



**ADVOCATES  
FOR HIGHWAY  
AND AUTO SAFETY**

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November 7, 2008

**RE: Dockets FMCSA-2000-8398; 2000-7165; 2004-18885; 2004-17984; and, 2006-24783.**

U.S. Department of Transportation  
Dockets Management Facility  
West Building Ground Floor  
Room W12-140  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590

**Qualification of Drivers; Exemption Applications; Vision  
73 FR 61925, October 17, 2008**

Advocates for Highway and Auto Safety (Advocates) files these comments regarding the Federal Motor Carrier Safety Administration's (FMCSA) notice announcing the agency's decision to grant twenty-six (26) applicants an additional two-year exemption from the federal vision requirement, 49 Code of Federal Regulations 391.41(b)(10).

The statute governing exemptions from the Federal Motor Carrier Safety Regulations (FMCSR) requires that, for each and every application for exemption, the Secretary "shall give the public the opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request." 49 U.S.C. § 31315(b)(4). The statute requires the Secretary to disclose relevant information to the public for its review in order to provide comment regarding the application. In the case of exemption applications from drivers who have already received a previous two-year exemption, the FMCSA has dispensed with the formality of informing the public with regard to specific "relevant information" of each applicant, including the need to disclose any information about the applicant's driving record during the prior two-year exemption. This is a substantive breach of the public disclosure requirements of the statute.

FMCSA has decided that updated factual information regarding the driving record of applicants who have previously been granted one or more two-year exemptions does not have to be disclosed to the public before granting another exemption request. The instant notice, and other similar notices termed "renewals" by the agency, do not provide individualized information regarding the driving history of each applicant during the two-year exemption period that immediately preceded the application for a second two-year exemption. This is precisely the type of information that the agency relies on and discloses prior to granting the initial exemption to each applicant. The summary information regarding applications for a subsequent two-year exemption is not individualized and is presented in conclusory terms and in a manner which does

not afford the public any “opportunity to inspect the safety analysis and any other relevant information known to the Secretary.” *Id.* The agency notice provides only a cursory statement that each of the applicants has provided sufficient information to qualify for another exemption, but does not disclose the underlying facts and basic information it relies on to come to that conclusion. No factual recitation is provided regarding the driving experience, crash and citation record of each applicant during the prior two-year exemption period – records that are directly relevant to the application for an additional two-year exemption. Although the agency makes specific reference to the fact that each applicants’ vision impairment remains stable, the agency summarily concludes that “a review of each record of safety while driving with their respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards.”<sup>1</sup> 73 FR 61925, 61926 (October 17, 2008).<sup>2</sup> The agency does not disclose the pertinent driving record information or its analysis to the public, nor does it place these materials in the docket. Even if this information does not disqualify a driver from consideration of an additional two-year exemption based on the screening criteria, the agency is required to provide the public with the specific information on which its safety determination is based. Using undisclosed information, however, FMCSA unilaterally concludes that each applicant should be granted another two-year exemption. *Id.* As a result, the public cannot form its own views, raise specific factual questions or provide fact-specific informed comment.

Advocates has repeatedly raised the contention that FMCSA, in violation of its statutory responsibility and regulatory practice for granting exemptions, has failed to disclose material information regarding the specific driving records of individual applicants during their first two-year exemption. Although the agency has repeatedly claimed that it addressed this specific contention, *id.*, *citing* 66 FR 17994 (April 4, 2001), the agency did not, in fact, explain its failure to disclose relevant factual information. Rather, the April 4, 2001 notice merely defends the

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<sup>1</sup> Advocates is unaware of any “standards” for vision exemptions. Rather, the exemptions are *exceptions* to the formally adopted federal vision standard and are based on surrogate screening criteria used in lieu of a performance standard for visual capability that directly measures visual acuity, perception, field-of-view, etc., factors which form the basis of the vision standard, 49 C.F.R. 391.41(b)(10). A true performance standard would relate the applicant’s visual capability to individual performance of the driving task in commercial motor vehicles.

<sup>2</sup> FMCSA uses identical wording in all notices. *See, e.g.*, 73 FR 60399 (Oct. 10, 2008); 73 FR 52457 (Sept. 9, 2008); 73 FR 51337 (Sept. 2, 2008); 73 FR 48270 (Aug. 18, 2008); 73 FR 42403 (July 21, 2008); 73 FR 28187 (May 15, 2008); 73 FR 27017 and 73 FR 27015 (May 12, 2008); 73 FR 15255 (Mar. 21, 2008); 73 FR 11990 (Mar. 5, 2008); 73 FR 9159 (Feb. 19, 2008); 73 FR 8393 (Feb. 13, 2008); 73 FR 7361 (Feb. 7, 2008); 73 FR 6247 (Feb. 1, 2008); 73 FR 5260 (Jan. 28, 2008); 72 FR 71999, 72 FR 71996, and 72 FR 71994 (Dec. 19, 2007); 72 FR 64274 (Nov. 15, 2007); 72 FR 62897 (Nov. 7, 2007); 72 FR 58360 (Oct. 15, 2007); 72 FR 54972 (Sept. 27, 2007); 72 FR 52423 (Sept. 13, 2007); 72 FR 40363, 40361 & 40360 (July 24, 2007); 72 FR 32706 (June 13, 2007); 72 FR 28904 (May 18, 2007); 72 FR 18727 (Apr. 13, 2007); 72 FR 12666 (Mar. 16, 2007); 72 FR 11426 (Mar.13, 2007); 72 FR 7813 (Feb. 20, 2007); 72 FR 7112 (Feb. 14, 2007); 72 FR 5490 (Feb. 6, 2007); 72 FR 1054 (Jan. 9, 2007); 72 FR 185 (Jan. 3, 2007); 71 FR 66218 (Nov. 13, 2006); 71 FR 62148 (Oct. 23, 2006); 71 FR 55821, 53490 & 50971 (Aug. 28, 2006); 71 FR 43558 (Aug. 1, 2006); 71 FR 26602 (May 5, 2006); 71 FR 19605 (Apr. 14, 2006); 71 FR 16411 (Mar. 31, 2006); 71 FR 6830, 6826 & 6824 (Feb. 9, 2006); 71 FR 646 (Jan. 5, 2006); 70 FR 74103 (Dec. 14, 2005); 70 FR 61166 (Oct. 20, 2005); 70 FR 53413 (Sept. 8, 2005); 70 FR 42616 (July 25, 2005); 70 FR 41812 (July 20, 2005); 70 FR 33938 (Jun. 10, 2005); 70 FR 25879 (May 16, 2005); 70 FR 16887 (Apr.1, 2005); 70 FR 14748 (Mar. 23, 2005); 70 FR 12266 (Mar. 11, 2005); 70 FR 7547 and 70 FR 7546 (Feb. 14, 2005); 69 FR 71099 (Dec. 8, 2004); 68 FR 69435 (Dec. 12, 2003); 68 FR 1654 (Jan.13, 2003); 67 FR 71611 (Dec.2, 2002).

basis for the agency's summary procedures in making the exemption determination. In that notice the agency claimed that its evaluation of the two-year driving record of each applicant, coupled with previously known information derived from the prior application process, indicates that each applicant continues to meet the agency's criteria for the granting of an exemption to the vision standard. 66 FR 17994. The agency does not explain, however, either in that or in any other published notice, why it does not set forth the specific driving record of each applicant during the previous two-year exemption. In the public notice announcing each applicant's initial exemption request, the agency insists that each applicant have three years driving experience immediately prior to the date of the application, and obtains self-reported information regarding the applicant's driving experience, and examines the applicant's official state driving record for the three year period immediately preceding the application. That information is published in the agency notice for the initial exemption request which sets out for each applicant, individually, their driving record and whether the applicant has had any recent accidents or violations and the nature of the offense, if any. The agency requests public comment on the factual information provided for review. The notices for subsequent exemption applications, however, provide no facts or specific information about the applicant's experience during their initial two-year exemption, but routinely state only that "over the past two years [] each applicant continues to meet the vision exemption standards." 73 FR 61925; *and see* citations contained in note 2 *supra*. This is a general conclusion that provides no specific detailed information and, in an undifferentiated manner, dispenses with any factual recitation of driving record violations as well as other portions of the factual record and agency exemption criteria.

The FMCSA also refers to additional exemption applications as "renewals," and apparently believes that it is free to dispense with prior public notice as well as the need to provide "relevant information" since the same applicant was previously granted an exemption. However, the statutory scheme recognizes no exception in the required procedures for subsequent exemptions by an applicant who has previously been granted an exemption, and the statute makes no provision for truncating public notice and information disclosure in the case of the "renewal" of an exemption. Indeed, the term "renewal" does not appear in the text of the statute. The agency must, therefore, treat each application for exemption as a separate request for a determination and order which, in fact, they are. Each such application must be accorded separate review, prior public notice, and all safety analysis and "other relevant information" must be disclosed to the public. While the agency can reference relevant factual information in conjunction with a previous exemption request, by so doing the agency is not relieved of the burden to disclose specific "relevant information" that has occurred during the course of the prior two-year exemption. Unfortunately, the agency has chosen to truncate its exemption procedures in the case of "renewals," and not only does the agency fail to disclose specific factual information except in conclusory terms, the agency has decided to short-circuit public notice and comment procedures as well.

Advocates objects to the issuance of the FMCSA final decision as a *fait accompli* without providing prior notice and opportunity for public comment as required by 49 U.S.C. § 31315. The agency has summarily granted the exemptions, making them effective as of October 27, 2008, 73 FR 61925, without prior notice and an opportunity for public comment before the agency rendered its

determination on the exemptions.<sup>3</sup> As has already been stated, applications for a subsequent two-year exemption are subject to the same notice and comment process as required for the initial determination to grant the first such exemption. In this and other instances of drivers seeking a second or additional two-year exemptions from the federal vision requirement, the agency has only provided an opportunity for public comment after the determination to grant the exemption has already been made and taken effect. This practice violates both the fundamental due process requirements secured under the Administrative Procedure Act (APA), 5 U.S.C. § 553 *et seq.*, as well as the explicit wording and procedures required by 49 U.S.C. § 31315.

The FMCSA has asserted that the statute is “satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequently submitted comments by interested parties.” 66 FR 17995. This response ignores the agency’s statutory duty and cannot overcome the intent of Congress. The express wording of the statute requires that the notice be published upon receipt of a request for an exemption, and that includes any request for a second and subsequent two-year term of exemption (*i.e.*, a “renewal”), and that the public be afforded an opportunity to inspect the safety analysis and other relevant information known to the Secretary prior to making the safety determination. No exception or special treatment is afforded subsequent or “renewal” applications for exemption. This is the appropriate construction of the statute and the agency statement that it prefers to proceed in a different manner does not explain or excuse its failure to abide by the statutorily mandated process.

Any reliance by FMCSA on nomenclature as a basis for according different procedural due process to “renewals” as opposed to initial exemption applications, is misplaced because Congress made no such distinction in the statute. FMCSA’s reliance on the term “renewal” is without legal import since the statute does not use that term nor does it define an exemption renewal as permitting a different process from any other application for a two-year exemption.

In addition to being a clear violation of the meaning and the purpose of the statute, this procedure violates due process considerations and the dictates of the APA. The agency is not at liberty to abrogate public notice and comment due process simply because it is not convenient. No legitimate argument to support short-circuiting APA required procedural due process is cited.

For these reasons Advocates’ requests that the FMCSA reconsider its process and procedures for dealing with applications for second vision exemptions.

**ORIGINAL SIGNED**

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Henry M. Jasny  
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<sup>3</sup> FMCSA appears to grant additional 2-year exemptions from the vision standard in perpetuity, with little regard for statutory formality or public notice and due process, to applicants previously granted an initial 2-year exemption.