

October 21, 2014

Acting Administrator Gregory G. Nadeau
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Acting Administrator Nadeau:

Yesterday, a federal jury in Texas returned a \$525 million verdict against Trinity Highway Products, LLC (Trinity), finding that Trinity had committed fraud in failing to adequately notify federal officials of changes in its design of highway guardrail end terminals or “heads.” These safety devices are installed at the end of highway guardrails and are intended to help absorb the impact of an out-of-control vehicle, reducing the chance of a motorist’s death or injury upon colliding with a guardrail. One end terminal product that is used in many states, including Connecticut, is the “ET-Plus” model, which is manufactured by Trinity. The Texas verdict comes after news reports raising serious questions about whether the guide channels on the ET-Plus model were unsafe because they were too small – 4 inches rather than 5 – which may prevent the end terminal from functioning properly. Trinity initially submitted a 5-inch model to your agency for approval, but it failed to inform you that it actually provided states with a 4-inch model for use on highways – potentially compromising safety.

I am gravely concerned about the effectiveness of this device and the conduct of Trinity in failing to disclose what could be a material change to a critical safety product. I am also very concerned that the Federal Highway Administration (FHWA) failed to protect against potentially fatal defects in this product and that it continued – even after Trinity disclosed its use of a different design and after states and individuals raised concerns about the device – to assume and represent to state transportation

agencies that the product was safe. The FHWA must provide to the public information regarding its role in this matter and how it has carried out its vital responsibility of assuring the public that highway safety products will protect their safety.

By way of background, in 2005, the FHWA recognized the ET-Plus as acceptable for use on the National Highway System (NHS), thus effectively approving states' use of federal highway dollars to purchase the device. In 2012, it became known that the version of the ET-Plus in use throughout the country was actually different than the model that was approved in 2005. The ET-Plus on highways nationwide had a 4-inch guide channel, whereas the model of the device that FHWA approved in 2005 had a 5-inch guide channel. This change raises serious questions about the safety of the device – and Trinity's conduct in not providing information about the 1-inch design change during the 2005 approval process. In fact yesterday's federal court found the company's misrepresentations caused \$175 million in damages to the federal government, and, pursuant to federal law, that amount must be tripled in order to properly penalize such fraudulent behavior, and the court may still impose additional penalties. But even in light of the disclosure over two years ago that the product was different than what was originally represented to the federal government, FHWA has continued to stand by its approval of the 4-inch device and its eligibility for reimbursement under the federal-aid highway program.

Officials from a number of states have learned of the issue and have raised questions about the effectiveness of the 4-inch device, including Connecticut, Missouri, Nevada, Massachusetts, Illinois, New Hampshire and South Carolina. Some have even raised concerns about actual injuries and fatalities that could be tied to the ET-Plus model. And others – including Virginia just two weeks ago – have gone to Trinity directly in search of more test data validating the adequacy of the device. Some state departments of transportation have now gone so far as to take the step of removing the product from their list of qualified products, or Qualified Products List (QPL), meaning the state no longer deems the device safe on the state's highways.

FHWA has a unique role in the oversight of highway safety practices, and all states look to you for your leadership and guidance. Your eligibility determinations regarding products like the ET-Plus model represent a key part of that oversight role. FHWA is also a guardian of the public trust, so your agency's fierce oversight of vendors and recipients of taxpayer dollars is paramount. Accordingly, please provide my office with answers to the following questions:

- When did FHWA first learn of Trinity's design modification from five

inches to four inches? Upon learning of the design modification, did FHWA contact all state departments of transportation regarding the design modification? How soon was this outreach conducted? If FHWA did not contact all states, how many did FHWA contact? Did FHWA ask any states if they were aware of failures in the field of the ET-Plus model? Did FHWA conduct any of its own performance evaluations of the model in the field? What questions and methodology did FHWA use to assess the adequacy of the model in the field? Has FHWA learned of any other unapproved designs to the ET-Plus model in addition to the 1-inch change?

- When was FHWA first contacted by outside entities on their own initiative regarding failures in the field of the ET-Plus model? What information led FHWA official Nicholas Artimovich to conclude in a February 27, 2012 email that “there does seem to be a valid question over the field performance of the current ET-Plus compared to earlier versions”?
- What testing information does FHWA rely on in support of its continued approval of the ET-Plus model? What testing was done subsequent to FHWA’s learning of the design modification? Is FHWA confident that Trinity has provided it with all testing data information regarding the ET-Plus? Is FHWA aware of any testing information that shows failures of the model? Has FHWA made all testing data of the ET-Plus publicly available, including documents, data and video? If not, when will FHWA make that information available?
- What action is FHWA taking to ensure that other Trinity products currently in use are consistent with models that were actually approved by FHWA? Is FHWA undertaking an inventory or audit of other manufacturers to ensure that their products are consistent with approved designs?
- How many ET-Plus models are currently in use nationwide? If FHWA does not know the number of models, what efforts is FHWA taking to ascertain this figure? If the ET-Plus model is indeed unsafe, what would the cost be of replacing the ET-Plus models currently in use nationwide?

I appreciate your focus on this vital matter and your prompt response to my questions. As FHWA continues to contend the ET-Plus model is safe, and as this issue receives increasing public attention, it is critical that all information about the

device be made public immediately – including FWHA’s role in standing behind the model and current efforts to investigate and ensure the model is safe. States and motorists must be able to rest assured the product is safe or take additional action should the product fail to meet safety standards.

Sincerely,

RICHARD BLUMENTHAL
United States Senate