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Qualification of Drivers; Exemption Applications; Vision
67 FR 57266, September 9, 2002

Advocates for Highway and Auto Safety (Advocates) files these comments regarding the Federal Motor Carrier Safety Administration=s (FMCSA) notice announcing the agency=s decision to grant 76 applicants a second 2-year exemption from the federal vision requirement, 49 Code of Federal Regulations 391.41(b)(10).

The statute governing exemptions from the Federal Motor Carrier Safety Regulations (FMCSR) requires that, for each and every application for exemption, the Secretary Ashall give the public the opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request.@ 49 U.S.C. ' 31315(b)(4). The statute requires the Secretary to disclose relevant information to the public for its review in order to provide comment regarding the application. In the case of exemption applications from drivers who have already received a previous 2-year exemption, the FMCSA has dispensed with the formality of informing the public with regard to specific Arelevant information@ of each applicant, including the need to disclose any information about the applicant's driving record during the prior 2-year exemption. This is a substantive breach of the public disclosure requirements of the statute.

FMCSA has decided that updated factual information regarding the driving record of prior exemption applicants does not have to be disclosed to the public before granting a second exemption request. The instant notice, and other similar notices termed Arenewals@ by the agency, do not provide individualized information regarding the driving history of each applicant during the 2-year exemption period that immediately preceded the application for a second 2-

year exemption. This is precisely the type of information that the agency relies on and discloses prior to granting the initial exemption to each applicant. The summary information regarding applications for a second 2-year exemption is not individualized and is presented *en masse*, in a manner which does not afford the public any Aopportunity to inspect the safety analysis and any other relevant information known to the Secretary.@ *Id.* The agency notice provides only a cursory statement that each of the applicants has provided sufficient information to qualify for another exemption, but the agency does not share the underlying, basic information in the public notice. No factual recitation is provided regarding the driving experience, crash and citation record of each applicant during the prior 2-year exemption period B records that are directly relevant to the application for an additional 2-year exemption. Although the agency makes specific reference to the fact that each applicants= vision impairment remains stable, the agency summarily concludes that Aa review of their records of safety while driving with their respective deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption standards.@[1] 67 FR 57266.[2] The agency does not share this driving record information or its analysis with the public, nor does it place these materials in the docket. Even if this information does not disqualify the drivers from consideration of a second exemption based on the screening criteria, the agency is required to provide the public with the specific information on which its safety determination is based. Using this secret information, however, FMCSA unilaterally concludes that each applicant should be granted another 2-year exemption. *Id.* As a result, the public cannot form its own views, raise specific factual questions or provide informed comment.

The FMCSA has not responded to this argument. The agency inaccurately states in this notice, as it has in other similar notices, that it has addressed Advocates= contention regarding the agency=s failure to disclose material information regarding the driving records of the applicants. *Id.*, *citing,* 66 FR 17994 (Apr. 4, 2001). In that notice, however, the FMCSA did not explain its failure to disclose relevant factual information. Rather, the agency merely defends the basis for its summary procedures in making the exemption determination. In the cited notice, the agency claimed that its evaluation of the 2-year driving record of each applicant, coupled with previously known information derived from the previous application process, indicates that each applicant continues to meet the agency=s criteria for the granting of an exemption to the vision standard. But the agency does not, either in that nor any other notice, explain why the it does not set forth the specific driving record of each applicant during the prior 2-year exemption,

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

[2]The identical wording is used by FMCSA in all renewal notices. *See, e.g.,* 67 FR 10476 (June 3, 2002); 66 FR 66969 (Dec. 2001); 66 FR 48505 (Sept. 20, 2001); 66 FR 41656, 41657 (Aug. 8, 2001).

as part of the record for the subsequent exemption request. For initial exemption applications the agency insists that each applicant have 3 years driving experience immediately prior to the date of the application, and the state driving record for the prior 3 years is examined by the agency. All of that information is conveyed in the agency notice for the initial exemption request, which sets out for each applicant, individually, whether their driving record has no accident or violations or, if the record reflects an accident of violation, the nature of the offense. The notices for subsequent applications, however, routinely states only that Aeach applicant continues to meet the vision exemption standards [,]@ a general conclusion that applies to possible driving record violations as well as other portions of the agency exemption criteria all lumped together. The underlying facts and pertinent driving record of each applicant during the previous 2-year exemption period are not disclosed.

In this particular instance, the egregious nature of the procedural violation is underscored by the fact that the FMCSA notice simply lists all 76 applicants by name without any providing any individualized information or assessment of each applicant's safety and driving record. 67 FR 57267. This is not the process or procedure required in the statute.

The FMCSA also refers to second exemption applications as Arenewals,@ and apparently the agency believes that it is free to dispense with prior public notice as well as providing Arelevant information@ since the same applicant was granted an exemption 2 years earlier. However, the statutory scheme recognizes no exception in the required procedures for subsequent exemptions by an applicant who has previously been granted an exemption, and the statute makes no provision for truncating public notice and information disclosure in the case of the Arenewal@ of an exemption. Indeed, the term Arenewal@ does not appear in the text of the statute. The agency must, therefore, treat each application for exemption as a separate request for a determination and order which, in fact, they are. Each such application must be accorded separate review, prior public notice and all safety analysis and Aother relevant information@ must be disclosed to the public. While the agency can reference relevant factual information in conjunction with a previous exemption request, by so doing the agency is not relieved of the burden to disclose specific Arelevant information@ that has occurred during the course of the prior 2-year exemption. Unfortunately, the agency has chosen to truncate its exemption procedures in the case of Arenewals,@ and not only does the agency fail to disclose specific factual information except in conclusory terms, the agency has decided to short-circuit public notice and comment procedures.

Advocates objects to the issuance of the FMCSA final decision as a *fait accompli* without providing prior notice and opportunity for public comment as required by 49 U.S.C. ' 31315. The agency has summarily granted the exemptions, effective September 21, 2002, without prior notice and an opportunity for public comment before the agency rendered its determination on the exemptions. As has already been stated, applications for a subsequent 2-year exemption are subject to the same notice and comment process as required for the initial determination to grant the first such exemption. In this and other instances of drivers seeking a second 2-year exemption from the federal vision requirement, the agency has only provided an opportunity for public comment after the determination to grant the exemption has already been made and taken effect. This practice violates both the fundamental due process requirements secured under the

Administrative Procedure Act (APA), 5 U.S.C. ' 553 *et seq.,* as well as the explicit wording and procedures required by 49 U.S.C. ' 31315.

The FMCSA has asserted that the statute is Asatisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequently submitted comments by interested parties.@ 66 FR 17994, 17995 (Apr. 4, 2001). This response ignores the agency=s statutory duty and cannot overcome the intent of Congress. The express wording of the statute requires that the notice be published upon receipt of a request for an exemption, and that includes any request for a second and subsequent 2-year term of exemption (*i.e.,* a "renewal"), and that the public be afforded an opportunity to inspect the safety analysis and other relevant information known to the Secretary prior to making the safety determination. No exception or special treatment is afforded subsequent or Arenewal@ applications for exemption. This is the appropriate construction of the statute and the agency statement that it prefers to proceed in a different manner does not explain or excuse its failure to abide by the statutorily mandated process.

FMCSA characterizes the request for an additional 2-year exemption as a Arenewal@ of an existing exemption. The treatment of the application for a second exemption indicates that the agency does not believe that it must afford the public the same due process that accompanies the application for an initial 2-year exemption.[3] The agency does not provide prior notice and opportunity for public comment on applications for renewals of exemptions and, as has been discussed above, the agency does not disclose the same type of driver record information that is part of the initial exemption application process. Any reliance by FMCSA on nomenclature as a basis for according different procedural due process to Arenewals@ as opposed to initial exemption applications, is misplaced because Congress made no such distinction in the statute. FMCSA=s reliance on the tern Arenewal@ is without legal import since the statute does not use that term nor does it define an exemption renewal as permitting a different process from any other application for a two-year exemption.

In addition to being a clear violation of the meaning and the purpose of the statute, this procedure violates due process considerations and the dictates of the APA. The agency is not at liberty to abrogate public notice and comment due process simply because it is convenient. The

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[3]FMCSA, and its predecessor agency, the Federal Highway Administration Office of Motor Carrier Standards, engaged in the practice of making the safety determinations to grant vision exemptions prior to issuing a public notice and providing an opportunity for public comment. Following criticism of this procedure as a violation of the statute and APA due process requirements, the agency stopped making such Apreliminary@ safety determinations in advance of notice and comment. Advocates raises the same objection regarding the agency=s use of this illegal procedure with respect to applications for second and subsequent vision exemptions. In this instance, however, not only is FMCSA making its determination prior to public notice and opportunity for public comment, but the agency is also withholding from the public the factual basis on which it is making its peremptory and secret determination.

agency propounds no legitimate argument to support its short-circuiting of APA required procedural due process.

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

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