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March 23, 2015

The Honorable Anthony Foxx
United States Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Secretary Foxx:

I write with profound concern about the Federal Highway Administration's (FHWA) failure to properly evaluate the potential dangers of ET-Plus guardrail end terminals and refusal to administer tests that meet its own current guidelines. The FHWA's effort several days ago to deem these devices as safe appears to be the agency's latest attempt to absolve itself for years of inaction. I urge your office to take over this matter so the public can finally know if these products can kill and maim motorists as so many claim.

As you know, Trinity Industries is a major manufacturer of guardrail end terminals, such as its ET-Plus, of which there are approximately 200,000 on the nation's highways. From 2005 until 2012, the FHWA reimbursed states who bought these devices, either unaware or refusing to recognize it was putting taxpayer dollars toward unapproved, potentially dangerous products. In early 2012, a whistleblower and representatives of several states – including Connecticut – alerted the FHWA to possible deadly defects tied to unapproved modifications in the devices. In late 2014, a federal jury returned a \$525 million verdict against Trinity for fraud in failing to disclose those modifications.

During the three years the agency was on notice, the FHWA failed to take a proactive approach to gain information about the safety of the devices, waiting until the end of 2014 to issue a public request for information. And not until there was overwhelming public scrutiny last year did the FHWA require re-testing of the devices. The only previous testing required by the FHWA until that point took place in 2005 and occurred at a facility with an ownership stake in the very devices it was evaluating. The FHWA employed older, inapplicable, less rigorous testing standards – and the fact that the FHWA relies on testing standards established by a trade association and industry stakeholders is an appalling indictment of its own independence. Moreover, in the latest tests the FHWA evaluated many newer, recently modified versions more likely to pass and put forward a report full of guesswork in a questionable effort to show those devices were representative of others. Still, with all the gaming of the system, one crash test showed a shocking outcome where the guardrail damaged the crash vehicle, causing a dramatic impact to the test dummy. The FHWA's evaluation of the test appears to ignore key aspects of the impact and the agency's own guidelines for evaluating tests.

Meanwhile, the FHWA has failed to evaluate how the devices have performed in real world scenarios. The FHWA has looked only to controlled, laboratory settings that can be manipulated for certain results, and the agency's transparency has been troublesome, limiting access to tests and stonewalling safety advocates and others seeking public documents.

We need to know whether ET-Plus devices – like any federally approved and underwritten roadside hardware – are safe. The FHWA has failed in this mission, focusing more on minimizing its own failings and, unconvincingly, continuing to stand by the devices and the manufacturer. With so many unanswered questions, I urge your office to do the following:

- (1) Ensure the ET-Plus is properly tested, using rigorous, up-to-date methodology that thoroughly evaluates those devices with potentially unsafe dimensions. This testing should be open and transparent and include an assessment of how the devices have performed in real-world incidents.
- (2) Investigate the FHWA's actions concerning the ET-Plus since the agency made the devices eligible for federal taxpayer dollars in 2005. Your investigation should assess what the FHWA knew or should have known about potential issues with the devices over the past decade and why it took the agency three years to take any real action once formally put on notice. I urge you to assemble a new team with a fresh set of eyes. The FHWA should not be investigating itself; we need a new team that is independent and free of potential for bias or conflicts of interest. We need individuals interested in getting real answers – not excusing the FHWA's inaction.

Until this effort is complete and the many unanswered questions are addressed, I urge you to consider revoking the eligibility letter for the ET-Plus while testing under current, rigorous standards is performed. This will allow federal taxpayers to rest assured their money isn't going to buy potentially deadly and destructive devices. Finally, I urge you to carry out these efforts immediately. The FHWA has squandered precious time and resources, and we need answers without any further delay.

I appreciate your time and attention to this vital issue.

Sincerely,



RICHARD BLUMENTHAL
United States Senate