

BEFORE THE
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.
IN RESPONSE TO ADVANCE NOTICE OF PROPOSED RULEMAKING

DOCKET NO. FMCSA-2001-11061

JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.
1 NW OOIDA Drive
Grain Valley, MO 64029

CLAIRE SHAPIRO
Eisen & Shapiro
10028 Woodhill Rd.
Bethesda, MD 20817

Counsel for Owner-Operator Independent
Drivers Association, Inc.

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INTRODUCTION

The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) submits these comments in response to the August 25, 2009, notice published by the Department of Transportation, Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”), at 74 Fed. Reg. 42833, soliciting comments in Docket No. FMCSA-2001-11061 regarding the need for a proficiency examination to determine whether a new applicant is knowledgeable about the applicable Federal safety requirements before they are granted new entrant operating authority. This is not the first time that FMCSA has considered the proficiency exam option in this Docket. To the contrary, the Agency has considered and rejected the option on two prior occasions since this rulemaking proceeding was initiated to implement the Motor Carrier Safety Improvement Act of 1999 (“MCSIA”), Pub.L. 106-159, 113 Stat. 1764 (Dec. 9, 1999).

In 2002, the FMCSA requested comments on regulations that would require the Agency to develop and provide first-time applicants with educational and technical assistance (“ETA”) materials designed to help them comply with applicable Federal safety regulations and establish good safety management practices, to monitor on-road performance of new entrants, to conduct a safety audit within the first 18 months of operation, and to require applicants to self-certify that they were knowledgeable about and had implemented systems that ensure compliance with applicable regulations. In developing these initial regulations, the Agency considered the proficiency exam option, as specifically required by section 210(b) of the MCSIA, but rejected that option based upon

the finding that “the educational and technical assistance materials provided to the new entrants and the safety certifications on the required application forms will demonstrate the new entrants understand applicable safety regulations.” 67 Fed. Reg. 31978, 31980 (May 13, 2002).

The proficiency exam option was again considered by FMCSA in 2006. 71 Fed. Reg. 76730 (Dec. 21, 2006). Based upon several years of experience with the new program, the Agency modified the regulations to eliminate self-certifications,¹ to identify 16 safety violations that would result in automatic failure of the safety audit, and to identify 7 other safety violations likely to be discovered during roadside inspections that would require expedited corrective action. *See* 73 Fed. Reg. 76472 (Dec. 16, 2008). The Agency also significantly expanded and updated the information covered in the ETA materials, and made those materials available electronically on the FMCSA website. *Id.* In response to several commenters, including Advocates for Highway and Auto Safety (“Advocates”), who favored a proficiency exam, the Agency stated that it “has considered the option of requiring a proficiency examination and has decided not to impose such a requirement at this time.” 73 Fed. Reg. at 76478. The Agency further expressed its belief that its actions complied fully with the requirement to consider the proficiency examination option. *Id.*

The current notice responds to a Petition for Reconsideration filed by Advocates (“Petition”), which seeks consideration of this issue a third time. Advocates contends that FMCSA failed on the prior occasions to comply with the specific statutory directive in section 210(b) of the MCSIA to

¹ OOIDA believes that affirmations of knowledge of applicable safety regulations as well as the implementation of appropriate safety management systems by applicants is important and should be retained. Even if, as FMCSA has found through safety audits, applicants falsely make such attestations, the certifications nevertheless identify the individuals who will assume responsibility for regulatory compliance and violations when they are found. As such, the self-certifications initially required, but now eliminated, provide a useful enforcement tool that should be reinstated.

“consider the establishment of a proficiency examination for applicant motor carriers. . .,” language that Advocates interprets to require FMCSA to evaluate “how it would be administered, what it might contain, and what safety benefits would be produced through its use. . .” Docket FMCSA-2001-11061, Item 0058.1 (Jan. 14, 2008), Petition for Reconsideration, at p.5. The MCSIA statute itself does not contain any such requirements and, in fact, gives FMCSA great latitude in determining how it will ensure that new carriers have sufficient knowledge regarding the applicable Federal safety regulations. Moreover, there is no apparent reason why the statutory language, “shall consider,” must include such a detailed evaluation. Nevertheless, the Agency has acceded to Advocates demands for additional consideration of the proficiency exam option. This time, the Agency has asked the public to address specifically-stated issues and questions pertaining to “Use of a Proficiency Examination” and “Other Recommended Alternatives,” while recognizing that commenters can only address those items that fall within their area of expertise. 74 Fed. Reg. at 42835.

OOIDA supports FMCSA’s prior rejection of a proficiency examination as a necessary or effective way to ensure that new entrants are knowledgeable about the applicable safety regulations or to ensure that new carriers establish systems that promote safety. 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 nearly 160,000 members collectively own and operate approximately 240,000 heavy duty trucks and small truck fleets. OOIDA actively presents 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.

Because the overwhelming majority of the approximately 45,000 annual new applicants for motor carrier authority are owner-operators or small business motor carriers like those that comprise OOIDA's membership, the Association has been active in this Docket as well as other DOT initiatives to ensure the safe handling of large trucks by these motor carriers. Indeed, OOIDA's Executive Vice President has served on the Motor Carrier Safety Advisory Committee that advised FMCSA on the new entrant regulations. OOIDA also submitted comments in response to the 2006 notice of proposed rulemaking that supported a process genuinely designed to ferret out applicants such as "chameleon" carriers who pose a real safety risk. Docket No. FMCSA-2001-11061, Item 0052 (Feb. 20, 2007) ("Comments").

As discussed more fully below, OOIDA opposes a proficiency exam requirement for a number of reasons. First, new entrants as a group do not present a greater safety risk than other carriers. To the extent that certain applicants among the tens of thousands that apply for authority each year present real safety risks, such a pass/fail proficiency test would not help FMCSA to identify and deny them authority. Nor does a proficiency exam increase the likelihood that applicants with demonstrably poor safety records and bad compliance dispositions will in the future take safety matters more seriously.

When the difficulties and costs of developing and implementing such an exam are added to the dearth of probable safety benefits, it is clear that FMCSA should instead focus its limited

resources on gathering information during the initial application process about an applicant's safety performance, as derived from evidence of work experience, training, and/or knowledge of the industry. FMCSA should also enhance current protest procedures to encourage industry stakeholders, including States, to provide data and other information that could lead to a more informed authorization process. This larger body of information could be checked against existing DOT databases to identify "chameleon" carriers and brokers as well as other problem applicants and to deny them new authorizations.

DISCUSSION

I. A Thorough Up-front Review of an Applicant's Past Performance Would Be Far More Effective Than a Proficiency Exam In Ensuring Good Safety Practices.

In its Petition, Advocates contends that the availability of ETA materials does not ensure that new motor carriers will read the regulations and establish appropriate safety management systems. While that is true, Advocates overlooks the fact that a proficiency exam suffers from similar deficiencies. A pass/fail test demonstrates only that the applicant found someone with an understanding of the pertinent regulations sufficient to take the test and get a passing score. A proficiency exam does not reflect practical knowledge of systems that will increase compliance with the regulations, does not ensure that pertinent "knowledge" will be passed along to all personnel involved with safety matters, does not demonstrate that effective safety compliance systems will be established and, most important, does not in and of itself help prevent truck accidents. As FMCSA correctly noted in its 2006 Notice of Proposed Rulemaking, "knowledge alone does not ensure a carrier is in satisfactory compliance with the regulations," and consequently would not lead to improved highway safety (question 1.i). 71 Fed. Reg. 76730, 76741 (Dec. 21, 2006). Thus,

Advocates loses sight of the ultimate goal here – a reduction in crashes – when it insists upon the allocation of limited FMCSA resources to development and implementation of such a proficiency test.

This does not mean that FMCSA should retain the current application form and perfunctory new entrant application review process combined with a safety audit of all new motor carrier applicants conducted within an 18-month period to determine whether permanent operating authority should be granted. To the contrary, OOIDA believes it is wrong to lump all new applicants together either for pre-qualification testing or later safety audit purposes. OOIDA’s experience assisting its members to obtain their own operating authority for the first time has shown that a majority of these new applicants are experienced commercial motor vehicle drivers with excellent safety records that allow them to purchase the requisite primary liability insurance through an OOIDA insurance subsidiary. They are stable business owners who have for many years been driving a truck as an owner-operator or employee driver and have, throughout those years, learned much about applicable safety regulations and effective safety management procedures. Further, FMCSA was relying upon a faulty study as the basis for imputing increased safety risks to new entrant motor carriers as a group. *See Comments, pp.4-6.* While it is true that new entrants may lag behind more experienced carriers in their compliance with applicable safety regulations, they do not have a demonstrably higher involvement in crashes. *See id.; see also FHWA Publication No. FHWA-MCRT-99-009, Analysis Brief on New Entrant Safety Research, pp. 2-3 (March 1999).* Indeed, crash rates are variable and do not show a steady rate of decline with experience.

Of course, there is a small group of applicants who present actual safety risks and should therefore be denied new entrant operating authority. For example, there are “chameleon” carriers

who shut down one company with a poor safety record, then reopen under another name. There are also “chameleon” brokers who cheat drivers and motor carriers out of money, then shut down and reopen under another name. Some pre-qualification process is essential to identify and weed out those unscrupulous applicants before any type of authority is granted.² As discussed below, OOIDA believes the best way to accomplish this is to conduct an up-front evaluation of an applicant’s likely safety performance based upon a review of historical data collected through an expanded application form and enhanced protest procedure.

There’s a strong correlation between a carrier’s future performance and its past accident record. Thus, FMCSA should expand the application form to collect information that will help the Agency to identify those applicants with poor crash records. FMCSA can not continue to rely, as it does now, upon applicants with a checkered past to voluntarily reveal affiliates or related companies with poor safety records if it really wants to address new entrant safety problems. The disclosure of companies affiliated with or related to the applicant is just a start.

All owners (whether individuals, partners, or shareholders) as well as key personnel, especially including but not limited to those who will be responsible for safety compliance and management, and drivers, should be identified. Their past training, experience, and work histories should be listed on the application. Applicants should also explain briefly why they left each employer or, if they were self-employed, why the business was shut down. This information should go back at least 5 years, and should not be limited to trucking experience as all work experience will

² While section 210 of the MCSIA focuses on new motor carrier entrants, OOIDA believes a more careful pre-qualification process as described here should apply to applicants for broker and freight forwarder as well motor carrier authority. Even if those parties are not placing their own vehicles on the road, they should not have a history of associations with unsafe carriers or of practices, such as failure to pay drivers, that are conducive to unsafe driving practices.

help determine whether the applicant possesses the character and integrity to conduct safe trucking operations. FMCSA might also consider requesting the applicant's recent tax returns and/or contracts and agreements as confirmation of the veracity of information provided.

FMCSA could also enhance this pre-qualification review process by modifying current protest procedures to take full advantage of third-party information about applicants. FMCSA's current practice is to post in the Federal Register a summary of the application (49 C.F.R. § 365.109(b)), which contains only the applicant's name and address, its designated representative, assigned number, the date of filing, and the type of authority requested. Interested parties, including States who would have a direct interest in keeping applicants with poor driving and accident records from receiving new authority, then have only ten days to request the full application and file a formal protest. *Id.* at § 365.115 & 365.203.

Well over a hundred applications for operating authority are filed with FMCSA each day. Thus, the ten-day review and protest period is far too short to allow stakeholders an opportunity to contribute in a meaningful way to the decision making process. OOIDA would suggest that the protest period be expanded to somewhere between 30 and 60 days to allow States and others who may be familiar with particular applicants through prior employment or otherwise to share their knowledge. The effectiveness of public review would also be improved if more information, such as the names of the principals, key personnel, and affiliates of the applicant, were also provided in the Federal Register notice. With slightly more information, interested parties could better determine whether an applicant with a new name is really an alter ego for another company or operator. In addition, the full application should be made available electronically to third parties who wish to investigate an applicant more thoroughly. These changes would make protests a more efficient tool

in FMCSA's arsenal for identifying new entrants who are in fact safety risks.

All names, businesses, and equipment identified in an application or by protesters could then be checked against the substantial pool of information currently collected in DOT's various computer databases, such as MCMIS, PRISM, and CDLIS, to confirm past performance and crash history. Certain types of information, such as evidence that the applicant is simply seeking to evade prior enforcement actions or out-of-service orders, or has a history of the 16 types of violations that now result in denial of permanent authority when discovered in a safety audit, should result in automatic denial of new entrant authority. Negative information found through the enhanced application and protest process demonstrating a past lack of integrity or financial responsibility, could also be used to prioritize applicants for audits, giving those with somewhat problematic pasts the highest priority for safety monitoring and audits to take place after only a few months of operations. For example, because unscrupulous economic practices such as the failure to pay drivers correlate with an inattention to good safety practices, this economic data could trigger an early audit.

The proposed pre-qualification investigation is analogous to that currently conducted and effectively used by the Federal Maritime Commission in its licensing process for ocean transportation intermediaries. Applicants must demonstrate not only that they possess the "necessary experience" in related activities but the "necessary character" to render such services. 46 C.F.R. §§ 515.11(a)(1) & 515.14. Further, the FMC investigates the accuracy of the information, the integrity and financial responsibility of the applicant, the character of the applicant and its qualifying individuals, and the length and nature of the applicant's relevant experience, before granting a license. *Id.* at § 515.13.

Such a thorough pre-qualification review process should eliminate problem applicants long

before the current application and safety audit procedure might find them. Further, it will do so without the added costs and burdens to FMCSA and the trucking industry of a proficiency exam required of all applicants.³

II. Development and Administration of the Exam Would be Time-Consuming and Costly.

If FMCSA determines to go ahead with the proficiency exam option, the development and administration of the exam would use a significant portion of FMCSA's limited resources. OOIDA is not aware of any comparable tests currently used by the motor carrier industry that could serve as a model for the proposed proficiency exam. Existing tests, such as the commercial motor vehicle drivers' test, and those now being developed, such as the certified medical examiners' ("CME") test, cover a much more limited range of topics than would be required here. Thus, FMCSA must start from scratch to develop a standardized test that accurately measures knowledge of regulations governing driver qualifications, controlled substances and alcohol use testing, commercial drivers licensing, levels of financial responsibility, accident reports, requirements applicable to the driving of motor vehicles, vehicle inspection, hours of service and duty status records, and hazardous materials requirements, as well as systems for ensuring compliance with each of these sets of regulations. FMCSA must also select either a multiple choice format that could be scored electronically or another format that would more accurately test actual knowledge but would require human involvement in the scoring process. Once the initial test is developed, protocols must be devised for updating the test regularly to keep it current as legislation or regulations in any of these

³ FMCSA might also consider asking applicants to briefly describe the systems that have been or will be adopted to ensure driver and vehicle safety. The need to address this subject in writing, however briefly, will force the applicant to familiarize himself with the applicable safety regulations and think about how to comply if he is not already knowledgeable on this subject.

areas change. FMCSA must also develop protocols to verify that the original and each revised version of the test accurately reflect the test taker's knowledge of the covered subjects.

FMCSA must also determine the point in the application process when the test will be given. Should the Agency's acceptance of an application be contingent upon a passing score? Or should the completed test be submitted along with an application and scored as part of the preliminary review of the application? Or should a new entrant application be submitted, the fee paid, and an initial review performed so FMCSA can identify who must take the test before it is given?

Whatever the timing, the Agency must determine what score demonstrates "proficiency," whether all subjects will be given equal weight in scoring and attaining proficiency, and the effect of a failing score. Assuming that this will not be a one-strike and you're out process, protocols and procedures for retesting must be developed. This includes the number of retests allowed, the required waiting period between tests, whether the same individual must take the retest, and what happens if more than one motor carrier employee takes the test but not all get a passing score. All of these eventualities and more must be anticipated and addressed before the test becomes operational.

FMCSA must also determine whether the proficiency exam will be offered on paper, computer, or both and, if it is computerized, whether it can be taken from any location over the internet (or on paper) or whether it must be taken on computers located at specific FMCSA or private testing facilities. Whichever format is chosen, FMCSA might find itself in need of new technology, IT equipment, and/or personnel to administer and score the test.

OOIDA does not have the expertise to calculate the costs that would be incurred in this burdensome and time-consuming test development, implementation, and administration process.

However, it seems evident that the costs would be significant. Looking at the FMCSA rulemaking earlier this year soliciting comments in Docket FMCSA-2008-0363 on its proposal to establish a national registry of certified medical examiners, who must be tested to ensure their qualifications to perform medical exams and issue medical certificates for truck drivers, we see that FMCSA turned to private testing organizations with specialized skills and testing expertise who estimated that such a test would add about \$100 per person to the other costs associated with the CME process if they were to administer and score the test. *See* Item 5.1, *Proposed Rule Regulatory Evaluation, Regulatory Flexibility Analysis*, at p. 15 (July, 2008). FMCSA found that costs could be higher if FMCSA administers the tests because of the Agency's limited experience conducting testing and lack of testing programs to share its technological costs. *Id.* at 23. If the cost is comparable here, that would add another \$4.5 million to the cost of the new entrant program that FCMSA would have to absorb or pass through to already financially-overburdened truckers.

III. Proficiency Exams Are Ordinarily Used With Individuals Not Business Entities.

Although Advocates has criticized FMCSA for failing to address the specifics of a proficiency test, Advocates itself has not, at any stage of this proceeding, offered any specific details of the proposed exam. For example, Advocates have never indicated who must take this test. Nor is there a fully satisfactory answer to this question (question 1.e) because a fundamental problem arises where, as here, a proficiency exam is being proposed for a business entity, not an individual. Although proficiency exams are often employed when an **individual** is applying for some type of license, permit, or authority, such as a commercial motor vehicle drivers license or CME certification, such tests are not ordinarily employed when a business entity is seeking government permission. The principal reason for this disparity is that knowledge demonstrated by an individual

test taker can not readily be imputed to the involved business entity. Indeed, the question of whether a corporation or a partnership has knowledge of particular illegal or unfair business practices has been a divisive and central issue in innumerable criminal and civil lawsuits.

The litigation shows how difficult it is when a business is involved to determine who can or must be tested to demonstrate sufficient “knowledge” on the part of the entity. Several options – the individual signing the new entrant application, the owners, or the individuals responsible for safety management – present themselves in the present case, but none are a perfect fit. The authorized signatory or owners, for example, are not logical test takers except in the case of an application submitted and signed by an individual or sole proprietor. The signatory in other cases may be a third party with power-of-attorney to submit the application who will not be involved in any capacity with the applicant’s day-to-day operations. With a partnership or a corporation, not all owners play a role in safety management for the applicant. Accordingly, their knowledge of applicable safety regulations may not be imputed to the applicant as a whole.

Thus, it would make the most sense to have an applicant provide the name, title, and responsibilities of the individuals who assume responsibility for any or all of the applicant’s safety programs and require those individuals to take the proficiency exam. Of course, an applicant might apply for authority before those individuals have been hired. Even if such safety managers have been hired, they might go to another company or be terminated before the 18-month safety monitoring period is over, as these are often the first employees to be let go in tough economic times. Accordingly, an applicant can not guarantee that they will stay until permanent operating authority is granted. If a test taker leaves prematurely, then the knowledge that arguably was demonstrated in a proficiency exam leaves with him. To avoid the information gap, applications would have to

be amended and additional tests given to accommodate new safety personnel.

IV. To Produce Reliable Results, the Exam Must be Given in a Supervised Setting.

Advocates has also failed in its prior submissions in this Docket to explain, as a practical matter, how a proficiency test would be administered (question 1.d). At present, the application process for procuring operating authority from FMCSA is generally conducted entirely on-line. Indeed, while the application forms and fee may be submitted to FMCSA by mail, the Agency “strongly encourages” applicants to use the internet to significantly shorten the processing time. *See, e.g.,* www.fmcsa.dot.gov/registration-licensing/print-forms/print-forms.htm; www.fmcsa.dot.gov/documents/forms/r-1/op-1-Instructions-and-Form.pdf. This means that applicants for operating authority, in contrast to applicants for commercial motor vehicle licenses, are not required to go to DOT or to any other facility in order to obtain operating authority. The proficiency exam could not be smoothly integrated into the application unless it is taken using the same methodology – on-line test for an on-line applicant or paper test for those applicants intending to submit a paper application.

Both on-line and paper tests, taken in the comfort of an applicant’s home, office, or even truck, however, present ample opportunities for fraud. There is simply no way to monitor the identity of the test taker or the number of individuals contributing to test answers in this situation. Further, the proficiency exam would, in effect, become an open book test. A passing score on such a test would not demonstrate true knowledge of the regulations and compliance systems: it would show only that the purported test taker was able to locate the answers in written materials available to him, or in the minds of others assisting with the test.

The only way to generate reliable results would be to separate the testing and application processes by offering the proficiency exam at supervised locations such as FMCSA headquarters,

regional service centers, or field offices, or at geographically-dispersed private testing facilities where the identity and number of test takers could be verified. Some sort of proctoring or oversight would also be required to guard against use of outside materials to find answers to test questions.

V. A Proficiency Exam Would Place An Undue Impact on New Applicants.

It is well-documented that most new entrants are small businesses. Small businesses, of course, are ordinarily more sensitive than larger operations to any increase in operating costs. This is particularly true in the trucking industry where the average owner-operator truck driver earns approximately \$41,000 per year after expenses, and most employee drivers earn only slightly more. Even the current \$300 fee for the motor carrier operating authority, when combined with new business start-up costs and the costs of staff time diverted to the pre-visit and onsite portions of the safety audit, take a noticeable bite out of this income. When the likely additional fees to cover FMCSA's test-associated costs, plus the costs of travel to a testing facility and the possible loss of income generated by those employees required to travel some distance for testing, are added to this, the costs and inconvenience could easily reach a level sufficient to deter some sizable portion of potential applicants from seeking their own authority (question 1.f).

As it stands now, many applicants never begin operations after getting their new entrant authority. FMCSA should not take steps likely to discourage additional numbers of otherwise qualified applicants, since trucks and trucking are the lifeblood of our economy and way of life. With very few exceptions, every product that individuals or businesses use was hauled on a truck at some point. In recent years, this has amounted to more than 10 billion tons of freight per year. It takes a lot of motor carriers and trucks to move that much freight.

VI. There are Other Equally or More Effective Means to Help Applicants Become Knowledgeable About Applicable Regulations.

As discussed above, development and implementation of a proficiency exam is costly for all involved parties, and those costs do not provide any likely improvements in highway safety. Simple additions to the ETA materials now available, however, should afford FMCSA more impressive results for its buck (questions 2.a & 2.c.).

The ETA packet made available to new applicants currently consists of a 160-page *Motor Carrier's Guide to Improving Highway Safety*. It would appear difficult for an applicant wading through all that information to determine precisely what safety management systems would foster compliance with each and every regulation discussed in those pages. OOIDA would recommend that FMCSA develop a short checklist stating in plain English the steps that a new motor carrier should take to ensure compliance with each category of pertinent regulations. Each item on the checklist could then be cross-referenced to the relevant section of the lengthy and more-detailed *Motor Carrier's Guide*. Such a checklist would help an applicant focus on and ensure the establishment of critical safety management systems that might otherwise be overlooked.

CONCLUSION

OOIDA believes that FMCSA's rejection of a proficiency exam requirement for new entrants on two prior occasions in this Docket was correct for all of the reasons discussed above. Such an examination is not likely to improve compliance by those applicants with checkered safety records. FMCSA would achieve far more in terms of reducing the number of truck crashes and generally improving safety levels among those operating large trucks on the nation's highways by collecting and reviewing detailed information about applicants before **any** authority, even new entrant

authority, is granted. More extensive application forms, a more meaningful protest procedure, and a check of all information obtained against all data currently collected and stored in DOT's various databases, will better focus FMCSA's attention on preventing applicants who lack the knowledge or the willingness to operate safely from obtaining operating authority. A comprehensive review of an applicant's history and past practices before such entities are allowed to begin operation is a much more effective and efficient use of resources. Not only would this review identify bad actors up front, and provide reasonable assurance a new carrier could operate safely, it would eliminate the need and expense of a mandatory audit of all new entrant carriers.

Respectfully submitted,



JAMES J. JOHNSTON
President
Owner-Operator Independent
Drivers Association, Inc.

CLAIRE SHAPIRO
EISEN AND SHAPIRO
10028 Woodhill Rd.
Bethesda, MD 20817

Counsel for Owner-Operator Independent
Drivers Association, Inc.