BEFORE THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

UNITED STATES DEPARTMENT OF TRANSPORTATION

COMMENTS OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO A NOTICE AND REQUEST FOR PUBLIC COMMENT

[FMCSA Docket No. FMCSA-2007-28055]

Demonstration Project on NAFTA Trucking Provisions
Notice; supplemental request for public comment

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June 28, 2007

BEFORE THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

I. INTRODUCTION

A. Procedural Statement

These comments are submitted on behalf of the Owner-Operator Independent Drivers Association, Inc. ("OOIDA" or "Association") in response to the Notice, Supplemental Request for Public Comment published by the Federal Motor Carrier Safety Administration ("FMCSA" or "Agency"), Docket No. FMCSA-2007-28055, [FR 72, No. 110 at 31877] (June 8, 2007) related to additional details of the initiation of a project to demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States beyond the commercial zones along the U.S.-Mexico border.

B. The Interest of the Owner-Operator Independent Drivers Association, Inc

The Owner Operator Independent Drivers Association, Inc. is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small business motor carriers and professional drivers. The more than 154,000 members of OOIDA are professional drivers and small business men and women located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks and small truck fleets. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96

percent of active motor carriers operate 20 or fewer trucks. The address of the Association is:

Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.ooida.com

The Association actively promotes the views of small business truckers and professional drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the position of small business truckers and professional drivers on numerous committees and in various forums on the local, state, national, and international levels. Allowing Mexico-domiciled motor carriers and drivers to operate beyond the commercial zones along the U.S.-Mexico border, even under a limited pilot program, will have a significant impact on the safety and security of the American public, as well as the safety, security and economic well-being of U.S.-domiciled small business truckers and commercial drivers, including members of OOIDA.

II. SUMMARY

The Department of Transportation has announced that its present proposal to permit Mexican trucks to operate throughout the United States is required by our country's commitments under the North American Free Trade Agreement and will result in many economic benefits in transportation efficiency and increased trade. OOIDA categorically disagrees with both of these positions. Disputes over the potential benefits

of the NAFTA agreement, however, were resolved with its adoption into law more than a decade ago. Such arguments have no bearing on the issue at hand: whether granting operating authority to Mexican motor carriers is arbitrary and capricious, an abuse of discretion, or not otherwise in accordance with the law. DOT's drive and intent to fulfill the United States' commitments under NAFTA do not permit the agency to ignore other laws that must be followed in pursuit of such an effort.

OOIDA believes that the June Notice demonstrates FMCSA's intent to open the border to Mexican trucks without regard for the disclosures and procedures required by law. Such disclosures and procedures include those specifically required by Section 6901 of the U.S. Troop Readiness, Veteran's Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Public Law 110-28, ("Section 6901") and those related to the establishment of this project as a pilot program and to the granting of exemptions from the Federal Motor Carrier Safety Regulations ("FMCSRs"). FMCSA tacitly admits in the June Notice that it is granting exemptions to U.S. FMCSRs by accepting Mexican motor carrier and driver compliance with Mexico's CDL, medical qualification, and drug testing rules.

Additionally, FMCSA continues to keep the public in the dark as to what plans it has made to ensure that Mexican motor carriers and drivers comply with other U.S. laws. These include safety rules from which exemptions may be granted, such as the hours-of-service rules, and those laws not subject to exemptions. Section 6901 requires FMCSA to publish "specific enforcement measures and penalties established to protect public health and safety." FMCSA has repeatedly stated that it will require compliance with all U.S. regulations and laws. OOIDA outlined many specific questions that provide a focus

to this Congressional requirement, the answers to which would provide details behind FMCSA's assurances, in its comments to the May Notice (Docket No. FMCSA-2007-28055-1521). These comments identify additional questions that require answers. OOIDA believes that there are certain logistical obstacles to a foreign motor carrier's compliance with some U.S. laws that require specific planning or preparation by FMCSA before it can ensure compliance with all U.S. laws. FMCSA has yet to publish such "measures or penalties" as required by Congress.

The only conclusions that can be drawn from FMCSA's lack of response to Congress and the public's requests for more information are either that FMCSA has no specific plan to ensure compliance with such rules, or that such disclosure would invoke the additional procedures necessary to grant exemptions and cause delay that is inconsistent with FMCSA's intent to open the border as soon as possible.

OOIDA believes that neither the disclosure in the June Notice nor the twenty day comment period provides sufficient opportunity for informed public comment on these issues. OOIDA believes that additional disclosures and an extended opportunity to comment are necessary for the agency to move forward with the pilot program in compliance with the law.

III. COMMENTS OF THE ASSOCIATION

A. Deficiencies in the June 8, 2007 Notice

FMCSA's rush to open the border is evident in its premature declarations that it has complied with each of the requirements of Section 6901.

1. The New IG Report Requirement

Section 6901(b) requires that before initiation of a pilot program the Inspector General of the U.S. Department of Transportation ("IG")

> shall transmit to Congress and the Secretary of Transportation a report verifying compliance with each of the requirements of subsection (a) of section 350 of Public Law 107-87, including whether the Secretary of Transportation has established sufficient mechanisms to apply Federal motor carrier safety laws and regulations to motor carriers domiciled in Mexico that are granted authority to operate beyond the United States municipalities and commercial zones on the United States-Mexico border and to ensure compliance with such laws and regulations.

The June Notice claims that in a January 2005 report, the "OIG concluded that FMCSA had sufficient staff, facilities, equipment, and procedures in place to substantially meet all eight requirements under section 350 that the OIG was required to review." The notice further states that FMCSA itself verified in its May Notice that it was prepared to enforce all U.S. safety regulations with Mexican motor carriers. These *pro-forma* recitations do not comply with Section 6901.

The Notice does not claim, as required by Section 6901, that the *Inspector General* has verified that DOT has sufficient mechanisms in place to apply Federal motor carrier safety laws and regulations to Mexican motor carriers. FMCSA assurance of its preparedness in the June Notice is not a substitute for the IG's verification under Section 6901. The Notice also admits that the 2005 IG report only stated that DOT is prepared to "substantially" comply with Section 350, not whether it was in full compliance. Because Section 6901 was enacted more than two years after the 2005 IG report was published, Congress was clearly not satisfied with prior publications concerning DOT's efforts.

Congress is presumed to have known about the January 2005 IG report when it passed the new law. DOT's interpretation that the new law is satisfied by a previously

published report violates the canons of statutory interpretation that a law may not be interpreted in a way that renders it meaningless. Congress, having conducted hearings on the Mexican truck issues this spring, two years after the IG's 2005 report, had significant questions as to whether or not DOT was in compliance with Section 350. Therefore it requested a new IG report on DOT's compliance with Section 350 and on DOT's preparedness to enforce the motor carrier safety laws.

OOIDA's national publication *Land Line Magazine* has learned that the DOT IG has commenced a new investigation of DOT's preparation to comply with Section 350 and to enforce Mexican carrier and driver compliance with U.S. safety laws and regulations. Section 6901 does not permit FMCSA to proceed with a pilot program until the IG publishes a new report and that report verifies FMCSA compliance with Section 350.

2. The Pilot Program Requirement

Section 6901(a) requires that the opening of the border to Mexican motor carriers shall be done as part of a pilot program in compliance with 49 U.S.C. §31315(c). The June Notice states that the May Notice, combined with new details in the June Notice, fulfills the requirements of §31315(c) for pilot programs. The agency does not list or attempt to describe how it has complied with any of the statutory pilot program requirements.

Despite use of the term "pilot program" by various DOT officials in their initial public announcements of its Mexican truck plan, when it became clear that a "pilot program" would require compliance with specific procedures and disclosures that had not yet been performed and that would delay implementation of the plan, this term was

quickly dropped from all DOT statements. The May Notice assiduously avoided the use of the word "pilot program" and did not cite to §31315(c) or any other section of the law as authority for its publication. That Notice did not discuss the requirements for promulgating a pilot program, and the June Notice makes no attempt to explain how the May Notice fulfilled those requirements. These deficiencies in the promulgation of this proposal as a pilot program have been detailed extensively in the comments files in response to the May Notice. Those comments are equally applicable to the consideration of the May and June Notices together.

Without any notice until June that FMCSA believed it was complying with the procedures required under §31315(c), FMCSA cannot justify setting only a 20 day expedited public comment period. This is especially true given FMCSA's admission in its June Notice that it intends to grant exemptions to at least three sets of motor carrier safety regulations. Typically, exemptions are sought by a single or a defined group of similar carriers testing an alternative to a narrow part of the safety regulations. FMCSA normally gives the public at least 30 days to comment on such proposals.

In this instance, the newly proposed pilot program and exemptions necessarily put at issue apply to a group of carriers without a common market niche and implicate significant sections of the U.S. safety regulations. This pilot program and these exemptions require more disclosure by FMCSA and a much longer public comment period.

3. Exemptions to the Rules

Section 6901(b)(2)(B)(v) requires the agency to publish:

> a list of Federal motor carrier safety laws and regulations, including 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 U.S. law or regulation, including for each law, how the corresponding United States and Mexican laws and regulations differ.

In response, the June Notice announced that it will be accepting the Mexican Licencia Federal de Conductor, Mexican driver medical qualification standards, and Mexican drug testing procedures in place of compliance with U.S. rules. This announcement acknowledges that Mexican drivers are being exempted from compliance with the U.S. CDL, medical qualification, and drug testing rules.

Even if the agency believes that accepting compliance with those Mexican rules is equivalent to compliance with the U.S. rules, their acceptance in substitute for compliance with the U.S. rules is a grant of exemptions that may only be established in compliance with the law. The requirements for establishing exemptions to the rules are set out in 49 U.S.C. §31315(b) and 49 CFR §§ 381.300 through 381.315. These requirements include the publication of an explanation of how compliance with those Mexican requirements would ensure a level of safety that is equivalent to or greater than would be obtained by complying with U.S. laws (see 49 CFR 381.310(5)) and the "specific countermeasures the person would undertake to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption." (See 49 U.S.C. §31315(b)). Neither the May nor June Notice cited to these requirements, nor can it be said in hindsight that these Notices complied with them. Without such an explanation, the public has no fair opportunity to comment on DOT's proposal.

The June Notice asserts that the U.S. and Mexican version of these three regulatory areas are equivalent. But that conclusory assertion does not provide any analysis that adequately informs the public of how the agency made such a determination

and denies the public the opportunity to provide meaningful comment on such an analysis as intended by the law.

4. Possible Exemptions from Other Rules

OOIDA continues to believe that there are other rules for which Mexican motor carriers and drivers will have a *de facto* exemption. In its comments to the May Notice, OOIDA asked many questions concerning the feasibility of foreign carrier compliance with specific U.S. safety rules and the likely difficulty the U.S. will have enforcing compliance with such rules. Blanket statements that Mexican carriers will be required to comply with all U.S. rules are not an adequate response to these concerns. OOIDA believes that this response indicates that the agency has not considered all of the implications of its plan. Mexican carriers would, therefore, effectively be granted additional exemptions not yet acknowledged by FMCSA.

5. The Need for FMCSA Compliance with 49 U.S.C. § 31315

The substantive and procedural requirements for the establishment of a pilot program and exemptions are important to highway safety. They were established by Congress so that alternatives to compliance with U.S. safety rules could be tested as long as the same level of public safety could be assured and maintained. OOIDA does not insist upon FMCSA compliance with such procedures as make-work, but because there are reasons to believe that the Mexican rules do not provide for the same level of safety as U.S. rules.

a. Mexico's Licencia Federal de Conductor

The notice states that the requirements of the U.S. CDL and Mexican Licencia Federal de Conductor ("Mexican license") were determined to be equivalent in

November of 1991. But there have been important substantive changes to U.S. CDL requirements since then. These include the mandatory disqualification for violations of out-of-service orders (59 Fed. Reg. 26022, May 18, 1994), disqualification for violations of railroad-highway grade crossing rules (64 Fed. Reg 48104, Sept. 2, 1999), and disqualification for violations of specific laws in noncommercial vehicles (68 FR 4394, Jan 29, 2003). The nearly 16 year-old assessment of their equivalency cannot be considered current or reliable.

The June Notice also states in "Table 1" that the Mexican license "can" be cancelled under several circumstances. In the U.S., CDL disqualification is mandatory in specific circumstances. This chart implies that the license cancellation rules are discretionary in Mexico. This chart does not demonstrate how Mexican license cancellation rules provide for at least the same level of safety as the U.S. mandatory CDL disqualification rules.

b. Mexico's Medical Qualification

FMCSA cites to *Reglamento del Servicio de Medicina Preventiva del Transporte* as the corresponding regulatory equivalent to U.S. medical qualification requirements found in Part 391 of title 49 of the Code of Federal Regulations. The Agency states that Mexico requires a comprehensive physical and psychological examination for a driver to be licensed. How do Mexico's rules compare to those found in Part 391? What sort of medical event or history disqualifies a driver in Mexico from passing a medical exam? What sort of centralized data-base exists in Mexico to track disqualification of a driver? Does Mexico issue waivers from their medical standards? Waivers are possible in the U.S. and Canada, however, by agreement each nation's drivers' operating under a waiver

are not allowed into the other's jurisdiction. How will our enforcement officials know whether a Mexican driver is operating under a waiver? The June Notice provides no information on which the public can evaluate how the Mexican medical qualification rules provide for the same level of safety as the U.S. rules.

c. Mexico's Drug Testing Procedures

Drug and alcohol testing is an integral part of the U.S. driver qualification process and furthers FMCSA goals related to highway safety. Procedures specifically detailing requirements on both employers and drivers are detailed at 49 CFR Part 382. Pre-employment, post-accident, random, reasonable suspicion, return-to-duty and follow-up testing are meant to insure that CDL holders are held to a higher standard than other vehicle operators. Nowhere in this current Notice does FMCSA give details as to what Mexican procedures or regulations mimic U.S. regulations and how they provide for the same level of safety. FMCSA has only cited to corresponding Mexican regulation identifiers without detailing, in English, the content of those regulations and how they've been determined to be equivalent to U.S. regulations.

The June Notice refers to an MOU in which Mexico agrees to adhere to U.S. drug testing regulations, states that their procedures and regulations are equivalent, and then states that Mexican laboratories are not certified due to lack of proper equipment and other procedural requirements.[1] On page 31880 of the Notice, column three under section "T"- controlled substance collection - FMCSA admits that "[c]urrently there are not any collection facilities certified in Mexico to collect controlled substance and alcohol specimens in accordance with 49 CFR Part 40." These facts appear to contradict any conclusion that Mexico's drug testing standards are equivalent to those required of

[1] Federal Register. Table 1 at page 31885

U.S. drivers and carriers. The Notice states that FMCSA has agreed to accept a drug test collected in Mexico using U.S. forms, but is silent as to the testing procedures that it believes are acceptable.

6. What FMCSA Must do to Establish Exemptions

Because FMCSA has finally acknowledged that Mexican drivers must be exempted from U.S. safety rules for the pilot program to move forward, it must provide additional public notice and opportunity for public comment before Mexican motor carriers are allowed to operate in the United States. The public is owed an explanation and analysis as to how compliance with Mexico's commercial license, medical qualification, and drug testing rules provide for the same level of safety as the U.S. rules despite the issues raised by OOIDA above and despite any other issues that become apparent to the public once the Agency publishes adequate notice of its specific efforts to ensure compliance with U.S. safety rules. To aid in this analysis OOIDA requests that FMCSA publish a side by side comparison of the Mexican license and U.S. CDL, medical qualification, and drug testing rules, to accompany its analysis as to how the Mexican rules will provide for at least the same level of safety as the U.S. rules.

Additionally, OOIDA requests that the agency respond to its questions raised in these and OOIDA's previous comments concerning how the FMCSA and Mexican motor carriers and drivers have planned to overcome the logistical problems in complying with and enforcing specific U.S. laws. If FMCSA has a plan to overcome these obstacles, it should share such plans with the public. If it has no plan, it should state how such exemptions are permitted by law.

7. Specific Measures to Enforce The English Language Requirement

Section 6901 requires FMCSA to publish specific measures to be required to ensure compliance with section 49 CFR §391.11(b)(2), the English language requirement. The June Notice states that CVSA has adopted the English language requirement in its out-of-service requirements, and that if there is a communication problem with a Mexican driver upon entering the border or during an inspection within the United States, then the driver will be placed out of service. This Notice falls short of providing the specific measures required by Congress.

The Notice fails to identify and address the special problems associated with putting a Mexican national out-of-service once the driver has traveled beyond the border. The memorandum of understanding between the U.S. and Mexico signed in April 2007 only discusses what efforts will be made in such situations when discovered at or near the border. If non-compliance with this rule is discovered at the border, the driver can be denied access to the country. If this problem arises at a point distant from the border, however, what are inspectors and enforcement officials to do with the truck and the driver? If determined not to be in compliance with the English language requirement, the driver ceases to have any permissible purpose to be within the country. Are enforcement personnel required to call someone? Do they detain the driver? Must the enforcement agency provide transportation to the driver back to Mexico? Under what conditions could they let the driver go? Would they be required to contact the motor carrier? Will the motor carrier be required to act within a certain amount of time to retrieve the truck and provide accommodations and transportation home for the driver? What punishment

will the Mexican motor carrier face for allowing an unqualified driver to operate in the United States. OOIDA believes that without specific guidance as to how to handle these issues, state and local enforcement officials will be discouraged from enforcing this requirement. These are the issues that require the development of specific enforcement measures.

Congress requested this information knowing full well that the regulation exists and that the authority exists to enforce it. The Notice's recitation of these facts adds nothing new to this understanding. It was Congress' dissatisfaction with assurances of its enforcement that was the impetus for the inclusion of this section in Section 6901. FMCSA's assertions of its authority and intent to enforce the rule do not comply with the requirement that FMCSA publish the specific measures it will take to do so.

8. Specific Measures to Enforce the Prohibition Against Point-to-Point Transportation Services Within the U.S.

Section 6901 requires FMCSA to publish specific measures to be required to ensure compliance with section 49 CFR §365.501(b), the rule restricting the operating authority of Mexican motor carriers to international shipments. The June Notice states that FMCSA has trained all state truck inspectors in the enforcement of operating authority restrictions. The Notice also states that such training has also been conducted with other law enforcement agents who are not full-time truck inspectors. Furthermore, the Agency will use records "like logbooks and associated supporting documents, such as bills of lading, during compliance reviews to determine if a Mexican carrier has operated beyond the scope of its authority..."

As with the English language requirement, Congress requested more information knowing full well that the regulation exists and that the authority exists to enforce it. But

it was Congress' dissatisfaction with the Agency's assurances of its enforcement that prompted Congress to include this requirement in Section 6901. FMCSA's *pro-forma* assertions that the power and intent to enforce the rule exists do not comply with the requirement that FMCSA demonstrate the specific measures to ensure compliance with this important rule.

OOIDA is a member and participant in several organizations such as the Commercial Vehicle Safety Alliance and the American Association of Motor Vehicle Administrators whose members include representatives of states licensing personnel and truck enforcement agencies throughout the country. OOIDA has raised the issue of cabotage and the prohibition on point-to-point operations of foreign carriers within the United States at meetings with these organizations. OOIDA has received almost no indication from state enforcement officials that they have been required to address this issue. And when OOIDA asked what kind of training they have received from the federal government to enforce such rules, it has yet to meet a state enforcement official who can corroborate FMCSA's claims that state officials have received such training.

OOIDA must ask: Who has been given such training? Who has received the training? When did it occur? What was taught? What course materials were used? Did such course materials cover the practical questions raised by enforcement of the prohibition on point-to-point operations within the United States? What documents and information must be reviewed at the roadside to determine compliance? As with the English language requirement, what are inspectors and enforcement officials to do with the truck and the driver found to be operating outside of their operating authority? Are the enforcement personnel required to call someone? Do they detain the driver? Can they

confiscate the truck? Must the enforcement agency provide transportation back to Mexico for the driver? Under what conditions could they let the driver go? Would they be required to contact the motor carrier? Will the motor carrier be required to act within a certain amount of time to retrieve the truck and provide accommodations and transportation home for the driver? What penalties will a motor carrier face if noncompliance is found during a roadside inspection or a compliance review?

OOIDA believes that these inevitable, yet unaddressed, questions will discourage state and local officials from enforcing these rules. Public notice that falls short of answering these questions also falls short of complying with the Congressional mandate to publish specific measures being taken to enforce these rules.

B. Databases Containing Mexican Driver Information

OOIDA would like to expand upon it comments to the May Notice concerning the ability of U.S. enforcement officials to verify the qualifications of Mexican Drivers. The Notice states that it will verify each driver's qualifications, including confirming the validity of each driver's "Licencia Federal de Conductor." OOIDA has serious concerns over the limits of the databases available to check the qualification of Mexico-domiciled drivers. The Mexican Licencia Federal Information System ("LIFIS") does not contain all traffic conviction data occurring in Mexico.[2] Conversations with representatives from the Los Angeles District Attorney's Office indicate the lack of any accessible Mexican database regarding criminal history information. Without the ability to accurately verify traffic conviction and criminal history records ("CHR") of Mexican commercial license holders, U.S. officials do not have the same ability to enforce Mexican driver compliance with U.S. CDL rules and a violation of the 1991 CDL MOU arguably exists.

[2] AAMVA web-site

Additionally, this lack of a database containing the background of Mexican drivers that is as complete or reliable as the databases available about U.S. drivers creates a double-standard. U.S. drivers are essentially held to a higher standard because of the availability of databases such as CDLIS, NLETS, and NDR containing more comprehensive and accurate histories of individuals than any information available about Mexican drivers. It should be noted that Congress has mandated and authorized funds to address the problem of drivers effectively "masking" their traffic conviction history by obtaining CDLs in different states. OOIDA has no information as to whether Mexico has made similar efforts. This issue is undeniably crucial especially when the FMCSRs contain provisions that disqualify a driver based upon certain traffic violations, including those which occur in a driver's personal vehicle.[3]

OOIDA has learned that moving violations recorded in LIFIS are violations or incidents that occur only on Mexican federal highways, not local highways or roads. If true, this system fails to accurately record an undetermined amount of violations and incidents committed by drivers that could disqualify them from operating within the U.S. Without a detailed and systematic safety analysis of the procedures within Mexico to accurately record and quantify driver violations, incidents and accidents, the equivalency of such a system to U.S. driver databases is in serious question. Without equivalent access to the background information of Mexican drivers, they would effectively be given an additional exemption from these disqualification rules.

[3] 49 C.F.R. subpart D- § 383.51

C. **Collection of State and Federal Taxes and Fees:**

The Agency makes broad assurances that Mexican motor carriers will pay all applicable U.S. "vehicle registration and taxation, and fuel taxes." FMCSA, however, has no authority over or responsibility for the collection of various State and Federal taxes and fees imposed upon the motor carrier industry. OOIDA asks FMCSA to explain what authority or capability it has to assure such compliance by Mexican carriers.

This issue, however, does raise important policy issues. OOIDA believes that opening the border to Mexican trucks has the potential to reduce several revenue streams into the highway trust fund. The already cash-strapped HTF will be further depleted as Mexico-domiciled trucks ultimately take over freight lanes currently being served by U.S. trucks. This is because:

- Mexican trucks will operate in the U.S. using fuel paid for in Mexico and this is not subject to the U.S. federal diesel fuel tax.
- Mexican trucks that replace U.S. truck operations in the U.S. will not have been subject to the 12 percent federal excise tax on commercial vehicle and tire purchases collected at the time of purchase within the U.S.
- No plan has been announced as to how Mexican carriers will be required to pay the annual heavy vehicle use tax.

Additionally, it is not clear how the states will have authority to conduct cross-border enforcement of Mexican motor carrier compliance with several state taxes. These include:

- The International Fuel Tax Agreement ("IFTA"). Although Mexican carriers will be required to register through one of the four U.S. base jurisdictions along the U.S.-Mexico border, OOIDA asks what authority do those base jurisdictions have to effectively audit Mexican carriers' records?

- The Unified Carrier Registration Plan ("UCR"). The UCR Plan is slated to replace the Single State Registration System to fund state highway safety programs. Foreign-domiciled carriers are required to register under UCR with a U.S. base jurisdiction. The states acting as base jurisdictions will be burdened with administering UCR for non-resident Mexican carriers.

- Vehicle Registration. FMCSA claims that Mexico-domiciled carriers will be required to pay state registration fees. Since Mexico is not a member of the International Registration Plan a Mexican carrier must register its vehicles through a U.S. base jurisdiction. OOIDA wonders what authority those base jurisdictions will have to effectively audit Mexican carriers' records.

- Other state taxes and fees. Many states impose taxes and fees on the U.S. motor carrier industry, including motor carriers who are not based in, but operate, within the states. This includes corporation taxes, mileage taxes and various permit fees. How can FMCSA ensure that these taxes and fees are evenly applied to Mexican carriers?

If Mexican motor carriers are not effectively required to pay their fair share of taxes, U.S. motor carriers are disadvantaged in two ways. U.S. motor carriers and drivers will shoulder a disproportionate share of the tax burden that funds truck enforcement and highway building activities. And without having to bear the cost of such taxes, Mexican carriers will have a competitive economic advantage over U.S. carriers for the available international freight.

D. <u>Compliance with U.S. Law does not Violate NAFTA Trucking Provisions</u>

None of the procedures and disclosures OOIDA believes FMCSA must follow and make are contrary to the United States' commitments under NAFTA. NAFTA gives each party to the Agreement the right to "adopt, maintain or apply any standards-related measure, including any such measure relating to safety, the protection of human, animal

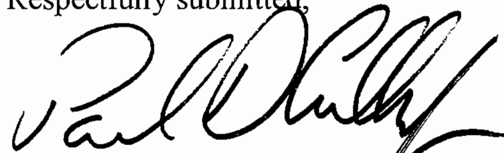
or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation." (NAFTA, Article 904 ¶ 1). Provided, however, that any such measures must be applied in a non-discriminatory manner (Article 904 ¶ 3). Thus, one country may not treat service providers from another country any less favorably that it would "in like circumstances" treat its own or another country's service providers (Articles 904 ¶ 3, 1202 & 1203).

Even though a NAFTA Arbitral Panel decided in 2001 that the U.S. was in violation of NAFTA for failing to process the applications of motor carriers to operate within the United States, it affirmed the right of the U.S. to "set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives," including the "safety of trucking services. . ." (Final Report, ¶ 298). The Arbitral panel did not require the United States to provide "favorable consideration to all or to any specific number of applications from Mexican-owned trucking firms, when it is evident that a particular applicant or applicants may be unable to comply with U.S. trucking regulations when operating in the United States." (Final Report ¶ 300). Under NAFTA, the United States may establish safety standards-related measures and deny U.S.-operating authority on an individualized basis to Mexican carriers that are not able to meet those safety standards, even if it determines that no Mexican carriers are able to meet those standards.

IV. CONCLUSION

DOT has stated that this project is necessary to comply with the United States Commitments under NAFTA. OOIDA's comments are completely consistent with the NAFTA agreement and the conclusions of the arbitral panel. OOIDA is only asking FMCSA to follow the laws Congress has put in place to ensure Mexican motor carriers and drivers comply with the safety standards that apply to all U.S. carriers and drivers, including all OOIDA members. No less than compliance with our own laws is necessary to ensure highway safety and to ensure the fairness to U.S. motor carriers and drivers that was made part of the NAFTA agreement.

Respectfully submitted,



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