

BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY OF TRANSPORTATION

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

IN RESPONSE TO A NOTICE OF REGULATORY REVIEW

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BEFORE THE
DEPARTMENT OF TRANSPORTATION
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The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) hereby submits its comments in response to the February 16, 2011, notice of regulatory review issued by the Department of Transportation, Office of the Secretary of Transportation (“DOT” or “Department”), at 76 Fed. Reg. 8940, advising the public of its intent to conduct a review of its existing regulations in accordance with Executive Order 13563. The purpose of this review is to identify significant rules that are not crafted in a way that efficiently achieves current regulatory objectives. To this end, DOT has asked affected parties to identify rules that are outmoded, ineffective, insufficient, or excessively burdensome and that therefore need to be modified, streamlined, expanded, or repealed. Consistent with the Executive Order, the ultimate goal is “cost-effective, evidence-based regulations that are compatible with economic growth, job creation, and competitiveness.” As one of the first steps towards this goal, DOT has asked for suggestions regarding specific rules that should be on an initial list of deficient rules.

OOIDA is a not-for-profit corporation incorporated in 1973 in Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. The more than 152,000 members of OOIDA are independent owner-operators, small-business motor carriers, and professional truck drivers (“small-business truckers”) located in all 50 states and Canada. These groups have a significant presence in the trucking industry: One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks.

OOIDA is the largest international trade association representing these small-business truckers. The Association actively promotes their views through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses, to advance an equitable and safe working environment for them. OOIDA also actively represents the positions of this group on all aspects of highway safety and transportation policy in numerous committees and various forums on the local, state, national, and international level.

Because the Department's regulations, to the extent they are directed at or applied to the commercial trucking industry, have a direct and significant effect on the operations of OOIDA's member truckers, OOIDA has submitted comments in many of the Department's rulemakings and studied the effectiveness of final rules. Based upon those observations, OOIDA has identified a particular set of deficient rules that have escaped recent scrutiny – the current controlled substances testing (“drug testing”) regulations at 49 C.F.R. Part 382 – even though they have not eliminated illegal drug use among commercial motor vehicle (“CMV”) drivers. Although DOT has asked commenters at this preliminary stage only to indicate what needs fixing and why, OOIDA has taken the optional step of suggesting “how to fix the perceived problem.” It is the Association's belief that the regulatory changes proposed below should better allow the random drug testing program to identify and take off the road the small number of CMV drivers who create a safety hazard because of their drug abuse. And it will achieve this result at a far lower overall cost to the industry.

DISCUSSION

I. The current drug testing program is not eliminating drug use as desired.

Federal Motor Carrier Safety Administration (“FMCSA”) regulations currently require employers to subject at least 50 percent of the average number of CMV drivers to random drug

testing on an annual basis. 49 C.F.R. § 382.305(b)(2). Since the regulations were modified in 1994, they allow FMCSA to lower the random drug testing rate for all drivers to 25 percent if, and only if, the industry-wide random positive rate is less than 1 percent for two consecutive calendar years while testing at the 50 percent rate. 49 C.F.R. § 382.305(g). Although the reported positive rate derived by FMCSA has declined measurably since 1994, it has never dropped below 1 percent.¹ Indeed, the positive test rate seems to have plateaued, going up and down over the past five reported years in a range between 1.5 and 2 percent.

OOIDA recognizes the need for a random testing component in any mandatory drug testing program because, unlike pre-employment testing or other testing tied to specific events, it has a stronger deterrent effect as well as far greater ability to catch drug users unawares. However, the fairly steady and no longer declining positive test rates under the current random testing scheme show that the use of a uniform industry-wide level of testing applicable to millions of CMV drivers is not an effective way to achieve maximal results. To the contrary, this methodology has resulted in repeated testing of some drivers while others are rarely or never tested and escape detection. Further, many of those tested repeatedly are among the vast majority of drivers who are not and never will be drug users. Nevertheless, these compliant drivers and the carriers that employ them are treated exactly the same as those with poor records for testing purposes. The result is a very costly and burdensome testing program that is not achieving the regulatory goal of getting all illegal drug users off the road. Thus, changes are needed to transform this into a program that addresses the legitimate safety concerns in a more effective and less costly manner.

¹ The reported positive rates from 1994 through 2005, the years for which the rates were published in the Federal Register or on the FMCSA website, were as follows: 1994, 2.6%; 1995, 2.8%; 1996, 2.2%; 1997, 1.3%; 1998, 1.5%; 1999, 1.3%; 2000, 2%; 2001, 1.5% , 2002, 1.7%, 2003, 2%, 2004, 1.6%, 2005, 1.7%.

II. A two-tier drug testing program will be more effective at identifying drug users.

The random drug testing program would identify more drug users at a lower overall cost to the motor carrier industry if it was restructured to focus testing more directly on the small group likely to include drug users. Accordingly, OOIDA proposes a performance-based program that would allow drivers who test negative on 5 consecutive random drug tests and who have never had a positive DOT drug test result of any kind to be removed from the pool of drivers subject to the annual 50 percent random drug testing requirement and be placed in a separate pool subject to an annual 25 percent random testing rate. It is important to emphasize that, under this two-tier system, no drivers would be fully exempted from possible testing, no matter how exemplary their records.

A 25 percent test rate is being suggested because DOT has previously determined that this is the minimum effective rate to ensure deterrence for drug use and to allow a modicum of detection. 59 Fed. Reg. 62218, 62223 (Dec. 2, 1994). The proposed number of negative tests required to qualify for this separate pool is 5 because of the extremely low rate of subsequent positive tests for drivers with this many negative tests. A review of past test results from CMCI, OOIDA's testing consortium, shows that virtually no drivers have a positive drug test result after 5 negative tests.²

All drivers who have not proven themselves under the 5-test criteria to be drug free would still be subject to the current 50 percent testing requirement. Even 1 positive test after being placed in the 25 percent group would result in an immediate permanent transfer back to the 50 percent

² CMCI was established by OOIDA to provide its members with a comprehensive program that satisfies DOT's mandatory drug and alcohol testing requirements. CMCI performs approximately 3,700 random drug tests per year on a population of more than 7,400 drivers, primarily for small business motor carriers. The percentage of positive random drug tests in this group has averaged .0042 percent over the past 5 years.

group. Finally, to ensure to the maximum possible extent that those in the 25 percent pool are non-drug users, any violation of the drug testing rules, regulations, or policies would exclude a driver from that preferential testing pool.

Given the current low percentage of positive tests, OOIDA believes that large numbers of drivers will be shifted into the 25 percent pool if the rules are changed, making it far more likely that those drivers using illegal drugs which remain in the 50 percent pool will be chosen for testing. The total number of covered drivers eligible for testing in either group would continue to be determined in compliance with 49 C.F.R. § 382.305(j)(1) and the selection of those to be tested would be made in compliance with 49 C.F.R. § 382.305(i). In fact, other than a change in the percentage being tested based upon the drivers' past performance, the testing process would be conducted unchanged in full compliance with the procedures set forth in Parts 40 and 382 of the regulations.

III. Substantial benefits would flow from the two-tier program.

Safety benefits. If we assume that the published positive random drug test rates accurately reflect the entire population of drivers then, as shown at footnote 1 above, between 1.3 and 2 percent of drivers who are not eliminated by pre-employment, reasonable suspicion, or post-accident drug testing are using illegal drugs while working. Such a small problematic group of drivers can easily escape detection when diluted in to a population of millions of drivers being tested each year. Those drivers are much more likely to be tested and found if they can be isolated in a smaller group. That is exactly what the two-tier system will do, once the much larger number of drivers who have repeatedly tested negative on random drug tests are removed from the 50 percent testing pool. Thus, the two-tier system should be more successful than the existing program in detecting problem drivers and getting them off the road. With the established

correlation between drug use, impaired driving, and traffic accidents, their removal from the roads will certainly increase safety on our nation's highways. *See Omnibus Transportation Employee Testing Act of 1991, Pub. Law 102-143, § 2 (Oct. 28, 1991), at 49 App. U.S.C. § 1434 Note.*

The two-tier program will also provide a "reward" that is currently lacking for drivers to remain drug free throughout their career and for motor carriers to strongly encourage them to do so. Under the current system, a reward is provided only if positive test results drop to a low level industry-wide. There is no similar direct performance-based reward for individual drivers or motor carriers with exemplary results. The lesser inconvenience and reduced costs associated with participation in a 25 percent testing pool will provide the missing concrete reward for continued good performance. Further, while the possibility of a less burdensome drug testing regime may not deter hard-core drug users, it could give occasional drug users or those contemplating isolated drug use a stronger reason to avoid drug use namely they are more likely to be detected.

Cost benefits. The overall random drug testing program costs the trucking industry millions of dollars annually. Thus, when the regulations allowing an industry-wide reduction of the testing rate were contemplated in 1994, the Federal Highway Administration ("FHWA") estimated the change from a 50 to 25 percent testing rate would save the transportation industry up to 40 percent of the annual random testing costs, a savings estimated to be more than \$107 million annually for motor carriers. 59 Fed. Reg. at 62223 & 62225. This includes fees paid per driver, whether or not tested, by those carriers who join a testing consortium that perform tests and related administrative functions for the participants as well as direct drug test fees paid by drivers and carriers.

Other significant, but less readily quantifiable, savings can also be anticipated. As the total number of random drug tests being given decreases, less driver on-duty time will be lost to such

testing. Drivers who have proven themselves to be drug free will have less time away from income-generating work, benefitting both themselves and their employers. Further, as more drug users are detected, the accidents those drivers might have caused and the resultant liability imposed on their employers for injuries or property damage incurred will be lessened.

IV. A pilot program would allow FMCSA to evaluate the benefits of a two-tier program.

OOIDA understands that FMCSA might be reluctant to simply abandon the current drug testing program without concrete evidence that a performance-based random drug-testing program would be more effective. Accordingly, OOIDA would suggest that the Department conduct a pilot program, pursuant to 49 C.F.R. Part 381, Subpart D, that would allow for the collection of data supporting the proposed two-tier system.³

Because it is the long-term effects of the changes that are critical for evaluation purposes, several years of data will be required to allow a meaningful study of the impact of the two-tier system. Hence, OOIDA would propose a 3-year test period, the maximum allowed by 49 C.F.R. § 381.505(b)(1). To ensure that qualified drivers can be placed in the 25 percent group at the start of the 3-year period, participants must be chosen from those who have retained all test results, both positive and negative, for 5 years. OOIDA's testing subsidiary, CMCI, which performs approximately 3,700 random drug tests per year for those who join its consortium, meets this qualification, and would be willing to be one of the participants. OOIDA has in the past spoken

³ The pilot program would require an exemption from 49 C.F.R § 382.305(b) which currently establishes an industry-wide 50 percent testing rate, which may be lowered only if the industry-wide random positive rate falls below 1 percent. Second, participants in the pilot program would have to be exempted from possible selection under 49 C.F.R. § 382.403 to submit an annual summary of their drug and alcohol test results to FMCSA, because they would not be conducting all their random drug testing at the 50 percent level.

with motor carriers of various sizes who also meet this criteria who would be interested in participating in such a pilot program.

OOIDA would be pleased to submit a more detailed pilot program proposal if FMCSA is interested in pursuing this course of action in lieu of a rulemaking proposing possible changes to the current rules. While OOIDA knows that prior requests seeking exemptions from the 50 percent testing requirements based upon the applicants' low positive test rates have been rejected, those requests are readily distinguishable from the current proposal because they sought to place all involved drivers, which could include drug users, into a group with a lower testing rate. *See, e.g.,* PacifiCorp Electric Operations Exemption Application, 65 Fed. Reg. 24533 (petition denied April 26, 2000); Controlled Substances and Alcohol Testing Management Information System (MIS) Statistical Data, 63 Fed. Reg. 2172, 2173 (petition of Truckload Carriers Association denied Jan. 14, 1998). In the two-tier system proposed here, only drivers who have proven themselves to be drug-free are placed in the lower testing class, while others are more likely to be randomly selected for testing. In short, the agency would be using a performance-based approach that rewards good conduct while maintaining a level of deterrence and detection (and hence safety) equal to or greater than that existing under the current system.

CONCLUSION

When Congress mandated alcohol and drug testing programs in the transportation industry, it said that “the greatest efforts must be expended” to eliminate the use of illegal drugs by CMV drivers because the use of such substances “affect significantly the performance of [those] individuals” and is a “critical factor in transportation accidents.” Omnibus Transportation Employee Testing Act of 1991, *supra*. “Greatest efforts” would seem to require the FMCSA to modify the current regulatory scheme, which has not proven itself adequate either to fully

eliminate the use of illegal drugs by CMV drivers or even to show continued movement in that direction. It is only by trying an alternative approach that further progress will be made. The two-tier system is an alternative that should be seriously considered because it is not measurably more difficult or costly for the agency to administer, and it should have substantial benefits in terms of safety and cost savings.

Respectfully submitted,

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