

BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

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

IN RESPONSE TO A NOTICE OF PROPOSED RULEMAKING

DOCKET NO. FMCSA-2008-0363

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INTRODUCTION

The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) submits these comments in response to the December 1, 2008 notice published by the Department of Transportation, Federal Motor Carrier Safety Administration (“FMCSA” or “the Agency”), at 73 Fed. Reg. 73129, soliciting comments in docket FMCSA-2008-0363 on its proposed rule implementing the Congressional mandate in Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”) for the establishment of a national registry (“Registry”) of certified medical examiners (“CME”) qualified to perform medical exams and issue medical certificates for interstate commercial motor vehicle (“CMV”) drivers. The proposed rules require medical professionals who want to be listed on the Registry to complete specified training covering the FMCSA’s physical qualification standards for CMV drivers, to pass an FMCSA-developed test that verifies an understanding of those standards, and to maintain competence in this subject matter through periodic retraining and testing. Once the Registry is fully operational, the FMCSA would only allow State Driver Licensing Agencies (“SDLAs”) to accept as valid medical certificates issued by CMEs listed on the Registry.

OOIDA is a not-for-profit trade association incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. OOIDA is the largest international trade association representing the interests of independent owner-

operators, small business motor carriers, and professional truck drivers on all issues affecting their operations. OOIDA's more than 160,000 members collectively own and operate approximately 240,000 heavy-duty trucks and small truck fleets. OOIDA actively promotes the views of these commercial truckers before a broad variety of forums, including federal and state agencies, legislatures, courts, other trade associations, and private businesses, in an ongoing effort to obtain equitable and safe working conditions for them. OOIDA is active in all aspects of highway safety and transportation policy and represents the position of its member truckers on numerous committees on the local, state, national, and international level.

The vast majority of OOIDA's members are owner-operator truck drivers operating in interstate commerce who must satisfy the FMCSA's physical qualification standards set forth in Part 391 of the Federal Motor Carrier Safety Regulations ("FMCSRs"). Smaller groups of OOIDA members are either company drivers or small business motor carriers whose interstate CMV drivers are also subject to those standards. Thus, by limiting the group of individuals who are qualified to provide CMV drivers with the necessary medical exams, this rulemaking will have a direct and substantial impact on the operations of virtually all of OOIDA's members.

As discussed below, OOIDA supports the creation of a National Registry for CMEs as a way to ensure that individuals performing CMV driver medical exams are trained and qualified for that task, as well as a way to put an end to the doctor-shopping and improper issuance of medical certificates that can occur under the current medical examination system. However, these goals will only be fully achieved if the mandatory use of listed examiners is applied uniformly to all CMV drivers operating the United States, whether they are based in Canada, Mexico, or any other foreign country. SAFETEA-LU and notions of fundamental fairness require no less.

Further, the existence of a national certification program ensuring a uniformly high level of competency among medical examiners should also provide a basis for prohibiting SDLAs from requiring the production of long-form Medical Examination Reports (“long-form reports”) either from drivers applying for CDLs or from CMEs to verify the validity of medical certificates. OOIDA believes that the FMCSA’s refusal to date to preclude State agencies from requesting the long-form reports from any source raises serious constitutional issues pertaining to Federal preemption and driver privacy rights.

Finally, OOIDA is concerned that many otherwise-qualified health care providers will be discouraged from seeking to be listed on the Registry because of the burdensome and costly certification process and the associated administrative obligations imposed upon listed CMEs. If there are not enough CMEs on the Registry, and if those CMEs are not geographically dispersed throughout the United States, the program will place an undue financial burden on the CMV drivers who need to travel long distances to get these medical exams in order to keep their truck-driving jobs. In addition, medical personnel who do complete the certification process may reasonably be expected to increase the charges to cover their additional costs associated with such exams under the new system, a cost that will certainly be passed through to often-underpaid drivers.

DISCUSSION

I. **CME Registry requirements should apply to all CMV drivers operating in the United States and to the examiners issuing medical certificates to them.**

In a footnote in the NPRM, the FMCSA remarks in passing that “Canadian and Mexican drivers operating in the United States will continue to be governed by the provisions of existing reciprocity agreements with Canada and Mexico, because they are not in conflict with 49 U.S.C.

31136(a)(3) and 31149.” 73 Fed. Reg. at 73131 n.3. Treating this as if it is an undisputable legal conclusion, the FMCSA provides absolutely no further explanation or discussion of this exemption of a significant group of CMV drivers and the individuals who conduct their medical examinations from the requirement that physical examinations performed on such drivers be conducted by medical examiners whose training, qualifications, and performance are guided and monitored by the FMCSA and whose names are listed on the CME Registry. There is absolutely no legal basis for the Agency’s creation of such an exemption.

When Congress adopted the SAFETEA-LU legislation in 2005, it established mandatory “minimum” standards pertaining to the issuance of medical certificates to CMV drivers, which included the requirement in 49 U.S.C. §§ 31136(a)(3) and 31149(d) that such certificates be issued only by examiners listed on the National Registry of Certified Medical Examiners maintained by the Department of Transportation. Those provisions admit of no exceptions. They do not contain any language limiting those requirements to medical examiners located in the United States conducting examinations of U.S.-based drivers, and they do not contain any express exemption for CMV drivers and examiners based in Mexico and/or Canada. The absence of any exemption is not surprising since the foreign standards, particularly the Mexican standards, are not at all equivalent to the FMCSA standards. Nor can foreign examiners reasonably be expected to be conversant with the FMCSA standards.

As previously argued by OOIDA in briefs submitted in *Owner-Operator Independent Drivers Ass’n, Inc. v. U.S. Dept. of Trans.*, No. 07-73987 (9th Cir.), a pending lawsuit challenging the Mexican cross-border trucking pilot program, 49 U.S.C. § 13902(a) carefully circumscribes the Agency’s legal authority to create any such exemptions. That statute permits the Secretary to issue

operating authority only to motor carriers willing and able to comply with all requirements for safety, fitness, employment and financial responsibility. This means that foreign-based drivers operating in the United States must have medical certificates issued by medical examiners that have been listed on the National Registry in compliance with Section 31136(a)(3) and 31149(d). In short, they must be examined by individuals who are trained, tested, and certified to meet CME standards, and who apply all U.S. standards, no matter where the drivers and the examiners are based. The FMCSA violates these statutory obligations with the stated exemption of foreign-based drivers.

The FMCSA has not cited any legal authority here or elsewhere showing that decades-old reciprocity agreements referenced in the Notice would supercede the statutory minimum standards imposed by SAFETEA-LU. Where Congress unambiguously passes legislation that conflicts with an earlier international agreement, the subsequent Congressional action controls. *South African Airways v. Dole*, 817 F.2d 119, 126 (D.C. Cir. 1987). Since Congress has the authority to ““regulate Commerce with foreign nations, ‘[it]’ can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.”” *Id.* (citing *Diggs v. Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972); see also *Reid v. Covert*, 354 U.S. 1, 18 (1957)). That is effectively what happened here. Congress renounced the previously-entered reciprocity agreements when it enacted mandatory provisions respecting standards for medical examiners who certify the fitness of individuals to operate CMVs within the United States.

Subjecting foreign-based motor carriers and drivers to the proposed CME Registry requirements is entirely consistent with the obligations of the United States under international law. Article 1201(1) of NAFTA provides:

each Party shall accord to service providers of another Party treatment no less

favorable than it accords, in like circumstances, to its own service providers.

This provision establishes an obligation on the part of signatories to NAFTA to accord other signatories “national treatment,” meaning that the United States is obliged only to treat foreign motor carriers and drivers the same as it treats U.S.-based motor carriers and drivers – not better or worse. Indeed, the obligation under NAFTA is in complete accord with FMCSA’s statutory obligations under 49 U.S.C. § 13902 which similarly requires the Secretary to treat all applicants for motor carrier operating authority alike. *See* 49 U.S.C. § 13902(a)(4) & (c)(8).

Moreover, it simply does not make sense to allow several different sets of standards to control the qualifications of medical personnel determining whether drivers are physically qualified to operate a CMV in the United States as well as the standards they apply in their examinations. The lack of understanding by medical examiners regarding the relationship between a driver’s physical condition and the task of operating a CMV, the condition that led to the creation of the Registry system, is not a problem that is geographically limited to examiners located within the United States. Some examiners in Canada and/or Mexico suffer from comparable gaps in their knowledge, both with respect to their home country standards and surely with respect to FMCSA standards. Nor is doctor shopping by CMV drivers a problem that is confined within U.S. borders. Thus, it is illogical to subject CMV drivers and examiners who happen to be based in the United States to the stringent Registry requirements and FMCSA standards, while exempting drivers operating on the same highways from those requirements just because they are based and examined in other countries.

II. States are preempted by Federal law from demanding the long-form report from drivers or CMEs.

In a recent rulemaking, the FMCSA merged the medical certification requirement with the

CDL process by requiring drivers to provide their SDLA with a copy of their medical examination certificate in order to obtain a CDL. *See Medical Certification Requirements as Part of the CDL*, 73 Fed. Reg. 73096 (Dec. 1, 2008). In OOIDA's comments in that proceeding, the Association objected to the practice of a number of States, including Arizona, California, Delaware, Indiana and Louisiana, to require drivers also to provide their long-form medical report to their SDLA, to allow the State to independently evaluate the driver's medical qualifications prior to issuance of a CDL. The long-form contains a driver's identifying information, plus a detailed health history and information about current medical conditions. 49 C.F.R. § 391.43(f). The FMCSA expressly approved this State practice notwithstanding that it appears to be preempted by Federal law. *See* 73 Fed. Reg. at 73102.

The FMCSA goes one step further in the present rulemaking. It not only disregards the insistence by some SDLAs upon production of the long-form reports by drivers, but it requires a CME to provide that long-form report to FMCSA or to authorized Federal, State and local enforcement agency personnel within 48 hours of a request. *See id.* at 73130, 73134, 73136-137. OOIDA has serious doubts about the authority of State and local agencies to demand the long-form report once the Registry and medical certification programs have been properly and fully implemented.

It is well-established that when Congress enacts legislation and federal agencies adopt regulations implementing that legislation, conflicting State laws and policies must yield. U.S. Constitution, Art. VI, Cl. II (Supremacy Clause); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 (2002); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). Safety-related transportation issues have been specifically preempted by federal law. Especially pertinent here,

SAFETEA-LU amended 49 U.S.C. § 31136(3) to require the Secretary of Transportation to prescribe safety standards that, among other things,

ensure that. . . the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely and the periodic physical examinations required of such operators are performed by medical examiners who have received training in physical and medical examination standards and, after the national registry maintained by the Department of Transportation under section 31149(d) is established, are listed on such registry.

The Secretary is instructed, in fashioning implementing regulations, to minimize the “unnecessary preemption” of State laws and regulations. 49 U.S.C. § 31136(b)(2)(B). As this language makes clear, any regulations adopted by the Secretary, or the Administrator of FMCSA as his delegate, can and will have a preemptive effect on State action.

Further, even absent express statutory preemption, preemption may be implied when a “state law is in actual conflict with federal law. . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Gade, supra*, 505 U.S. at 98. That is precisely the situation here. When Congress adopted the pertinent provisions of SAFETEA-LU, and FMCSA developed its implementing regulations, the purpose and objective was to improve highway safety and driver health by developing a uniform national program that replaced the inefficient existing patchwork of State laws and procedures governing medical examiner qualifications, that would prevent medically-unqualified drivers from operating a commercial motor vehicle on the nation’s highways. Indeed, State and local access to the driver’s personal medical information could actually have the opposite effect and prevent FMCSA from accomplishing its safety-related objectives when drivers decide not to openly discuss past or current health issues with CMEs because State or local personnel (possibly

even personnel without proper medical training) might apply their own standards to this information and inconsistently judge them medically unfit for reasons that are erroneous or unjustifiably exceed the Federal medical standards being applied.

The FMCSA maintains that the reason for requiring CMEs to promptly provide long-form reports to State and local agencies, as well as the FMCSA, is “to allow for investigation of errors and improper certification of CMV drivers.” 73 Fed. Reg. at 73134. But it is ultimately the role of the FMCSA, with the advice of the Medical Review Board and chief medical examiner, to audit listed CMEs and the medical reports they issue. 49 U.S.C. § 31149(c)(1)(C)&(F). Where patterns of errors or improper certification are found, it is up to the Secretary of Transportation to determine whether the involved examiners should be removed from the Registry and questionable certificates voided. *Id.* at § 31149(c)(2). Accordingly, it should be the job of the FMCSA alone to investigate errors and improper certifications by CMEs. Thus, a State or local agency should notify the FMCSA when it is presented with specific information indicating that a medical certificate is invalid, to allow FMCSA to investigate the matter.¹ FMCSA could provide the results of its investigation to the State agency if a certificate is ultimately voided and the State could then take appropriate enforcement action against the involved driver.

If FMCSA is unwilling to assume full responsibility for this task, States should at a minimum be required to limit their requests for long-form reports to those few cases where the State has clearly articulated legitimate reasons for believing that the medical certificate was falsified or otherwise

¹ Indeed, since a driver can get his exam and medical certificate from a CME located in any State, the SDLA questioning a certificate presented in conjunction with a CDL may not have any authority over the out-of-state CME that issued the certificate. Only the FMCSA would have such nationwide authority.

improperly issued. Indeed, they should be required when submitting a request for a long-form report to briefly state what information led them to question the validity of the involved certificate and its finding that the driver is physically-qualified to drive a CMV. There is nothing in the proposed rules that would limit long-form requests in any manner.

III. State access to long-form reports violates drivers' constitutional right of privacy in their personal medical information.

Pursuant to the recently-finalized rules merging medical certification requirements with the CDL process, CMV drivers must now present copies of their medical examiner's certificates to their SDLA in order to obtain a CDL. 73 Fed. Reg. at 73096-097, 73111, 73123-124. Once the current rulemaking establishing a Registry of CMEs is fully operational, the medical certificate may be issued only by an examiner who is listed on that Registry. *Id.* at 73129, 73132, 73135. To provide FMCSA with the data needed to effectively monitor the activities of listed examiners, the current proposal requires CMEs to electronically transmit over the internet, on a monthly basis, the names of all drivers examined, an FMCSA numerical identifier for each of those drivers, and whether each driver was found to be medically qualified, temporarily disqualified, or permanently disqualified. *Id.* at 73130, 73134, 73137. This would be the first national database to contain the outcomes of CMV driver medical exams.

In addition, CMEs must retain the long-form report for each examination performed for three years (*id.* at 73134, 73137), and must provide that long-form not only to FMCSA, but to an authorized State or local agency, within 48 hours of a request. *Id.* at 73130, 73134, 73136, 73137. This procedure would appear to allow government agencies at all levels to obtain the drivers' personal medical information without their knowledge or consent, by routinely requesting the long-

form reports directly from CMEs.

FMCSA's stated purpose for this 48-hour production requirement is to identify examiners for removal from the Registry by allowing "FMCSA to investigate patterns of errors or improper certification." *Id.* at 73130 (emphasis added). However, the transmission and distribution of such medical information has the clear potential to violate the privacy rights of the involved drivers. Indeed, there is nothing in the proposed regulations that would ensure that the privacy of driver's medical information and records is retained throughout this process. Once exam results are sent over the internet to FMCSA or actual reports provided to federal, state, or local authorities (electronically or otherwise), the CME as well as the driver lose any ability to control access to that personal medical information and constitutionally-protected privacy rights would be undermined. It is well established that the constitutional right to privacy protects an individual's interest in avoiding disclosure of personal matters, including medical records that contain intimate facts of a personal nature. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Roe v. Sherry*, 91 F.3d 1270, 1274 (9th Cir. 1996); *United States v. Westinghouse*, 638 F.2d 570, 577 (3d Cir. 1980). "Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within the 'private enclave where he may lead a private life.'" *Westinghouse, supra*, 638 F.2d at 577. Indeed, "[t]here are few matters that are quite so personal as the status of one's health. . ." *Roe, supra*, 91 F.3d at 1274.

Of course, the privacy right is not absolute. To the contrary, it is a conditional right that may be infringed upon a showing of a compelling governmental interest. *Roe, supra*, 91 F.3d at 1274, citing *Doe v. Attorney General*, 941 F.2d 780, 796 (9th Cir. 1991). However, the government's interest in obtaining and using the information must not only advance a "legitimate state interest,"

but the government's actions must be "narrowly tailored to meet the legitimate interest." *Id.*

States certainly have a legitimate interest in ensuring that CMV drivers operating on their highways are physically qualified to drive. However, this interest is well protected through the "narrowly tailored" program fashioned by FMCSA which allows SDLAs only to accept medical certificates issued by duly trained, tested, and certified medical examiners listed on the Registry and allow FMCSA to require long-form reports as necessary to effectively monitor the program. A State requirement that long-form reports be produced by all drivers or a system that routinely demands long-form reports from CMEs without the driver's knowledge, is not "narrowly tailored" to ensure the physical qualifications of drivers because the federal Registry system and medical certification process will already ensure the trustworthiness and reliability of medical examiners and the certificates that they issue. Indeed, the establishment of the Registry should eliminate any legitimate State concerns regarding the validity of medical certificates.

The potential for harm resulting from any wrongful disclosure of the sensitive medical information contained in these reports is substantial and outweighs the State's need for access to the form. Consequences might not only include the loss of a truck-driving job, but could make it more difficult for the individual to find jobs in other fields. There is also some concern that long-form reports could be accessed by insurance companies or motor carriers who may then cancel a driver's trucking, health, or life insurance coverage based upon misconceptions or prejudices about the driver's medical condition. For example, a finding that a driver is HIV-positive or has AIDS could lead to termination of a job or insurance coverages even though the condition would not prevent the CMV driver from doing his job in a safe and professional manner.

Even absent disclosure to unauthorized parties, the intrusive collection of drivers' detailed

medical records by the States could by itself undermine the integrity and validity of the medical exam process and have a negative impact on highway safety. As noted by the Supreme Court in the *Whalen* case discussed above, drivers' decisions about matters vital to their medical care will inevitably be adversely affected by knowledge that their medical concerns and problems will be disclosed to third parties. *Cf. Whalen, supra*, 429 U.S. at 599. Indeed, a driver's fear that unqualified State or local personnel might independently find him medically unfit to drive a CMV could lead him to avoid any discussion with the medical examiner of medical conditions that could be easily treated or controlled if mentioned.

To avoid such an eventuality, a blanket prohibition against SDLAs collecting medical information beyond that set forth on the medical examiners' certificate would be appropriate. FMCSA should not allow States to create parallel and duplicative bureaucracies staffed with individuals who may not even be properly qualified to issue medical opinions. To the contrary, consistent with SAFETEA-LU, the Agency should retain the exclusive authority to determine whether the CME has erred and to take appropriate action when a problem is found.

Absent a complete ban against dissemination of long-form reports to SDLAs, the Agency must take steps to protect the confidentiality of drivers' sensitive medical information to the greatest extent possible. It is essential that FMCSA employ the best technology to ensure the security of sensitive information during the transmission, storage, retrieval, and searching of that information. Second, long-form medical reports are no less sensitive than alcohol and drug test results. Accordingly, they should be afforded all the protections incorporated into parts 40 and 382 of the FMCSRs to help maintain the confidentiality of alcohol and drug test results, including a general requirement of written driver consent to the release of this information, a prohibition on blanket

releases, and strictly controlled access to the reports.

Finally, at a minimum, the Agency should restrict SDLA requests from CMEs for long-form reports to those unusual cases where the State has provided concrete information indicating that a medical certificate presented to them is fraudulent.² It is absolutely voyeuristic to lay claim to the long-form absent ANY information of wrong-doing on the part of anybody. Thus, in all other cases, a certificate issued by an examiner listed on the NRCME should be all that the State or local authority can request before issuing a CDL. States simply should not be allowed to routinely circumvent the rights of drivers to maintain the privacy of their personal medical information by regularly requesting long-forms from CMEs without the knowledge or permission of the involved drivers.

IV. The costs and administrative burdens imposed by the Registry program will likely result in a shortage of CMEs.

In an effort to boost the number of individuals authorized to provide CMV drivers with the requisite medical exams, in 1992 the Federal Highway Administration (“FHWA”) broadened the regulatory definition of “medical examiner” to allow health care providers other than physicians to perform those examinations. *See* 73 Fed. Reg. at 73130. All of these individuals, like the doctors previously performing the examinations, had to be licensed, registered, or certified by their States to perform physicals and had to be proficient in the use of medical protocols required by the FMCSRs. Neither before or after the amendment was made, however, was there any requirement

² Once the Registry and medical certification is fully operational, the only other situation in which a State would have a legitimate interest in a long-form report would be in connection with an accident investigation where the role played by the driver’s medical condition was at issue.

that medical examiners obtain training regarding the relationship between the driver's physical condition and the task of operating CMVs. Yet such an understanding is essential for a medical examiner to be able to fully and fairly evaluate an individual's ability to perform safely as a CMV driver.

Recognizing this significant gap, Congress required in SAFETEA-LU that FMCSA develop a mandatory core training curriculum for medical examiners that would cover such relevant subjects as well as the tests to be used to determine whether an individual may be listed on the Registry. 49 U.S.C. § 31149(d). Thus, once the Registry is implemented, potential examiners must take an approved training course and pass the initial test. 73 Fed. Reg. at 73129-130, 73132-135. In order to remain on the Registry, certified examiners must, on a monthly basis, submit certain information about all completed long-form reports to FMCSA and must undergo periodic retraining and retesting. *Id.* at 73129-130, 73132-133, 73136.

FMCSA has asked for comments about the ability of existing examiners to adapt to the new regime. Competent and honest medical examiners should not have significant problems qualifying to be certified under the new system. The issue here, however, is not so much whether they could adapt, but whether they will decide it is worth the effort. Satisfying the new requirements will involve a good deal more compliance costs for medical examiners than existed previously.

Based upon courses currently being offered to medical examiners, it is estimated that the core curriculum could be taught in a one-day training course and would cost about \$400. *See* Regulatory Flexibility Analysis ("*Regulatory Analysis*"), at p. 14 (July, 2008). Several private-sector testing organizations have estimated that testing would cost an additional \$100. *Id.* at p.15. Of course, those seeking to qualify must take time off from work for training and testing, especially if they have

to travel to far-away facilities. The result could be a significant loss of income in addition to varied travel costs. Indeed, FMCSA has estimated \$40.6 million in lost wages during the initial three years it will take to get the Registry fully operational. *Id.* at p. 18. More lost income will be associated with the time allocated to periodic retraining every three years, a repeat of the complete initial training program every twelve years, and recertification testing every six years, to ensure that CMEs' knowledge remains current as regulatory requirements are updated.

The program would also impose new administrative burdens on CMEs. Examiners will now need a computer system that can interface electronically with FMCSA in order provide the required driver exam information to the Agency on a monthly basis and, when a specific request is made by FMCSA or by other authorized Federal, State, or local enforcement agency personnel, and must have personnel available to provide the actual long-form reports requested within 48 hours.³ FMCSA estimates that the transmission of CMV driver examination data would require approximately 46,000 hours of administrative personnel's time annually (38,000 for data entry and 8,000 for report filing). 73 Fed. Reg. 73141. This does not even include the time involved in sending long-form reports in response to specific requests from various governmental agencies. This burden will be added to the substantial administrative burdens already imposed on these medical providers when they attempt to collect payment from their patients' insurers.

These additional costs may be worthwhile expenditures for those medical examiners who, according to the NPRM conduct over 1,000 CMV driver medical exams per year. *Id.* at 73132. However, it is equally likely that the expenditures will be sufficient to deter many in the more

³ This short time frame could be especially problematic around weekends and on holidays. Accordingly, the time should be extended and stated as requiring production within a specified number of business days.

numerous group of otherwise qualified medical examiners, who perform closer to the average of 75 exams per year, from seeking to qualify to be listed on the Registry. *Id.* Unless FMCSA can significantly reduce the burden, it is a virtual certainty that FMCSA will not get anywhere near the 40,000 CMEs that it has estimated are needed to perform an estimated 3 million annual medical examinations. *Id.* Further, it is likely that the most severe shortage will be in more rural areas or other areas with low demand because it will not be cost-effective for examiners in those areas to devote the time and money to qualify and stay listed as a CME.

There are several ways that the burdens on medical providers can be reduced. Although FMCSA will develop, periodically review, and update a core curriculum, the Agency has proposed that the initial training be conducted by private-sector organizations, apparently assuming that a sufficient number of geographically-dispersed organizations would be interested in offering this course. Whether or not that proves to be the case, FMCSA has in its NPRM also raised the possibility that self-paced, on-line training courses might also be used. *Id.* at 73133. OOIDA strongly supports the development and use of such on-line or other forms of distance training courses. On-line courses allow an interested party to complete the training at the time that is most convenient with minimal interference with their work schedule. Generally, such training also costs less because of the reduced need for classroom facilities and instructors. The added convenience combined with the lower cost of such training should help increase the number of health care professionals who decide that it is worth the time and effort to become CMEs. Indeed, FMCSA has stated that it intends to develop and offer examiners periodic, web-based retraining. *Id.* at 73133. There is no reason why the FMCSA or private organizations could not similarly develop and offer the initial training in a web-based format.

Certification testing should also be made as convenient as possible. As currently proposed, FMCSA will develop the certification test, but independent testing organizations will actually collect and verify pertinent information about an applicant's eligibility to take the certification test and will then give and score the test. This means that interested parties would have to travel to an approved testing center, separate from the various training programs, to take the test. *Id.* After this process is completed, the testing organization would then forward to FMCSA the test results along with the applicant's information package, and the Agency would decide whether to list the individual on the Registry.

The FMCSA believes that existing private-sector testing organizations will provide enough geographically-dispersed testing centers to accommodate all applicants without requiring them to travel a great distance. The Agency's idea of a convenient location, however, may differ from that of the test takers. To ensure the easiest possible access to testing centers, OOIDA would propose that testing also be offered at all FMCSA division offices. FMCSA notes in its Regulatory Analysis that private testing organizations "have specialized skills and information technology assets that enable them to provide testing at a low cost." *Regulatory Analysis*, at p.23. FMCSA finds that the Agency, by contrast, has limited experience conducting testing and would have only this one testing program over which to spread its technological costs. *Id.* However, the estimated additional cost is only about \$20 more per test, an amount that an applicant may well be willing to pay to be able to take the test at a more convenient location. Further, as the Agency itself has noted, it might be able to purchase the necessary testing technology from one of the private testing organizations. *Id.* Finally, it makes some sense to have FMCSA, as an adjunct to private testing organizations or on its own, offer the tests, since it is the FMCSA, not private testing organizations, that is designing the

test and making the ultimate determination whether an applicant should be listed on the Registry notwithstanding the test results. FMCSA's active involvement in the testing process would have the added benefit of giving the Agency more input and control over the testing protocols used.

V. The Registry program must be designed to minimize new burdens on CMV drivers.

In addition to an overall shortage of CMEs, fundamental supply and demand principles make it likely that CMEs will be concentrated in those areas where demand for CMV-driver medical exams is the greatest. Recognizing this likely scenario, FMCSA has proposed a phased approach to the mandatory use of listed examiners. Drivers who work for large employers, defined as motor carriers that employ 50 or more CMV drivers, will be required to use listed examiners beginning two years after the effective date of the new rules. 73 Fed. Reg. at 73134, 73137. Other CMV drivers will be given an additional year before the use of listed examiners is mandatory. *Id.* The distinction is based upon FMCSA's assumption that drivers who work for larger employers "are less likely to have problems locating a medical examiner." *Id.* at 73134. This assumption is flawed in two respects.

First, while CMV drivers who haul freight for small motor carriers or drivers who operate under their own authority may be more likely to live in rural areas or areas with lower demand for medical examiners, long-haul CMV drivers working for large employers who move freight nationwide live in all parts of the country. Indeed, many drivers live far from their employers' headquarters and once they are hired may never visit the headquarters. All transactions are done electronically, by fax, or by mail. Consequently, they too may live far from areas where medical examiners are more likely to be concentrated.

Second, FMCSA assumes there will be a full complement of 40,000 geographically-dispersed

CMEs within a three-year period. As discussed above, OOIDA strongly suspects that there will always be a shortage of examiners in rural areas or other areas with a low demand quite simply because those who currently perform a limited number of CMV driver exams will not find it cost-effective, even three years into the future, to invest the amounts needed to get listed on the Registry or to make the administrative changes required to meet the examiners' continuing reporting obligations. Further, the American College of Occupational and Environmental Medicine ("ACOEM") is recommending to the FMCSA's Medical Review Board that only medical or osteopathic doctors (MD or DO) be allowed to perform medical exams on CMV drivers who have more than two active medical problems. A large percentage of drivers fall within this category. This means that the majority of the 40,000 certified examiners must be doctors, not the physicians' assistants, nurse practitioners, or other health care professionals that currently perform most of the exams. Unless this ACOEM recommendation is rejected, the shortage of qualified examiners could be even more severe. In any case, the lack of a sufficient number of qualified examiners would obviously mean that a good percentage of drivers will have to travel excessive distances to get the requisite exam, losing precious work time and income as a result.

Under the current regulations, drivers may go to an examiner in any State and FMCSA has indicated in the NPRM that it does not intend to remove this flexibility. 73 Fed. Reg. at 73132. However, the rules do not prevent motor carriers or other employers from requiring their drivers to go to specific clinics or doctors to obtain their exams, and many do just that. Such a requirement might in the past have been somewhat justified as the only way to give employers confidence that their drivers were being evaluated by a reputable and knowledgeable medical examiner, and that no doctor-shopping was involved. That justification, however, will evaporate once the Registry is

operational. At that point, all listed CMEs should be equally trustworthy and the results of their exams beyond question. Thus, there is no reason not to allow every driver to go to any CME on the Registry. Indeed, to reduce the downtime associated with the medical exam process, the rules should make it clear that each CMV driver can go to the listed examiner of his or her choice, whether it is the local doctor or a medical clinic located at a truck stop that the driver passes while hauling freight, and whether the examiner is a doctor, physicians' assistant, nurse practitioner or other type of health care provider. To avoid any uncertainty, the rules should expressly prohibit motor carriers from restricting the driver's rights in this regard.

The added costs of certification and of the new administrative obligations can reasonably be expected to be passed through to the drivers, leading to a measurable increase in the average charges for CMV driver medical exams. Increases might be even more severe in geographic areas where there is limited competition and examiners have to spread the additional costs over a small number of exams. Since nearly all drivers are required by their employers to bear the costs of the medical exam, any increase in costs will be a burden on often-underpaid drivers. Allowing drivers to go to any CME should generate a more competitive environment and help keep cost increases down.

Another obstacle to finding a conveniently-located medical examiner could be created by FMCSA's heavy reliance upon the internet, specifically the proposed NRCME website, as the primary source of information about the program, including the names and addresses of nearby qualified CMEs. 73 Fed. Reg. at 73132. Although FMCSA also envisions a resource center with a toll-free phone number (*id.*), it is not entirely clear what information will be available by telephone. Nor is it clear whether this phone line would be staffed by knowledgeable people who can answer

a variety of medical exam-related questions or whether it would be a digital labyrinth with a series of pre-recorded messages. Importantly, long-haul CMV drivers often spend extended periods of time away from home, and not all own laptop computers that could be used to identify conveniently-located examiners over the internet. Thus, it is critical that **all** relevant information provided on the internet also be available through the toll-free telephone line, and that a live person be available at reasonable hours to provide such information.

CONCLUSION

OOIDA believes that the type of training, testing, and Registry program proposed by FMCSA could have the desired “clear and direct positive impact on both safety of CMV operations and driver health,” 73 Fed. Reg. at 73132, if the modifications discussed above are made. The FMCSA should apply the Registry requirements uniformly to all CMV drivers operating the United States, even those based in Canada, Mexico or any other foreign country. Of equal importance, FMCSA should prohibit State and local authorities from demanding either that CMV drivers or CMEs produce the drivers’ long-form medical reports in order to get a CDL or for other purposes. Such State actions are not only totally unwarranted under the proposed Registry system and medical certification process, but they are preempted by the existing federal regulatory scheme. Such State actions also disturb the proper balance between highway safety and the drivers’ rights of privacy in their sensitive medical information that would exist if drivers were uniformly required only to produce their medical certificates to SDLAs in order to get and retain their CDLs and FMCSA alone were monitoring the operation of the system.

In addition, FMCSA must take all possible steps to bring down the costs and administrative burdens associated with compliance to encourage a sufficient number of otherwise-qualified health

care providers to take the steps to be listed on the Registry. This might include allowing on-line training and making testing available at FMCSA division offices as well as private testing centers. Further, the regulations must be modified to reduce any new burdens placed on drivers by the new program.

Respectfully submitted,



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