no extraterritorial jurisdiction to enforce FMCSA rules. If Mexico chooses to suspend or revoke a driver's LFC for violations committed in Mexico, the Licencia Federal Information System (LIFIS) will reflect that fact and FMCSA will refuse to let the driver operate in this country.

All drivers operating CMVs in the United States are subject to the same driver disqualification rules, regardless of the jurisdiction that issued the driver's license. The driver disqualification rules apply to driving privileges in the United States. Any convictions for disqualifying offenses that occur in the United States will result in the driver being disqualified from operating a CMV for the period of time prescribed in the FMCSRs.

In Mexico, in order to obtain the LFC, a driver must meet the requirements established by the Ley

de Caminos, Puentes y Autotransporte Federal (Roads, Bridges and Federal Motor Carrier Transportation Act) Article 36, and Reglamento de Autotransporte Federal y Servicios Auxiliares (Federal Motor Carrier Transportation Act) Article 89, which state that a Mexican driver must pass the medical examination performed by Mexico's SCT, Directorship General of Protection and Prevention Medicine in Transportation (DGPMPT). While there is currently no government oversight of the proficiency and knowledge of medical examiners in the United States, the medical examinations in Mexico are conducted by government doctors or government-approved doctors instead of the private physicians who perform the examination on U.S. drivers.

The Agency emphasizes that drivers for Mexico-domiciled motor carriers have been operating within the border commercial zones for years with the medical certification provided as part of the LFC, and the Agency is not aware of any safety problems that have arisen as a result.

In response to the questions regarding how violations in personal vehicles will be handled and the quality of the Mexican databases, FMCSA notes that it and its Federal and State partners performed 254,397 checks of LFC holders in FY 2010. These LFC checks resulted in detection of a valid license 250,640 times, expired licenses 3,713 times, and disqualified licenses 44 times. While the Mexican State driving records systems vary significantly, FMCSA will be working with the applicant motor carriers,

drivers, and SCT to secure valid copies of the State driving records for review.

FMCSA has satisfied the requirement of section 350(c)(1)(G) concerning an accessible database containing sufficiently comprehensive data to allow safety monitoring of motor carriers operating beyond the border commercial zones and their drivers. Looking specifically at driver monitoring, in 2002 FMCSA established a system known as the Foreign Convictions and Withdrawals Database (FCWD), which serves as the repository of the U.S. conviction history on Mexican CMV drivers. The system allows FMCSA to disqualify such drivers from operating in the United States if they are convicted of disqualifying offenses listed in the FMCSRs.

The FCWD is integrated into the Agency's gateway to the Commercial Driver's License Information System (CDLIS), allowing enforcement personnel performing a Mexican CDLIS-check to simultaneously query both the Mexican LIFIS and the FCWD. The response is a consolidated driver U.S./Mexican record showing the driver's status from the two countries' systems.

The States also have the capability to forward U.S. convictions of LFC holders, and other drivers from Mexico, to the FCWD via CDLIS. To accomplish this, the States implemented changes to their information systems and tested their ability to make a status/history inquiry and forward a conviction to the FCWD. All States except Oregon, (which does not

electronically transmit any convictions) and the District of Columbia (which does not electronically transmit convictions of Mexico-domiciled CDL drivers) have successfully tested electronically forwarding convictions on Mexico-domiciled CMV drivers. Both jurisdictions, however, can manually transmit the information to FMCSA for uploading into the system.

As of May 31, 2011, the border States transmitted 46,065 convictions to the FCWD between 2002 and 2011. This averages 5,118 per year. Of that number, 41,118 were transmitted electronically and 4,947 were manually entered into the system. It should be noted that only 242 of these convictions were for major traffic offenses (as listed in 49 CFR 383.51(b)), and 1,709 were for serious traffic offenses (as listed in 49 CFR 383.51(c)). In comparison, between May 2010 and May 2011, the States transmitted 186,184 U.S. driver convictions through CDLIS.

The conviction data shows that the system is working, and States can both transmit the conviction data on Mexico-domiciled drivers and query the system to retrieve conviction data. FMCSA and its State partners have experience from providing safety oversight for Mexico-domiciled drivers currently operating within the border commercial zones. It is reasonable to believe that the small group of drivers who would be involved in the pilot program will be no more difficult to monitor than the much larger population of Mexico-domiciled drivers currently allowed to operate within the border commercial zones.

As an additional safety enhancement, compared to the previous demonstration project, the Agency will review the Mexican State license of a driver for violations that would result in a revocation or suspension in the United States. This will include violations in personal vehicles that would impact a CDL in the United States.

Drug and Alcohol Testing. Regarding the protocols for collection of specimens for drug and alcohol testing, FMCSA clarifies that Mexico is using procedures equivalent to those established by DOT regulations. A copy of the 1998 MOU between DOT and the Government of Mexico is included in the docket for this notice.

Urine specimens for controlled substances testing must be collected in a manner consistent with 49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. During the 2007-2009 demonstration project, an independent evaluation panel conducted its own assessment of the urine collection procedures at four collection facilities in Mexico. The panel concluded that Mexico has a collection program with protocols that are at least equivalent to U.S. protocols found in 49 CFR part 40. Because there are no U.S.-certified laboratories in Mexico, Mexico-domiciled motor carriers must comply by ensuring that the specimens are tested in a U.S.-certified laboratory. The participants in the 2007-2009 demonstration project all had specimens tested in U.S.-certified laboratories located in the United States.

In the new pilot program, urine collection may continue to take place in Mexico. The specimens will be processed in accordance with U.S. requirements. Drivers who refuse to report to the collection facility in a timely manner will be considered to have refused to undergo the required random test, and the motor carrier would be required to address the issue in accordance with FMCSA's Controlled Substances and Alcohol Use and Testing regulations (49 CFR part 382).

Currently, Mexico-domiciled drivers operating within the border commercial zones use this approach to comply with the random testing requirements of 49 CFR 382.305. The random selection of drivers must be made by a scientifically valid method; each driver selected for testing must have an equal chance (compared to the motor carrier's other drivers operating in the United States) of being selected, and drivers must be selected during a random selection period. Also, the tests must be unannounced, and the dates for administering random tests must be spread reasonably throughout the calendar year. Employers must require that each driver who is notified of selection for random testing proceed to the test site immediately.

In addition, through the PASA, the Agency will determine whether the motor carrier has a program in place to achieve full compliance with the controlled substances and alcohol testing requirements under 49 CFR parts 40 and 382. The ability of the border commercial zone motor carriers to follow these procedures further demonstrates that Mexico-domiciled motor

carriers are capable of satisfying the Agency's drug and alcohol testing requirements. Based on FMCSA's experience enforcing the controlled substances and alcohol testing requirements on border commercial zone motor carriers, the Agency believes long-haul Mexico-domiciled motor carriers can and will comply with the random testing requirements, especially given that some of the anticipated participants in the pilot program may already have authority to conduct operations within the border commercial zones.

The Agency's experience in this area and the drug collection facility reviews performed during the previous demonstration project make us confident that testing is being conducted correctly. In addition, the Agency will be conducting collection facility reviews during the pilot program to verify specimens are being collected correctly.

Medical Qualifications. FMCSA has compared each of its physical qualifications standards with the corresponding requirements in Mexico and continues to believe acceptance of Mexico's medical certificate is appropriate, especially given that some Mexican medical standards are more stringent than their U.S. counterparts.

For example, one of the areas where Mexico's standards exceed those of the U.S. is in Body Mass Index (BMI) and the association between BMI and certain medical conditions that could increase the risk of a driver having difficulty operating a CMV safely. Mexico's regulations include certain limits on

BMI, as it relates to medical conditions related to obesity, whereas FMCSA's regulations do not include such requirements.

Another area where Mexico's physical examination and qualifications process is more rigorous is vision testing. Mexico's examination process includes a measurement of intraocular pressure, a test that may be indicative of glaucoma, a disease characterized by a pattern of damage to the optic nerve. FMCSA's regulations do not require a measurement of intraocular pressure.

Finally, the medical certification for an LFC is part of Mexico's licensing process for commercial drivers. This means the license is not issued or renewed unless there is proof the driver has satisfied the physical qualifications standards. This is not the case in the United States, where medical certification is not currently posted on the CDL record. FMCSA has issued regulations to move towards this level of oversight ("Medical Certification Requirements as Part of the CDL," final rule, published at 73 FR 73096, December 1, 2008), but Mexico has more stringent requirements in effect at this time.

There are some areas where FMCSA's requirements are more stringent. Specifically, FMCSA requires drivers be capable of distinguishing between red, green and yellow, while Mexico limits the color recognition requirement to red. Additionally, the U.S. medical examination has standards for both systolic and diastolic blood pressure readings while Mexico

only has a standard on the systolic reading. A finding of equivalency, however, does not require that both country's standards be identical. Here, it was FMCSA's considered judgment that these differences would not diminish safety and that, therefore, the Mexican requirements are equivalent to U.S. requirements.

FMCSA has prepared a table comparing the United States' and Mexico's physical qualifications standards. A copy of the table is provided in the docket for this notice.

To assist in the review of Mexican regulations, FMCSA has added English versions of the regulations to the docket for this notice. This includes the Mexican regulations for the Transportation Preventive Medicine Service Regulations, the Federal Motor Carrier Transportation and Auxiliary Services Regulations, and the Federal Roads, Bridges, and Motor Carrier Transportation Act.

4. Reciprocity With Mexico

The CTA, ATA, and numerous individual commenters stated that NAFTA reciprocity could not be achieved because of the current state of violence and corruption in Mexico. OOIDA also provided U.S. State Department alerts to travelers and instruction to U.S. government employees as documentation of the inability of Mexico to provide "simultaneous and comparable" authority and access.

The Teamsters elaborated that "[s]ection 6901 limits funds to grant authority to Mexican-domiciled motor carriers to operate beyond the commercial zones to the extent that 'simultaneous and comparable authority to operating within Mexico is made available to motor carriers domiciled in the United States.'" Teamsters further stated that "[i]it is very clear that the safety of U.S. drivers traveling into Mexico cannot be ensured, and therefore simultaneous and comparable authority is not made available to U.S. motor carriers under the pilot program."

Ron Cole pointed out that a Congressional Research Report dated February 1, 2010, notes "[a]s of this writing the Mexican government has not begun accepting applications from U.S. trucking companies for operating authority in Mexico." The Texas Department of Motor Vehicles suggested that FMCSA provide detailed information on Mexico's regulatory requirements to the States and U.S. motor carriers that express an interest in participating in the program.

The ATA also endorsed allowing Mexico-domiciled motor carriers with U.S. investors to join the program as Mexico-domiciled motor carriers.

FMCSA Response: In response to the comments about reciprocity for U.S. motor carriers, FMCSA will continue to work closely with the Mexican government to ensure that U.S.-domiciled motor carriers are granted reciprocal authority to operate in Mexico during the pilot program. Mexico will publish rules

for its current program before initiation of the program. Both English and Spanish versions of SCT's draft rules have been added to the docket for informational purposes.

In addition, the Department of Transportation is entering into a MOU with Mexico's SCT that requires that Mexico provide reciprocal authority.

The Agency will also work with the U.S. trucking industry to facilitate the exchange of information between the Mexican government and U.S. trucking companies interested in applying for authority to enter Mexico under this pilot program.

Both Teamsters and OOIDA commented on the ongoing violence in Mexico, and that it negatively impacts the possibility of U.S. motor carriers entering Mexico. Both cite to the U.S. State Department travel advisory, and in turn point to a portion of section 6901 that states that "simultaneous and comparable authority to operate within Mexico is made available to motor carriers domiciled in the United States." The reference to the section 6901 language speaks to the ability of U.S. motor carriers to receive comparable operating authority from Mexico's SCT. The MOU between DOT and SCT provides for reciprocal access to each country. The SCT has issued proposed rules outlining procedures for U.S. motor carriers to operate in Mexico. They will have the ability to apply for authority and operate within Mexico similar to that of Mexico-domiciled motor carriers in the United States. Therefore, the statutory requirement has been

met. It is an independent business decision on the part of motor carriers as to whether or not they wish to apply for authority, or use it once obtained. Hundreds of companies are currently operating in the border region, and four U.S. motor carriers from the 2007 demonstration project continue to operate into Mexico. (Whereas the United States required Mexico-domiciled motor carriers participating in the 2007 demonstration project to relinquish their operating authority when the project was terminated, Mexico permitted the U.S.-domiciled motor carriers holding reciprocal authority to continue their operations in Mexico.)

OOIDA makes the claim that the violence in Mexico is a violation of the NAFTA as a nullification and impairment of U.S. motor carrier rights to engage in cross-border trade in services under Chapter 12 of the NAFTA. OOIDA contends that, "Federal, state and local governments within Mexico are seen by many to be complicit" in the drug-related violence. OOIDA quotes Annex 2004 of the NAFTA "Nullification and Impairment" language, including " * * * being nullified or impaired as a result of *the application of any measure* that is not inconsistent with this Agreement * * * " (emphasis added). The violence of the drug cartels, according to OOIDA, impairs U.S. motor carriers wishing to operate in Mexico. The fundamental error with this reasoning is that no measure has been put in place by the Government of Mexico that would prohibit U.S. motor carriers from doing business in Mexico, or would put U.S. motor

carriers at such a competitive disadvantage that they are impaired. In order for Annex 2004 to apply, a State actor, such as SCT, must put in place "measures not inconsistent with" cross-border trade in services. It could constitute a violation of the NAFTA if a Mexican agency put in place restrictions on U.S. motor carriers that would on its face not be discriminatory but have the ultimate effect of denying the motor carriers the benefits they reasonably expected under Chapter 12. That, however, is not the case here. The application for authority and using it to operate into Mexico requires several business decisions on the part of the motor carrier, and it is ultimately the motor carrier's decision to operate into Mexico, as much as it would be for a motor carrier to expand its business from short-haul to long-haul.

FMCSA also notes that while Mexico has not begun accepting applications from U.S. trucking companies for operating authority in Mexico, neither has FMCSA begun accepting applications from Mexico-domiciled motor carriers for participation in the pilot program. Mexico, like the United States, is updating its application procedures for U.S. motor carriers to operate into Mexico. Following the publication of this notice, FMCSA will begin accepting applications from Mexico-domiciled motor carriers to participate in the pilot program. Mexico will begin accepting applications from U.S. motor carriers to operate in Mexico soon thereafter. When Mexico's new processes are finalized, FMCSA will post information regarding those requirements on our Web page related to this

pilot program so that States and industry are aware of the requirements. In any case, the United States will not grant authority to operate beyond the border commercial zones to any Mexico-domiciled motor carriers under this pilot program unless and until Mexico is ready to provide authority to U.S. motor carriers. FMCSA also uses this notice to clarify that Mexico-domiciled motor carriers with U.S. investors are eligible to participate in the pilot program.

5. Pilot Program Requirements

The Agency received comments from the OOIDA, Teamsters, Advocates, and the Coalition regarding the requirements of FMCSA's pilot program authority.

OOIDA noted that, under 49 U.S.C. 31315(c)(2), a pilot program must include safety measures designed to achieve a level of safety that is "equivalent to, or greater than" the required level of safety. OOIDA also faulted the proposal for not elaborating on the countermeasures to protect the public health and safety of study participants and the general public.

FMCSA Response: The FMCSA and its State partners will ensure compliance with the requirements of the pilot program the same way the Agency and the States ensure that Mexico-domiciled motor carriers operating in and beyond the border commercial zones comply with the applicable safety regulations. There are currently 6,861 motor carriers with authority to operate within the border commercial

zones and an additional 1,063 motor carriers with Certificates of Registration to operate beyond the commercial zones. FMCSA and the States have a robust safety oversight program for Mexico-domiciled motor carriers that are currently allowed to operate CMVs in the United States. In FY 2010, FMCSA and its State partners conducted over 256,000 commercial vehicle inspections on vehicles operated by Mexico-domiciled motor carriers in the border commercial zones. Further, in order to assist in ensuring compliance, FMCSA imposed the following pre-requisites for Mexico-domiciled motor carriers to participate in the pilot program: (1) The application for long-haul operating authority, which includes requirements for proof of a continuous valid insurance with an insurance company licensed in the United States, in contrast to trip insurance used by motor carriers that operate solely within the border commercial zones; (2) successful completion of the PASA prior to being granted provisional authority; (3) the continuous display of a valid CVSA decal; and (4) a special designation in their USDOT Numbers to allow enforcement officials to readily distinguish between vehicles permitted to operate solely within the border commercial zone and those authorized to operate beyond the border commercial zones.

In addition, section 350 and 49 CFR 385.707 require that a CR be conducted within 18 months of the motor carrier being granted provisional operating authority. In the context of the pilot, FMCSA will prioritize long-haul Mexico-domiciled motor carriers

for CRs based on a number of factors, such as the motor carrier's safety performance as measured through roadside inspections and crash involvement and the Agency's Safety Measurement System.

The vehicles and drivers will be monitored through data collected from electronic monitoring devices with GPS. In addition, the drivers' complete driving records will be reviewed in advance of participation and then annually thereafter. Also, during the first stage, the vehicles and drivers will be subjected to more inspections.

The FMCSA and its State partners have for many years provided safety oversight under the same regulations for a much larger population of Mexico-domiciled motor carriers operating in U.S. border commercial zones and motor carriers with Certificates of Registration than the group that will participate in the pilot program. As a result, the Agency has a well-established and effective enforcement program in place to ensure that participants comply with the terms and conditions of the program. Moreover, full compliance with existing U.S. safety regulations and domestic point-to-point transportation prohibitions will be required, as is the case with Mexico-domiciled motor carriers operating in the border commercial zones and certificated motor carriers already operating beyond the border commercial zones.

As discussed in this section, FMCSA has taken necessary steps to comply with the requirement to

provide an equivalent or greater level of safety, and countermeasures are therefore not required.

6. PASA Requirements

Commenters, including Teamsters and Advocates, recommended that information about the PASAs be posted in the **Federal Register** rather than the FMCSA Register.

Teamsters recommended that the PASA also include a spot check of vehicles other than those to be used in the long-haul program to gather more information on the carrier's operations.

OOIDA, Advocates and Teamsters requested additional information on the Agency's standards for evaluating English language proficiency and one association submission indicated the English language screening and should be a component of the initial screening.

Advocates requested that the violation histories of applicant motor carriers, and their driver convictions records in both Mexico and the U.S. should be disclosed in the **Federal Register** publication as part of the PASA information disclosure. OOIDA requested additional information about participating motor carrier's past operations within the United States.

The IRP requested that the Agency use the PASA as an opportunity to reiterate the requirements for IRP and IFTA registrations.

OOIDA also recommended that PASAs be conducted again on motor carriers that participated in the previous demonstration project to ensure they are still safe motor carriers.

FMCSA Response: There appears to have been some confusion about where the PASA information will be published. The results of the PASAs will be posted in the **Federal Register**. This was where the PASA information was posted during the previous demonstration project, and FMCSA will follow this protocol again in this pilot program. The operating authority application information will also continue to be posted in the FMCSA Register as required by applicable regulations.

If the motor carrier has passed the PASA, FMCSA will publish the motor carrier's request for authority in the FMCSA Register. The FMCSA Register can be viewed by going to: http://lipublic.fmcsa.dot.gov/LIVIEW/pkg_html.prc_limain and then selecting "FMCSA Register" from the drop-down box in the upper right corner of the screen. Any member of the public may protest the motor carrier's application on the grounds that the motor carrier is not fit, willing, or able to provide the transportation services for which it has requested approval. FMCSA will consider all protests before determining whether to grant provisional operating authority. Under FMCSA regulations, all motor carriers receive provisional new entrant authority for 18 months after receiving a USDOT Number and are subject to enhanced safety scrutiny during the provisional operating period.

Regarding the Teamster's request that additional vehicles in the motor carrier's fleet be inspected during the PASA, the Agency points out that all available vehicles that are used in U.S. operations will be subject to review during the CR. Additionally, vehicles operated in the U.S. by Mexico-domiciled motor carriers also regularly cross the border, where the vehicle inspection rate is 13 times higher than that of vehicles in the interior of the U.S. As a result, the Agency does not believe it is necessary to inspect vehicles other than the participating vehicles during the PASA.

FMCSA will check participating Mexico-domiciled drivers during the PASA through an interview in English. The interview will include a variety of operational questions, which may include inquiries about the origin and destination of the driver's most recent trip; the amount of time spent on duty, including driving time, and the record of duty status; the driver's license; and vehicle components and systems subject to the FMCSRs. The driver will also be asked to recognize and explain U.S. traffic and highway signs in English.

If the driver successfully completes the interview, FMCSA has confidence that the driver can sufficiently communicate in English to converse with the general public, understand traffic signs and signals in English, respond to official inquiries and make entries on reports and records required by FMCSA.

Regarding Advocates' request that additional information be published about the history of Mexico-domiciled motor carriers and drivers, FMCSA is committed to publishing the results of the PASAs as required by section 6901(b)(2)(B) of the 2007 Appropriations Act. FMCSA will not publish violation data on individual Mexican drivers as protection of their personal privacy. FMCSA, however, will make additional information about all participating motor carriers' past U.S. performance available through its Safety Management System (SMS) as requested by OOIDA.

FMCSA agrees with the IRP's suggestion that information regarding the requirements for registration and fuel taxes be provided during the PASA. The Agency is revising its PASA procedures to include this information.

In regard to motor carriers that participated in the previous demonstration project that choose to apply to participate in the pilot program, it has always been in FMCSA's plan that PASAs will be completed on these motor carriers. FMCSA recognizes that there may have been changes in the motor carrier's operations since the demonstration project ended in 2009 and that a current PASA is needed.

7. Credit to Demonstration Project Participants

Most commenters did not agree with the Agency's plans to give credit to motor carriers that participated in the demonstration project for the amount of time

they operated safely. The Teamsters specifically contended that providing credit to previous participants was a violation of section 6901.

FMCSA Response: It appears that there was some confusion about how these motor carriers, if they chose to participate in the new pilot program, would enter the program, and how their safety would be evaluated. As noted above, it has always FMCSA's plan and responsibility to conduct PASAs on all motor carriers applying for authority under the pilot program including motor carriers that participated in the prior demonstration project. As a result, the motor carrier's safety management controls will be assessed again in advance of participation. The only distinction that is being made for motor carriers that previously participated in the demonstration project is to give them credit for the amount of time they operated under the project in completing the 18 months of provisional authority before being eligible to advance to Stage 3 in this pilot program. FMCSA believes this is consistent with section 6901 because the previous demonstration project was subject to the same pilot program statute and regulations. While it was ultimately determined that the previous project did not have sufficient participation to allow for a statistically valid demonstration that Mexico-domiciled motor carriers as a whole could comply with U.S. safety standards and this program has added additional safeguards, reports from both the OIG and the Independent Panel documented that motor carriers in the previous program had safety

records that were comparable or better than the U.S. fleet averages.

As a result, if a motor carrier from the demonstration project chooses to apply to participate in the pilot program, it will be subject to the security check by the Department of Homeland Security, PASA, financial responsibility, CVSA decal, and CR requirements. If a motor carrier operated for 5 months under the demonstration project, it would then only need to operate safely for an additional 13 months under the pilot program before being eligible to advance to Stage 3 in the program.

8. Use of Electronic Monitoring Devices and Compliance With Hours-of-Service Requirements

The majority of commenters did not support FMCSA funding the installation of electronic monitoring devices on Mexican trucks participating in the pilot program. Representative Peter A. DeFazio stated that, "it is outrageous that U.S. truckers, through the Federal fuel tax, will subsidize the cost of doing business for these Mexican carriers." Representative Reid J. Ribble articulated his understanding of his colleagues' disapproval of using the Highway Trust Fund to cover the costs of the electronic monitoring devices, but "recognize[d] that DOT cannot require Mexican motor carriers to cover these expenses because there is no similar requirement for U.S. carriers."

The BTA pointed out that the hours-of-service requirements for drivers of Mexico-domiciled motor carriers participating in the program must include the driver's on-duty and driving time in Mexico before reaching the Southern border. In addition, Teamsters asserted that electronic monitoring devices do not measure "on-duty/not driving" time and, as a result, Mexican drivers need to provide logs and supporting documents.

Several commenters did not understand if the data from the electronic monitoring devices would be processed in real-time or at the conclusion of the program. In addition, there were several questions about who would be reviewing the data.

FMCSA Response: FMCSA developed guidelines for this new pilot program after extensive engagement with members of Congress and other stakeholders to better understand the strengths and weaknesses of the prior demonstration project that ended in March 2009. Using that valuable input, we worked with the Government of Mexico to craft a more robust program. As described in the April 13, 2011, **Federal Register** notice, all participating Mexican trucks will be required to be equipped with electronic monitoring devices with GPS capabilities so that FMCSA is able to monitor the vehicle and use the data to address hours-of-service and domestic point-to-point transportation concerns. Stakeholders felt strongly that FMCSA include this as an element of the new pilot program.

FMCSA will own the monitoring equipment and thereby will have access and control of the data provided by the electronic monitoring devices and GPS units and will be able to customize reports and alerts from the system of the vendor that will collect the data. This proposed approach is necessary to address concerns expressed by members of Congress and others regarding hours-of-service and domestic point-to-point compliance. The most the Agency would spend on electronic monitoring devices for purchase, installation, and monitoring over the life of the 3-year program is $2.5 million – less than 0.1 percent of the costs borne by U.S. firms subject to the tariffs imposed by Mexico in a 12-month period. As a result, we believe this is not only in the public interest to require and provide the electronic monitoring devices, but is also a good investment for the country. Moreover, as stated above, the in-truck equipment will be the property of the United States.

In addition, the electronic monitoring devices that FMCSA will install will have functionality to allow on-duty start and end times to be entered and tracked. As a result, FMCSA will be monitoring on-duty time in Mexico to ensure that drivers comply with FMCSA hours-of-service regulations while operating in the United States. FMCSA agrees, however, that the participating motor carriers will be expected to maintain the appropriate supporting documents for review by FMCSA during the safety and compliance reviews.

It is FMCSA's intention to acquire devices and monitoring software that will allow the Agency to develop alerts and reports of the vehicles and drivers' information. These reports will be reviewed by FMCSA at least weekly to identify compliance issues. If there are any indicators of problems, FMCSA will initiate an investigation. FMCSA expects to use staff to conduct the analysis, but acknowledges that the conversion of the electronic data to a format usable for analysis may require some processing by a third party. Finally, once the pilot program is terminated, the program participants must return the equipment to FMCSA.

9. Federal Motor Vehicle Safety Standards (FMVSS) and Emissions Issues

Commenters on this issue all supported the requirement that the equipment must meet the FMVSS or Canadian Motor Vehicle Safety Standards (CMVSS) at the time of manufacturing. However, Teamsters believe that the Agency's proposal that model years 1996 and newer do not need a label constitutes a waiver and that FMCSA does not have the authority to waive this requirement.

ATA argued that the vehicles should not have to comply with the FMVSS, but instead with the FMCSRs.

ATA and CTA stressed that all equipment operating in the United States must comply with Federal emissions standards. Both also expressed concern

about the limited availability of low-sulfur fuels in Mexico and the impact on vehicle emissions.

Werner Enterprises requested clarification on the requirement that the vehicles meet the EPA requirements at the time of manufacturing.

FMCSA Response: Participating Mexico-domiciled motor carriers, the drivers they employ, and the vehicles they operate in the United States must comply with all applicable Federal and State laws and regulations, including those concerning customs, immigration, vehicle emissions, employment, vehicle registration and taxation, and fuel taxation.

Environmental Issues. First, Mexico-domiciled motor carriers operating in the United States must ensure compliance with all applicable Federal and State laws related to the environment. FMCSA has no reason to doubt that its sister Federal and State agencies will enforce their laws and regulations as they apply to long-haul Mexico-domiciled motor carriers, just as they have done for years with respect to the border commercial zone motor carriers as well as U.S.- and Canada-domiciled motor carriers.

Second, FMCSA does not have the statutory authority to enforce Federal environmental laws and regulations, with the exception of those concerning vehicle noise emissions (49 CFR part 325). The Agency cannot, for example, condition the grant of operating authority to a motor carrier on the motor carrier's demonstration that its truck engines comply with EPA engine standards. FMCSA does not

construe section 6901 as expanding the scope of the Agency's regulatory authority into environmental regulation or any other new area of regulation. Section 6901 makes no mention of environmental regulation, and FMCSA construes the reference to "measures * * * to protect public health and safety" in section 6901(b)(2)(B)(ii) of the 2007 Appropriations Act as within the context of the scope of the Agency's existing statutory authority. Moreover, because FMCSA is a safety rather than an environmental regulatory agency, the pilot program is appropriately focused on evaluating the safety of long-haul Mexican truck operations in the United States, consistent with the scope of 49 U.S.C. 31315(c). However, vehicle data is being collected to assist with determining the potential environmental impacts of the pilot program (and for any further actions concerning the border) in accordance with the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality's (CEQ) NEPA implementing regulations (40 CFR part s1500-1508) and FMCSA's NEPA Order 5610.1 as this program is not exempt from NEPA review.

Third, the Agency is conducting an Environmental Assessment (EA) in accordance with NEPA, CEQ implementing regulations, and FMCSA's NEPA Order 5610.1 to examine the potential impacts of this pilot project on the environment. It is important to note that the EA is limited to the environmental impacts of this particular pilot project. FMCSA will announce availability of the draft Environmental Assessment in

a separate **Federal Register** notice and place a copy in the docket for this rulemaking.

Finally, EPA, in partnership with Mexico and other governments on both sides of the border, has conducted numerous diesel emissions reduction projects. These include vehicle testing, monitoring, and tracking, diesel retrofitting, accelerated use of ultra-low sulfur diesel fuel, and anti-idling programs. In addition, the State of California regulates particulate matter emissions from trucks through roadside emissions testing conducted throughout the State, including in its border commercial zones. California has also issued regulations requiring truck engines, including those in Mexican trucks, to have proof that they were manufactured in compliance with the EPA emissions standard in effect on the date of their manufacture and will be able to conduct inspections of these vehicles while they are in California. Motor carriers are subject to penalties for the violation of these regulations. In addition, FMCSA considers these issues in its NEPA review for the pilot program.

Regarding the availability of low sulfur fuels, it is our understanding that low sulfur fuels are available in the border areas and large cities, so access should not limit participation in the project.

FMVSS Compliance. With regard to concerns about compliance with the FMVSSs, the Agency already requires Mexico-domiciled motor carriers to certify on their applications for operating authority that CMVs used in the United States meet the

applicable FMVSSs in effect on the date of manufacture. While there is no requirement that the vehicles display an FMVSS certification label, the Agency believes the concerns about displaying a certification label have been adequately addressed by the Department through a notice-and-comment rulemaking proceeding.

On March 19, 2002, FMCSA and NHTSA published four notices requesting public comments on regulations and policies directed at enforcement of the statutory prohibition on the importation of CMVs that do not comply with the applicable FMVSSs. The notices were issued as follows: (1) FMCSA's notice of proposed rulemaking (NPRM) proposing to require motor carriers to ensure their vehicles display an FMVSS certification label (67 FR 12782); (2) NHTSA's proposed rule to issue a regulation incorporating a 1975 interpretation of the term "import" (67 FR 12806); (3) NHTSA's draft policy statement providing that a vehicle manufacturer may, if it has sufficient basis for doing so, retroactively certify a motor vehicle complied with all applicable FMVSSs in effect at the time of manufacture and affix a label attesting this (67 FR 12790); and 4) NHTSA's proposed rule concerning recordkeeping requirements for manufacturers that retroactively certify their vehicles (67 FR 12800).

After reviewing the public comments in response to those notices, FMCSA and NHTSA withdrew their respective proposals on August 26, 2005 (70 FR 50269). NHTSA withdrew a 1975 interpretation in

which the agency had indicated that the Vehicle Safety Act is applicable to foreign-based motor carriers operating in the United States. Accordingly, it is the Department's position that the FMVSSs do not obligate foreign-domiciled trucks engaging in cross-border trade to bear a certification label. Although FMCSA withdrew its NPRM, the Agency indicated that it would continue to uphold the operational safety of CMVs on the nation's highways, including that of Mexico-domiciled CMVs operating beyond the United States-Mexico border commercial zones, through continued vigorous enforcement of the FMCSRs, many of which cross-reference specific FMVSSs.

FMCSA explained in its withdrawal notice that Mexico-domiciled motor carriers are required under 49 CFR 365.503(b)(2) and 368.3(b)(2) to certify on the application form for operating authority that all CMVs they intend to operate in the United States were built in compliance with the FMVSSs in effect at the time of manufacture. These vehicles will be subject to inspection by enforcement personnel at U.S.-Mexico border ports of entry and at roadside inspection sites in the United States to ensure their compliance with all applicable FMCSRs, including those that cross-reference the FMVSSs.

For vehicles lacking a certification label, enforcement officials could, as necessary, refer to the VIN (vehicle identification number) in various locations on the vehicle. The VIN will assist inspectors in identifying the vehicle model year and country of manufacture to determine compliance with the FMVSSs based

on guidance provided by FMCSA. Based on information provided by the Truck Manufacturers Association in a September 16, 2002, letter to NHTSA and FMCSA, FMCSA believes model year 1996 and later CMVs manufactured in Mexico meet the FMVSSs. The Agency continues to believe this information is an appropriate basis for considering whether a vehicle is likely to have been manufactured in compliance with the FMVSSs because most of the members of TMA have truck manufacturing facilities in Mexico that are used to build vehicles for both the United States and Mexico markets.

Therefore, FMCSA continues to use its August 26, 2005 guidance, "Enforcement of Mexico-Domiciled Motor Carriers' Self-Certification of Compliance with Motor Vehicle Safety Standards," which provides technical assistance to Federal and State enforcement personnel on this issue. The guidance indicates that if FMCSA finds, during the PASA or subsequent inspections, that a Mexico-domiciled motor carrier has falsely certified on the application for authority that its vehicles are FMVSS compliant, that the Agency may use this information to deny, suspend, or revoke the motor carrier's operating authority or certificate of registration or take enforcement action for falsification, if appropriate. A copy of the Agency's guidance is included in the docket referenced at the beginning of this notice.

Although Mexico-domiciled vehicles may be less likely to display FMVSS certification labels, FMCSA believes continued strong enforcement of the FMCSRs

in real-world operational settings, coupled with existing regulations and enhanced enforcement measures, will ensure the safe operation of Mexico-domiciled CMVs in interstate commerce. As the Agency stated in the 2005 withdrawal notice, FMCSR enforcement, and by extension the FMVSSs they cross-reference, is the bedrock of these compliance assurance activities. The Agency continues to believe it is not necessary to require participating motor carriers to ensure their CMVs display an FMVSS certification label. Requiring CMVs to have FMVSS certification labels would not ensure their operational safety. The American public is better protected by enforcing the FMCSRs than by a label indicating a CMV was originally built to certain manufacturing performance standards. See 70 FR at 50287.

There appeared to be some confusion about when the vehicles would be checked for FMVSS or CMVSS certification. During the PASA, the Agency will check those vehicles identified for the long-haul trucking program to determine whether the vehicle displays an FMVSS or CMVSS certification label, or whether the vehicle is a 1996 model year or newer truck. Alternatively, if there is no label, the motor carrier may present a certificate or other documentation from the manufacturer confirming that the vehicle was built to the appropriate standard.

FMCSA understands ATA's position that the safety of the participating vehicles should be determined based on compliance with the FMCSRs, rather than the FMVSSs. FMCSA acknowledges that vehicle

manufacturers must comply with the FMVSSs at the vehicle manufacturing state and that the vehicles may not meet the FMVSSs after they are placed in service. However, the Agency's inspection of participating vehicles during the PASA, inspections, and CR will confirm compliance with the FMCSRs, as is required by 49 CFR 390.3.

10. Statistical Validity

Teamsters asserted that the Agency's evaluation plan was flawed because the statute requires evaluation based on participants, not the number of inspections.

Advocates challenged the Agency's null hypothesis and asserted that the evaluation plan does not conform to established scientific research methodology.

Advocates also requested additional information on how the rate of violations per type of inspection performed will be calculated. Advocates further requested information on the specific statistical tests or methods of analysis to be used, and suggested that a peer review panel review the study design. Specifically, Advocates noted that "the elements contained in the pilot program statutory provision under 49 U.S.C. 31315(c) require more specific and detailed information about the experimental design of the Pilot Program than the agency has provided."

FMCSA Response: Section 31315(c)(2)(C) of title 49, United States Code, requires a pilot program to have a sufficient number of participants to allow for statistically valid findings. Given that the majority of statistical comparisons between the Mexico-domiciled and U.S.-domiciled motor carriers will focus on roadside inspection data, the relevant question becomes whether or not the total number of inspections performed on the pilot program participants will be sufficient to allow for valid statistical comparisons. The Agency believes that the sample size targets presented in the April 13, 2011, **Federal Register** notice will ensure that the number of motor carrier participants will be sufficient for achieving this objective. As discussed in that notice, based on the results of the application and vetting process from previous border demonstration project, the Agency estimates an upper limit for the total number of Mexico-domiciled motor carriers both capable and interested in taking advantage of the NAFTA cross border provisions at 316 motor carriers. Thus, if 46 motor carriers were to participate in the current effort, the sample would represent 15 percent of this population.

The Agency acknowledges, however, that the statistical validity of the findings also hinges upon the representativeness of the study data. For example, if most of the inspection data collected in the pilot program were to come from just a few of the Mexico-domiciled motor carriers, the question of sample bias becomes a legitimate concern when producing survey

estimates. To mitigate the effect of this potential bias, the Agency plans to calculate the various violation rates both for the population of program participants as a whole, as well as for individual program participants. Thus, for each metric in question, the violation rates for each of the program participants will be averaged to give an alternate violation rate for the program participant population. This alternate violation rate calculation will help to minimize the effect of inspection data being potentially dominated by a small number of motor carriers. Comparison of the original population violation rate to this alternate violation rate calculation will give the Agency an indication of the magnitude of this problem.

With regard to the United States' obligations under NAFTA, FMCSA does not have reason to deny Mexico-domiciled motor carriers from operating in the United States unless it can demonstrate that the motor carriers pose a safety threat to the American public. Thus, the null hypothesis for the study begins with a presumption that Mexico-domiciled motor carriers are as safe as U.S. motor carriers. The data from the study will be used to determine whether this assumption should be rejected or not. While the term "null hypothesis" can be used for any hypothesis set up primarily to see whether it can be rejected, the more common statistical practice is to hypothesize that two methods, populations, or processes are the same and then determine if there is sufficient statistical evidence to reject this null hypothesis. If one can demonstrate definitively from the pilot program data

that Mexico-domiciled motor carriers are inherently less safe than U.S. motor carriers, then the Agency would be justified in rejecting this null hypothesis and restricting Mexico-domiciled motor carrier operations in the United States. If, on the other hand, the Agency cannot establish as a fact, there would be no justification for denying these motor carriers full access to our roadways as guaranteed under NAFTA. Had the null hypothesis for the study begun with the assumption that Mexico-domiciled motor carriers were inherently less safe than U.S. motor carriers (as recommended by the commenter), then all non-statistically significant results from the study would imply that Mexico-domiciled motor carriers are less safe than U.S. motor carriers, since this initial assumption would not be rejected. In contrast, the approach taken by FMCSA is a prudent one, and is similar to the scientific approach used in virtually all medical research examining safety risk. In such studies, the null hypothesis assumes that a particular food, chemical, or activity poses no safety risk, or no safety benefit. In other words, the null hypothesis always assumes that the item or activity in question has absolutely no effect. The results of the study are used to determine whether one can reject this null hypothesis, to identify a clear risk or clear benefit attributable to the item or activity. Additionally, the null hypothesis is supported by the safety data on border commercial zone motor carriers and the Mexico-domiciled motor carriers that participated in the previous demonstration project.

With regard to the Advocates' reference to 49 U.S.C. 31315(c), the Agency believes the commenter's interpretation of this section is incorrect. The section does not speak to the findings of a program or the conclusions to be drawn from them. Rather, the section simply states that a pilot program must be designed to ensure that public safety is not compromised while the study is being conducted. All of the safeguards put in place by the Agency, such as requiring pilot program participants to achieve a specified level of safety performance at various stages of the pilot in order to continue with their participation (as stipulated in the original notice requesting public comment), speak directly to this issue.

On a routine basis, program participant vehicles will be inspected at border crossings and other roadside inspection stations. Additionally, under section 350, each participating motor carrier will, within 18 months of being granted provisional operating authority, be subject to a full CR. During the CR, the Agency plans to inspect both "program participating" and "nonparticipating" vehicles of a Mexico-domiciled motor carrier that operate in the United States.

Concerning how the violation rates obtained from the study will be used, these rates will be directly compared to similar rates from U.S. motor carriers. Although a motor carrier's crash history is a good predictor of future crashes, given the relatively short time frame of the pilot study, it is anticipated that participating motor carriers will have very few, if any, crashes while operating in the United States. Thus,

violation rates based on inspection data will be used to assess the safety performance of each participating motor carrier. This same approach is used to evaluate U.S. motor carriers. For example, six of the seven performance metrics used to assess a motor carrier's safety risk under the Agency's Compliance, Safety, Accountability (CSA) program are based on data collected from the roadside.

Inspection data used in the study will be based on Level 1, 2, and 3 inspections. The Agency anticipates that inspections performed on program participants' trucks will be, on average, as thorough and rigorous as those performed on U.S. motor carriers. For those violations only observable by a Level 1 inspection, such as brake violations, only Level 1 inspection data will be used when making comparisons between program participants and U.S. motor carriers.

The Agency plans to evaluate the safety performance of the Mexico-domiciled motor carriers participating in the pilot project by looking at a variety of metrics and comparing their performance on these metrics with the performance of U.S. motor carriers. All of these metrics represent proportions of some type (proportion of inspections having a particular violation, or the proportion of motor carriers having a particular violation), and, as such, statistical tests designed for comparing proportions from two populations can be used. The metrics to be evaluated are discussed below.

Vehicle Out of Service (OOS) Rate. The vehicle OOS rate will be calculated in two different ways for the Mexico-domiciled motor carriers. First, the rate will be calculated in the standard manner, summing up all vehicle OOS violations found from all vehicles belonging to Mexico-domiciled motor carrier participants, divided by the total number of vehicle inspections performed in the United States on these vehicles during the study.

In addition, a vehicle OOS rate will be calculated for each participating motor carrier based upon the data collected during the duration of the pilot program. Using these carrier-level OOS rates, the average value for these carrier-level vehicle OOS rates will then be computed by summing up the individual vehicle OOS rates and dividing by the number of motor carriers having an OOS rate assigned to them. This last statistic, which is the average value of each motor carrier's OOS rate, will be used as a check to determine if the standard vehicle OOS rate calculated for the Mexican trucks participating in the pilot program is dominated by data from a small number of carriers. If it is, then more emphasis will be placed on the average OOS rate in the analysis.

Vehicle Violation Rate. The vehicle violation rate is similar to the vehicle OOS rate, except that all violations will be considered, rather than just OOS violations.

Driver OOS Rate. The driver OOS rate for the Mexico-domiciled drivers participating in the pilot

program will be calculated in the same manner as the vehicle OOS rates. First, the rate will be calculated in the standard manner, summing up all driver OOS violations found from all Mexico-domiciled drivers participating in the pilot, divided by the total number of driver inspections performed on these drivers during the study. In addition, the driver OOS rate will be calculated for each Mexico-domiciled motor carrier in the pilot, and these carrier-level driver OOS rates will next be averaged over all participating motor carriers.

Driver Violation Rate. The driver violation rate is similar to the driver OOS rate, except that all violations will be considered, rather than just OOS violations.

Safety Audit Pass Rate. The percentage of motor carriers in the pilot program that pass the PASA will be calculated and compared to the percentage of U.S.-domiciled motor carriers that pass the new entrant safety audit. The Agency recognizes that there are differences in these two types of reviews. However, they both evaluate success at meeting the established safety standards.

Crash Rate. Because crashes are relatively rare events, FMCSA will likely have insufficient crash data to evaluate safety performance of Mexico-domiciled motor carriers in this area. However, if sufficient data are available to produce meaningful statistical results, crash rate comparisons will be produced. It is anticipated that motor carriers participating in the

pilot program will be involved in a wide variety of trucking operations, and many, if not most, of them will not be operating their vehicles full-time in the United States. For this reason, crash rates for carriers participating in the pilot program will be calculated in terms of crashes per million miles, and not crashes per power unit. All crashes that have a severity level of towaway or higher will be included in the crash count.

Crash rates will be calculated based on crashes occurring within both the United States and Mexico, and on mileage accumulated within both countries.

Specific Violation Rates. In addition to overall vehicle and driver violation and OOS rates, violation rates for study participants will be calculated for specific types of violations, including traffic enforcement, driver fitness, and hours of service. These violation rates measure safety performance in subject areas considered key by Agency's CSA program. The purpose of this is to see whether there are specific types of violations that are more common among the Mexico-domiciled carriers than their U.S. counterparts.

Traffic Enforcement. Of particular interest are traffic enforcement violations pertaining to local laws, including, but not limited to, speeding, reckless driving, or driving too fast for conditions. Because traffic enforcement pertaining to driving only occurs when a violation is suspected, the exposure measure for these violation rates will not be total inspections, but,

rather, the total number motor carrier trucks participating in the program, prorated by the number of months each motor carrier is in the pilot program. This traffic enforcement violation rate will be compared to a similar rate for US.-domiciled motor carriers, based on 36 months of data.

Driver Fitness. A driver fitness violation rate will be calculated for the motor carriers participating in the pilot program by summing-up all of the driver fitness-related violations detected during the program for participating motor carriers, divided by their total number of inspections. This statistic will be compared to this same rate for U.S.-domiciled motor carriers.

Hours-of-Service. An hours-of-service violation rate will be calculated for the motor carriers participating in the pilot program by summing-up all of the hours-of-service violations detected during the program for participating motor carriers, divided by their total number of inspections. This statistic will be compared to this same rate for U.S.-domiciled motor carriers.

The Agency will conduct a peer review to assess the study design. Upon its conclusion, we will submit the results of the peer review to the docket for this notice. If the peer review results in recommended changes, the Agency will publish a notice in the **Federal Register** explaining the change.

Regarding the assertion that Mexico-domiciled drivers are not cited for violations in the United

States, FMCSA does not have any information available that would corroborate this statement.

11. Minimum Levels of Financial Responsibility

The Coalition requested that the minimum insurance requirements for all CMVs, domestic and foreign, be increased before conducting the pilot program.

The American Association for Justice interpreted the Agency's regulations as allowing participating motor carriers to self insure and suggested that all Mexican motor carriers carry insurance at all times.

FMCSA Response: FMCSA does not agree with the Coalition's suggestion that motor carriers transporting general freight should be required to have a greater level of financial responsibility. Mexico-domiciled motor carriers must establish financial responsibility, as required by 49 CFR part 387, through an insurance carrier licensed in a State in the United States. Based on the terms provided in the required endorsement, FMCSA Form MCS-90, if there is a final judgment against the motor carrier for loss and damages associated with a crash in the United States, the insurer must pay the claim. The financial responsibility claims would involve legal proceedings in the United States and an insurer based here. There is no reason that a Mexico-domiciled motor carrier, insured by a U.S.-based company, should be required to have a greater level of insurance coverage than a U.S.-based motor carrier.

Increasing the minimum levels of financial responsibility for all motor carriers is beyond the scope of this notice and would require a rulemaking.

In accordance with section 350(a)(1)(B)(iv), FMCSA must verify participating motor carriers' proof of insurance through a U.S., State-licensed insurer. As a result, participating motor carriers may not self-insure.

12. Vehicle Inspection and Fleet Safety

Teamsters expressed concern that only the segment of the motor carrier's fleet participating in long-haul trucking would be inspected. They also questioned how inspections at "a rate comparable to other Mexico-domiciled motor carriers" will be effective. Additionally, several commenters questioned what level of inspections would be conducted during each phase of the pilot program.

FMCSA Response: As noted previously, while only participating vehicles will be inspected during the PASA, the maintenance of all of the motor carrier's available vehicles that operate in the United States will be subject to inspection during the CR. Additionally, motor carriers currently operating within the border commercial zone are subject to inspections on a routine basis. The inspection rate of border commercial zone motor carriers is significantly higher than the average U.S. motor carrier. As a result, at all stages of the program, the participating motor carriers' drivers and vehicles are expected to be inspected

more frequently than those of the average U.S. motor carrier.

In FY 2010, FMCSA and its State partners conducted 2,614,052 commercial vehicle inspections on U.S.-based motor carriers with 4,125,778 CMVs. FMCSA and its State partners conducted 256,151 CMV inspections on Mexico-domiciled motor carriers within the border commercial zones with 29,566 CMVs. Thus, the inspections rates for U.S.-based motor carriers and Mexico-domiciled motor carriers are 0.636336% and 8.6337% respectively. At an inspection rate that is 13 times greater for Mexico-domiciled motor carriers, FMCSA is confident that the inspections performed on motor carriers during Stages 2 and 3 should be sufficient to ensure continued safe operations. Additionally, Mexico-domiciled motor carriers that are in Stages 2 and 3 of the pilot program are required to be inspected at least once every 90 days in order to maintain a valid CVSA safety decal.

FMCSA will use all available inspection levels as well as license/ insurance check inspections on the vehicles during the program. The level of inspection chosen will depend on a number of factors including the presence of a CVSA decal, previous history, and other observations by the inspector. At a minimum, a Level I inspection will be conducted if a CVSA decal has expired or will soon expire.

It must also be noted that participating vehicles will be required to maintain a current CVSA decal and must be inspected every 90 days. This is not a

requirement for U.S. motor carriers or border commercial zone motor carriers.

13. Transparency

Advocates requested that all of the Agency's agreements with Mexico be subject to notice and comment and that each step in the pilot program be subject as well.

Advocates and ATA advised that the monitoring group should be independent from the Agency's Motor Carrier Safety Advisory Committee (MCSAC), and Advocates further indicated that under the Federal Advisory Committee Act (FACA), the use of a subcommittee of a Federal advisory committee to provide consensus advice and recommendations to a Federal official is prohibited. Advocates questioned whether the MCSAC participants comprised persons with backgrounds in basic research and statistical analysis who can offer advice on how decisions made by the monitoring group will affect the research design. Advocates requested that FMCSA provide all reports to the appropriate congressional authorities and the public in a timely fashion.

The Coalition requested that monthly or quarterly reports of data collection be made available to the public.

FMCSA Response: The FMCSA has added copies of the 1991 MOU regarding CDL reciprocity and the 1998 MOU regarding drug and alcohol testing

protocols to the docket for this notice. However, these documents are for informational purposes only and are not the subject of comments as they were negotiated by the Governments of the United States and Mexico more than a decade ago. The MOU between DOT and SCT that has been under negotiation since January 2011, is not subject to public comment, and the terms of that MOU have been explained in the April 13, 2011, **Federal Register** notice. The terms for U.S.-domiciled motor carriers wishing to travel south can be found in the draft rules proposed by SCT, which have been placed in the docket.

The FMCSA provided the opportunity for notice and comment on all steps of this pilot program through the notice published on April 13, 2011, and will not be providing another notice.

Regarding the monitoring groups, FMCSA clarifies that there will be a government monitoring group to discuss bi-lateral operational issues. In addition, there will be an independent monitoring group.

The FMCSA agrees that the group must be independent from the Agency. As a result, FMCSA continues to believe that the most efficient and effective process is to establish a subcommittee of the MCSAC. The MCSAC has proven itself to be independent of the Agency. We, however, want to clarify that the subcommittee would be able to invite input from individuals outside the MCSAC itself and would report out through the Committee. As a result, consistent with FACA requirements, only the MCSAC will transmit

recommendations and advice to the FMCSA Administrator. FMCSA will make reports of the monitoring group available to the appropriate congressional committees and the public in a timely manner.

The FMCSA will maintain a comprehensive Web site dedicated to this pilot program to keep the public informed about how the program progresses. In addition to the specific information mentioned within this notice, FMCSA will publish the name and DOT Number of each participating motor carrier, the Vehicle Identification Numbers (VIN) of all vehicles approved for long-haul transportation, details on the driver/vehicle inspections the motor carrier has received, and details on any crashes involving the motor carrier. FMCSA will also publish aggregate data regarding the number of trips taken by participating motor carriers and the destinations of those trips.

14. Resources

Senator John D. Rockefeller expressed a concern about the adequacy of FMCSA, State law enforcement, and Immigration and Customs Enforcement (ICE) resources to support the program. Representative Hunter indicated he believed the Agency had gaps in its ability to properly manage the previous program. OOIDA indicated that based on contacts at the International Association of Chiefs of Police, more training on cabotage is needed.

The Texas Department of Motor Vehicles recommends that FMCSA provide financial assistance to

the Border States to off-set the Border States' administrative and enforcement expenses related to the pilot program.

FMCSA Response: The FMCSA notes that the number of Mexico-domiciled motor carriers and vehicles that will participate in the pilot program is extremely small compared to the population of motor carriers and vehicles currently operating within the border commercial zones. Most of the motor carriers that would participate in the pilot program already have authority to operate in the border commercial zones, so their participation in the program would not result in a significant increase in the population of Mexico-domiciled motor carriers operating in the United States. Further, as to concerns regarding possible strains on border inspection facility capacity, it should be noted that FMCSA has no reason to believe the number of Mexican trucks crossing the border during the pilot program will increase significantly because the cargo carried by the long-haul trucks would have crossed the border in any event via short-haul, border commercial zone trucks.

The FMCSA and its State partners have sufficient staff, facilities, equipment, and procedures in place to meet the requirements of this pilot program. This conclusion is based on the Agency's experience providing safety oversight for Mexico-domiciled motor carriers currently authorized to operate within the border commercial zones and on its regular liaison with its State enforcement partners with whom the Agency has worked for years in anticipation of the

opening of the border to long-haul Mexico-domiciled motor carriers. In fact, during the previous program, FMCSA was able to confirm that over 99 percent of the participating vehicles received an inspection at the border. Further, FMCSA can find no evidence that the remaining less than one percent of the vehicles were not inspected as they crossed the border, and neither the OIG, nor the Independent Panel, nor any other entity has identified any vehicles that crossed without an inspection. FMCSA currently employs 260 Federal personnel dedicated to border enforcement activities.

In response to the OOIDA's concerns about the burden on the States for providing safety oversight for Mexico-domiciled motor carriers and the Texas Department of Motor Vehicles comment regarding making funding available to Border States, FMCSA is authorized under 49 U.S.C. 31107 to provide border enforcement grants for carrying out CMV safety programs and related enforcement activities and projects and has $32 million available in FY2011 for this purpose. The Agency's State partners along the border employ 456 State officials for this purpose. Therefore, the Congress has provided funding for enforcement resources dedicated exclusively to ensuring the safe operation of foreign-domiciled motor carrier operations.

The FMCSA works with the States to ensure that motor carrier safety enforcement personnel receive extensive training. From 2008 to date, over 5,800 State motor carrier safety inspectors have received

North American Standard (NAS) inspection procedures training. The NAS training course is designed to provide State motor carrier safety enforcement personnel with the basic knowledge, skills, practices, and procedures necessary for performing inspections under the Motor Carrier Safety Assistance Program (MCSAP).

Additionally, through the Agency's partnership with the International Association of Chiefs of Police (IACP), four Foreign CMV Awareness Training sessions have been conducted on a recurring basis including a session that covers cabotage laws. Approximately 215 officers were certified to train law enforcement officers throughout the United States using this course which includes cabotage information.

The training these officers will provide to other law enforcement officials will ensure patrol officers are informed about potential safety and enforcement issues involving foreign-based CMVs and drivers operating beyond the border commercial zones. Therefore, not only has FMCSA provided funding resources to support the States' role in providing Safety oversight for Mexico-domiciled motor carriers operating in the United States, the Agency has provided training. Presently, 1,755 law enforcement officers have received such training.

Finally, during the program, FMCSA will monitor for domestic point-to-point transportation violations using the information obtained from the GPS feature

of the electronic monitoring devices installed on the vehicles and during CRs.

15. Impact on Truck Drivers, Small Fleets and Businesses

Over 1,000 commenters felt that this pilot program would have a negative economic impact on the United States at a time when unemployment was high.

FMCSA Response: The FMCSA does not believe the pilot program will have a significant adverse impact on U.S. motor carriers or drivers. As an initial matter, however, it is important to note that FMCSA lacks the authority to alter the terms under which Mexico-domiciled motor carriers operate in the United States based on the possible economic impact of those motor carriers on U.S. motor carriers. FMCSA's responsibility, pursuant to the November 2002 presidential order, is to implement NAFTA's motor carrier provisions in a manner consistent with the motor carrier safety laws.

While the wages for a Mexico-domiciled driver may differ from those of a U.S.-domiciled driver, wages represent only one factor in the cost of a trucking operation. The costs for safety management controls to achieve full compliance with U.S. safety requirements, equipment maintenance, fuel, taxes and insurance costs must also be considered. Therefore, driver wages alone should not be considered the determining factor for an economic advantage.

Also, Mexico-domiciled motor carriers cannot compete against U.S.-domiciled motor carriers for point-to-point deliveries of domestic freight within the United States. Section 365.501(b) of title 49, Code of Federal Regulations, provides that "a Mexico-domiciled motor carrier may not provide point-to-point transportation services, including express delivery services, within the United States for goods other than international cargo." FMCSA notes that engaging in domestic point-to-point transportation in the U.S. is operating beyond the scope of a Mexico-domiciled motor carrier's authority, and FMCSA and its State partners are actively engaged in enforcing this regulation. Vehicles caught in this practice will be placed out-of-service, participating motor carriers may be subject to civil penalties of up to $11,000 and more comprehensive review of operations by FMCSA, and they could be removed from the pilot program.

16. Concerns About Furthering Illegal Activity

Numerous commenters noted the existence of drug cartels in Mexico and expressed concern that the long-haul program would increase drug trafficking.

FMCSA Response: The FMCSA disagrees with the commenters on this issue. FMCSA is not aware of any information that would suggest the pilot program will increase the extent to which illegal activities occur. Mexico-domiciled motor carriers are already allowed to operate in border commercial zones. Many of the motor carriers that may apply for authority to

operate beyond the border commercial zones and participate in the pilot program are already conducting CMV operations in the U.S., albeit limited to the border commercial zones. Moreover, as noted above, FMCSA does not anticipate that the pilot program will result in a substantial increase in the number of Mexican trucks crossing the border. It follows that the pilot program will not increase instances of cross-border drug smuggling in any significant way.

Finally, as the U.S. Immigration and Customs Enforcement's inspections of long-haul trucks will not change as a result of this pilot, we do not believe this program introduces any new risks.

FMCSA's Intent To Proceed With Pilot Program

In consideration of the above, FMCSA believes it is appropriate to commence the pilot program after the Department's Inspector General completes his report to Congress, as required by section 6901(b)(1) of the 2007 Appropriations Act, and the Agency completes any follow-up actions needed to address any issues that may be raised in the report. FMCSA reiterates that before an applicant Mexico-domiciled motor carrier may receive operating authority, it must submit a complete and accurate application; complete the DHS security review process; successfully complete the PASA; and file with FMCSA evidence of adequate insurance from a U.S. company. In addition, as stated above, FMCSA will complete reviews of Mexican licensing facilities to ensure

compliance with the 1991 MOU before granting authority. FMCSA does not anticipate that any Mexico-domiciled motor carrier seeking participation in the pilot program will receive its provisional operating authority before the first weeks of August 2011.

Issued on: June 29, 2011.

William Bronrott,

Deputy Administrator.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1251 **September Term, 2012**

FMCS-2011-0097

Filed On: July 26, 2013

Owner-Operator Independent Drivers Assn., Inc.,

Petitioner

v.

Federal Motor Carrier Safety Administration, et al.,

Respondents

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, and Srinivasan, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk