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**ADVOCATES  
FOR HIGHWAY  
AND AUTO SAFETY**

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U.S. Department of Transportation  
400 Seventh Street, S.W.  
Washington, DC. 20590

**Qualification of Drivers; Exemption Applications; Vision  
Notice of Petitions and Intent to Grant Applications for Exemption  
65 Fed. Reg. 20245, April 14, 2000**

**Introduction**

Advocates for Highway and Auto Safety (Advocates) files these comments in response to the Federal Motor Carrier Safety Administration (FMCSA) notice of petitions and intent to grant applications for exemptions from the vision waiver standard, Title 49 United States Code of Federal Regulations (C.F.R.) § 391.41(b)(10).<sup>1</sup> 65 Fed. Reg. 20245 *et seq.* (Apr. 14, 2000). Advocates does not comment on the merits of the individual applications or the specific qualifications of the 61 drivers except as necessary to exemplify problems in the quality and quantity of the information provided regarding the applications, the agency's presentation of the information to the public, and the process adopted by the agency for evaluating the petitions and for making determinations to grant the exemptions. The agency has reviewed the applications and has already made the determination to grant each of the requested exemptions.

More than 5,000 people are killed annually in commercial motor vehicle (CMV or truck and bus) related crashes and recent data shows that the fatality total has been increasing in the last 5 years. In addition, many thousands of motor carriers are unrated by the Office of Motor Carrier Safety and timely information about operator records is poor. A number of crashes involving motor coaches has also heightened awareness regarding motor carrier and operator safety. In addition, Congress expressed its concern for safety on our nation's highways and specifically determined that there is a need for new leadership and oversight in the regulation and stewardship of commercial motor vehicle operations. Toward that end, Congress passed and the President signed the Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, 113 Stat. 1748 (Dec. 9, 1999), which requires the establishment of a new

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<sup>1</sup> Authority to carry out functions pursuant to 49 U.S.C. §§ 31315 and 31136(e) was re-delegated by the Secretary of Transportation from the Administrator of the Federal Highway Administration to the Director of the Office of Motor Carrier Safety. See 64 Fed. Reg. 56270, 56271 (Oct. 19, 1999).



agency, the Motor Carrier Safety Administration, within the U.S. Department of Transportation. That agency was formally established as of January 1, 2000. See 65 Fed. Reg. 220 (Jan 4, 2000).

### **The Federal Motor Carrier Safety Improvement Act of 1999**

The Federal Motor Carrier Safety Improvement Act of 1999 (the Safety Improvement Act), was enacted in order to significantly enhance the oversight and safety of commercial motor vehicles. The Safety Improvement Act created a new agency, the Federal Motor Carrier Safety Administration (FMCSA), which is devoted entirely to motor carrier safety. Authorization of the new agency was based on the proposition that a separate agency, with expanded resources and funding dedicated to the safety of commercial motor vehicle operations, could achieve the safety improvements intended by Congress, as well as the 10-year fatality reduction goal set by the Secretary of Transportation.

Congress changed the fundamental manner in which federal authorities regulate motor carriers. Congress identified in the findings section of the Safety Improvement Act a list of major problems with the existing federal oversight of commercial vehicles that needed to be corrected. In order to implement these statutory findings and purposes, Congress explicitly enshrined safety as the new agency's mission and highest priority. The Safety Improvement Act states that the FMCSA "shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation." Safety Improvement Act, Section 101 (a). Not only is safety the agency's highest priority, it is the single most important goal which the agency is required to promote in all of its actions and functions. This is not merely gratuitous rhetoric, but instead represents a clear mandate to the FMCSA to advance safety as its paramount mission and to carry out actions and adopt policies which always demonstrate the advancement of safety goals to the highest degree.

As a consequence of the unequivocal wording and clear meaning in the Act, the agency must justify each of its actions based on its measurable safety impact. FMCSA is authorized to improve safety not merely to a greater extent than existed before, but to promote the "highest degree of safety in motor carrier transportation." *Id.* This means that safety must be the rationale behind agency planning, analyses, and programs, and that the FMCSA must demonstrate that its goal is to achieve the highest possible level of safety in its decisions and actions. The enactment of the Safety Improvement Act sets an overarching standard to achieve the highest degree of safety in motor carrier operations, and the establishment of the FMCSA was intended to ensure that this pre-eminent standard of safety is achieved through agency policy choices and other actions.

## **Motor Carrier Driver Qualifications Exemption Policy**

In light of these events and other concerns about safety, Advocates opposes the policy of granting exemptions from the federal motor carrier safety regulations including the driver qualification standards. Rather than granting exemptions, the agency should focus on scientific research that will establish whether current safety standards accurately measure the level of safety required to ensure safe motor carrier operations, and on research to develop a rational basis for conducting individualized testing. Granting exemptions based on substitute criteria does not ensure that deviations from the motor carrier safety standards will provide equivalent or greater levels of safety. Moreover, piecemeal exemptions from otherwise credible and established standards will only serve to undermine the standard itself and will promote pressure to grant exemptions from other safety standards. Unfortunately, FMCSA, and its predecessor agencies, have participated in this devaluation of the existing federal motor carrier safety standards (FMCSRs) by accepting “junk” science as non-scientific analysis as a valid substitute for the vision safety standard, and by placing the burden on the public to oppose granting these and other exemptions.

Advocates files these comments for several purposes. We comment in order to clarify the consistency of the exemption application information provided by FMCSA to the public; to object to the agency’s misplaced reliance on conclusions drawn from the vision waiver program; to underscore the procedural inadequacy of this notice and previous, similar notices; to address the agency’s misinterpretation of existing law regarding the statutory standard governing exemption determinations; and, to state for the administrative record the ruling of the U.S. Supreme Court that directly affects the legal validity of vision exemptions and the agency’s exemption policy.

### **Consistency of Information Presented to the Public**

Advocates has reviewed the accompanying background information as to each of the drivers as reported by FMCSA. While the information presented on behalf of each applicant is superficial and sparse, FMCSA has at least responded to criticism leveled by Advocates in prior exemption notices by providing a more **organized** and consistent presentation of some of the driver background information in this notice.<sup>2</sup> The more important issue, however, is the

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<sup>2</sup> In this notice the FMCSA has made an effort to provide the eyesight for both eyes, the years of driving experience and the number of years driving commercial motor vehicles for each applicant. This is an improvement over past notices. The agency also consistently reported on the applicant driving record for the previous three years while driving commercial motor vehicles only. While the driving record information is more consistent than past notices the public is entitled to know the driving record of the applicants in non-commercial motor vehicles as well. Accidents and violations in private passenger and other non-commercial vehicles are considered by licensing agencies, insurers, and the public as indicative of good driving performance and should be

dearth of information and analysis on which the FMCSA presumes to make (and has already made) determinations to grant exemptions. The information provided in the notice amounts only to a terse statement of a few highlights on behalf of each applicant without providing any analysis or closer scrutiny. Essentially, the information only reflects that each applicant has passed the screening stage for exemption criteria and meets, at least on its face, the preconditions for consideration of the exemption application. FMCSA presents these bits of information as if they constituted a safety analysis of the driver record, but no actual analysis is presented.

For each applicant, the FMCSA notice states the total miles they have driven (either annually or over their lifetimes), the number of years driving commercial vehicles, the type of vehicle, and the most recent 3-year driving record. The public, however, is not advised whether the information presented is taken from the driver applications without outside verification, or whether FMCSA has determined these figures are accurate by other means. For example, miles driven is reported for each driver either as an annual figure or as a total for the driver's lifetime. No insight is provided as to how these figures were derived nor is any statement made about their reliability. If the driver mileage figures are self-reported, FMCSA should inform the public as to how the totals were arrived at, and what documentation was submitted by each driver to verify the accuracy of the figures cited in the notice. If the total mileage is based on other sources, FMCSA should describe the type and quality of information on which the mileage figures are based. A similar concern exists about the verification of the other information presented to the public as the basis for granting the exemption. FMCSA should disclose how it verified the information that formed the basis for its determinations.

In addition, no effort is made to scrutinize the information provided beyond total figures. For instance, there is no analysis of the percentage of total miles driven daytime versus nighttime by each applicant. Moreover, while crash and violation records are given only for the three years immediately preceding the date of the application, miles driven by each applicant is generally stated as a total figure over the driver's entire driving career, or as a single annual figure that, presumably, is presented as an average to be multiplied by the years of driving over the applicant's career. As a result, no reliable exposure data for the three years covered by the official driving record is available unless the applicants actually drove an equal number of miles each year, an unlikely scenario. FMCSA needs to provide an accurate mileage figure for the three years during which the driving record is applicable. This exposure

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<sup>2</sup>(...continued)

considered by FMCSA and made available to the public. Although crashes in commercial motor vehicles is the criterion used by the agency for granting exemptions, the public still has the right to know if the applicants have on their records crashes in other vehicles during the last three years and the circumstances surrounding those accidents. With respect to the reference to 30 applicants in the "Background" section of the notice, 65 Fed. Reg. 20245, this appears to be a simple typographical error resulting from the failure to correctly update the boilerplate statement included in a prior iteration of this notice.

factor would be helpful in determining the mileage compiled by each applicant in the most recent driving years, as opposed to earlier in their driving careers, and whether individual applicants with crashes and violations on their records have accumulated those based on relatively low exposure (few miles driven each year) or high exposure (many miles driven each year) in the three years immediately preceding their application for exemption.

The FMCSA clearly believes that the number of miles driven by an applicant is an important factor in determining to grant the application for exemption and has reported the mileage driven all applicants. If, however, mileage driven is one of the critical criteria used by the agency to make its determination then not only should the mileage driven be indicated for all applicants, but the agency should require applicants to meet a minimum average annual mileage or total mileage in order to qualify for an exemption. We note in this regard that the mileage driven by the applicants varies widely, from as little as 40,000 and 66,000 total miles over four and three years, for applicants number 38 and 3, respectively, to over three million miles for a number of applicants reporting 20 years or more driving experience. Moreover, although FMCSA has provided some separate information on applicant experience and mileage driving combination tractor-trailers and straight trucks, the agency has not assessed the relative value in terms of driving experience between driving these two types of vehicle configurations.

Further, the FMCSA has not made any attempt to distinguish between the kinds of driving routine the applicants experienced based on the type of driving they have done. In its recently issued proposed rule on driver rest and sleep for safe operations, 65 Fed. Reg. 25540 *et seq.* (May 2, 2000), the agency distinguishes between five types of drivers and driving regimes : long haul; regional; local-split shift; local; and work vehicle. In terms of hours-of-service requirements the agency has identified distinctions that indicate that drivers involved in different types of routines and schedules have different experiences. In this notice, the agency has not indicated whether such different types of driving experience are relevant factors for consideration, whether the different types of driving should be given equal weight and treatment within the context of the exemptions considered in this notice, and what type of driving each applicant is most familiar with. While some breakdown between tractor-trailer combination and straight truck is mentioned, there is no analysis of the driving environment, local streets or rural interstates, that have made up the majority of each applicant's driving experience. The agency simply presents all reported driving experience as equally acceptable even though the waiver program nor research data supports the conclusion that driving a straight truck is equivalent to operating a tractor-trailer combination. Indeed, there is a good deal of research to distinguish the two which has not been addressed by the agency. This disparity raises an issue as to the qualifications of some applicants especially if the agency is using the drivers in the vision waiver program as the basis for this judgment. While Advocates does not believe that data obtained from the now-defunct vision waiver program can be used for this or any other purpose (an issue addressed in greater detail below), it does appear that the drivers in that program had far more driving miles than some of the applicants considered

for exemptions in this notice, and that those miles were driven on long-haul trips in tractor-trailer combinations, not short-haul, day trips exclusively in straight trucks.

The **FMCSA** continues to emphasize, as it should, that most exemption applicants do not have an accident or citation (however, only in a commercial vehicle) in the prior three years. In this notice the agency reports that 13 of the 61 applicants have either accidents or citations, or both, on their driving records within the last three years. The agency does make an attempt in one instance to defend the individual applicant by describing the crash circumstances in terms that minimize the culpability of the applicant. The agency should refrain from engaging in such defenses unless it is prepared to provide the full factual record of the incident. It is inappropriate for **FMCSA** to proffer the applicant's version of events, or to bolster the application in this manner unless the underlying information and documents are made available to the public and are part of the record. The docket does not contain any basis for the information presented regarding the accident history of applicant number 43.<sup>3</sup>

Advocates continues its objection with regard to the **FMCSA's** reliance on personal statements from ophthalmologists or optometrists as to the applicant's ability to safely operate a commercial motor vehicle. While these specialists may be able to provide information regarding visual acuity and other aspects of visual capacity, they are not experts on the driving task and are most probably unfamiliar with the requirements for safe operation of commercial motor vehicles. This is particularly true in light of the fact that the vision standard requires better vision than any of the applicants possess. Moreover, none of these statements indicate that the ophthalmologists or optometrists are familiar with the types of vehicles that are driven by the applicants or the conditions under which their patients actually operate a commercial vehicle including annual driving mileage, amount of time spent loading vehicles and waiting for loads, amount of nighttime driving performed, weather conditions, over-the-road sleeping conditions (cab berths, motels), etc. None of these specific conditions are taken into account in the statements that are provided to the public. As a rule, ophthalmologists or optometrists are not conversant with the operating conditions of trucks, nor are they aware of the conditions and job requirements that drivers must fulfill that may affect their vision. Moreover, the

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<sup>3</sup> It does appear that the **FMCSA** has not engaged in the one-sided efforts to defend the accident records of exemption applicants through the selective recitation of facts gleaned from court and police records that were not made available to the public. In prior notices, the agency repeatedly provided specific information to exculpate or at least ameliorate the liability of exemption applicants involved in crashes or cited for violations but, in other cases, the agency was silent where further information might have assisted the public even in understanding the gravity of a crash or offense. Clearly, in the latter group, the information may have been damaging to the applicants for exemption. None of the information was included in the record or made available to the public. It was obvious that the agency was engaging in the selective rendition of information that would only support the petitions for exemption which the agency had already determined to grant. At least in this one notice, **FMCSA** has not engaged in this practice to the extent evident in prior vision exemption notices. However, agency reliance on facts and information not part of the record is a violation of procedural due process, at odds with fundamental rules of informal rulemaking, and should not be repeated.

ophthalmologists or optometrists conducting the exams may have no prior familiarity with the patient. Indeed, the ophthalmologist quoted in support of the application for driver number 54 appears to have relied in part on the applicant's "13-year career as a commercial driver" when the agency reports that the applicant had been driving straight trucks for 48 years. 65 Fed. Reg. 20250. Thus, it is clear that while such professionals can attest to the snellen level of vision they cannot be relied on for the proposition that the applicant has sufficient vision to perform the task of operating a commercial motor vehicle. The agency, however, uses the statements of the ophthalmologists or optometrists not just to establish the degree of the applicant's visual acuity, but to support the view that the applicant is a safe driver. While the doctors are experts on vision, they are not experts on driving ability and conditions and so their opinions on those issue are not persuasive and should not be relied on by the agency.

In light of the concerns presented about the quality of the information on which the agency has made its "preliminary determinations" to grant the exemptions, as well as the fact that not all the information relied on by the agency has been made available to the public, Advocates requests that the agency provide more information and actual safety analysis of the information regarding petitions for exemption from the federal vision standard.

### **Misplaced Reliance on the Vision Waiver Program**

The FMCSA's Notice of Petitions and Intent to Grant Applications for Exemption, in concluding that the 40 drivers' petitions for exemptions should be granted, relies, in part, on the purported results obtained from the ill conceived and illegal vision waiver program. According to the agency, "[t]he 61 applicants have qualifications similar to those possessed by the drivers in the waiver program." 65 Fed. Reg. 20251. The agency asserts that "[w]e believe that we can properly apply the principle to monocular drivers because the data from the vision waiver program clearly demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively." *Id.* Advocates disagrees with this use of data collected from the now-defunct vision waiver program. The agency's conclusion "**that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.**" *Id.* (emphasis added). No such conclusion, however, is tenable since the vision waiver program did not use a valid research model nor did it produce results that could legitimately be applied to any drivers other than those participating in the original vision waiver program.

Indeed, FMCSA was strongly criticized by a number of independent researchers and research organizations for ignoring basic principles of scientific methodology in its conduct of the vision waiver program. In the wake of the federal court decision that invalidated the vision waiver program, *Advocates for Highway and Auto Safety v. Federal Highway Administration*, 28 F. 3d 1288 (D.C. Cir. 1994), the agency admitted the inadequacy of the study methodology and design. "The FHWA [now FMCSA] recognizes that there were weaknesses in the waiver

study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which<sup>4</sup> to develop new vision and diabetes standards.” 61 Fed. Reg. 13338, 13340 (Mar. 26, 1996).<sup>4</sup> In fact, the data collected in the vision waiver program are worthless as scientific information and conclusions regarding the safety of any other individual driver or group of drivers who did not participate in the vision waiver program are neither credible nor scientifically valid. The agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired drivers who did not participate in that program. This point was made repeatedly to the FHWA in comments to the numerous dockets spawned by the agency’s determination to grant vision waivers. It was made quite clear at the time the agency undertook to grant waivers to drivers in the vision waiver program that the data accumulated in that program could not be used to serve any other purpose. Data collected in that program has been comprehensively repudiated as a basis for drawing any conclusions about non-participant drivers. FMCSA, therefore, is obligated to re-evaluate the merits, and reconsider its preliminary determination to grant, exemption petitions, without any reliance on, or reference to, the experience of the drivers who participated in the vision waiver program.

### **Preliminary Determinations to Grant the Applications for Exemption**

Advocates also objects to FMCSA issuing this notice requesting comments only subsequent to the agency having already made “preliminary” determinations to grant the exemptions. This is not truly a fair and unbiased attempt to solicit comment and views on the application for these exemptions. Rather, like an interim final rule in which the agency has already made its decision, the agency has predetermined its view of the merits prior to soliciting and evaluating public comment on the petitions. This procedure places an undue burden on the public and the raises the evidentiary bar for those opposed to the agency’s “preliminary” determination. Although the agency may claim that the determination is only an initial determination on the merits, it is evident that the agency has decided to grant such petitions and has already determined the outcome without awaiting public comment.

The procedure used by FMCSA is objectionable under the requirements specified in 49 U.S.C. § 31315, and the dictates of the Administrative Procedures Act, 5 U.S.C. § 553. The statutory language governing treatment of exemption applications states that:

*[u]pon receipt* of an exemption request, the Secretary [FMCSA] shall publish in the Federal Register a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request.

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<sup>4</sup> See also *Qualification of Drivers; Vision Deficiencies; Waivers -- Notice of Final Determination and change in research plan*, 59 Fed. Reg. 59386, 59389 (Nov. 17, 1994) (“The agency believes that the observations made by the Advocates, the ATA, the IIHS and others regarding flaws in the current research method have merit”).

49 U.S.C. § 31315(4)(A) (emphasis supplied). There is no mention that any determination or “preliminary” determination should be made by the Secretary or FMCSA after receiving the request and prior to obtaining public comment.<sup>5</sup> The statutory section that immediately follows, which governs the granting of requests for waivers, exemptions, and pilot programs, clearly indicates that the granting of such a request is subsequent to the publication of notice and opportunity for public comment. 31315(4)(B). Thus, as a matter of statutory construction, as well as procedural due process, FHWA should not undertake to make “preliminary” determinations of requests for waivers, exemptions, and pilot programs prior to notifying the public of the details of the request and soliciting and evaluating the public comment.

FMCSA’s predecessor agency, the Office of Motor Carrier Safety (OMCS), argued that a preliminary determination is “analogous to a notice of proposed rulemaking.” 64 Fed. Reg. 66964. See *also* Notice of Final Disposition, DOT Docket No. FHWA-99-5578, 64 Fed. Reg. 51568, 51572 (Sept. 23, 1999). This characterization is inaccurate and not applicable to exemption petitions. The appropriate procedural approach is for FMCSA, after screening applications to ensure that they are complete, to publish such petitions in *the Federal Register* and request public comment without having made a prior determination (whether preliminary or otherwise) as to the merits of the application.<sup>6</sup> The agency is not given the leeway to conduct research, investigate issues and then draft a proposed rule. The statute requires that exemption requests must be published “upon receipt,” before the determination to grant or deny has been made.

The clear meaning of the statute is that all petitions for exemptions are published along with any factual information submitted by the requestor or known to the Secretary. Only after the facts are made known to the public and the public has an opportunity to comment, does the

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<sup>5</sup> Indeed, the words “[u]pon receipt” imply that publication of a notice in the *Federal Register*, accompanied by the mandated opportunity for public comment, should occur promptly after receipt of the exemption application and does not allow for a review of the request on the merits.

<sup>6</sup> Another modal administration within the Department of Transportation provides a shining example of how this procedure can be conducted in a proper and fair manner. The National Highway Traffic Safety Administration (NHTSA) frequently receives petitions requesting exemption, pursuant to 49 U.S.C. § 30118(d), from the requirements for notification and remedy of defects and noncompliance under 49 U.S.C. §§ 30118 & 30120. NHTSA invariably publishes the application for a decision of inconsequential noncompliance and requests public comment without making an initial or preliminary determination of the merits of the application. For example, in a recent application for a decision of inconsequential noncompliance, NHTSA stated that “[t]his notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 **and does not represent any agency decision or other exercise of judgment concerning the merits of the application.**” 64 Fed. Reg. 27032 col. 2 (May 18, 1999) (emphasis supplied). This typifies NHTSA’s treatment of the plethora of exemption applications handled by the agency annually, and provides a fair, unbiased means of making determinations on the merits of each application.

agency then determine whether to grant or deny the petition. That is why the statute has three separate subdivisions governing how the agency is to proceed. The first requires publication “[u]pon receipt,” the second addresses the subsequent granting of a request, and the third requests that are denied. See 49 U.S.C. (B)(4) subsections (A) through (C). Thus, OMCS was entirely incorrect in stating that “[i]t is only when the agency proposes to grant a petition that it publishes the proposal.” 64 Fed. Reg. 5 1572. The FMCSA should not adopt the practice or arguments previously used by OMCS.

Nothing in the statute indicates that the agency, on behalf of the Secretary, is to delay publication of the petition so that the agency has time to determine whether to grant the petition and to fashion arguments in support of it. While the public is entitled to know whether the agency intends to grant or deny a exemption application, that agency should engage in that process only after public comment has been solicited and received, so that the agency can address concerns raised in the public comment with an open mind. Agency personnel in charge of determining whether to grant or deny requests for waivers, exemptions, and pilot programs should not **pre-determine** the outcome before evaluating public comment on the request. The process urged on the agency by Advocates would only require that the agency follow applicable statutory procedures in publishing and reviewing exemption applications, and that the agency abide by legal requirements and concerns for fundamental fairness and due process by refraining from making any judgment on the merits of an exemption petition until after the public has been accorded the required notice and opportunity for comment.

### **Interpretation of Statutory Standard for Granting Exemptions**

In previous notices of final disposition of exemption requests, OMCS granted all the exemption requests that had previously been granted preliminarily. In doing so, OMCS asserted that it was afforded more flexibility to grant exemptions under current law than it had under prior law. 64 Fed. Reg. 66964; **see also** 64 Fed. Reg. 27025 (May 18, 1999); 63 Fed. Reg. 67600 (Dec. 8, 1998). FMCSA appears to have adopted this same line of argument.

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<sup>7</sup> See comments filed by Advocates for Highway and Auto Safety to DOT Docket Nos FHWA-99-5473 (filed June 17, 1999), and FHWA-98-4145 (filed Feb. 8, 1999), respectively.

<sup>8</sup> For example, the FMCSA recently stated that “[a]ccording to the legislative history, the Congress changed the statutory standard to give the agency greater discretion to consider exemptions. The previous standard was judicially construed as requiring an advance determination that absolutely no reduction in safety would result from an exemption. The Congress revised the standard to require that an ‘equivalent’ level of safety be achieved by the exemption, which would allow for more equitable resolution of such matters, while ensuring safety standards are maintained.” Federal Motor Carrier Safety Regulations; Technical Amendments, final rule, 65 Fed. Reg. 25285 (May 1, 2000). As we show in this section of the comments, the agency’s conclusion is spurious and at odds with the express meaning of the statutory language.

Advocates disagrees with the agency's view on this issue and its interpretation of the controlling law.

The current law on exemptions permits granting an exemption if that exemption "would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." 49 U.S.C. § 31315(b)(1). FMCSA, as OMCS and FHWA before it, believes that Congress "changed the statutory standard to give the agency greater discretion to consider exemptions." 64 Fed. Reg. 27025 (1999). Indeed, the agency interprets the term "equivalent" to allow for a "more equitable resolution of such matters." *Id.* **See also** Federal Motor Carrier Safety Regulations; Technical Amendments, final rule, 65 Fed. Reg. 25285 (May 1, 2000). There is no basis in fact or law for this view.

The level of safety required in order for the Secretary of Transportation to grant waivers and exemptions is governed by the statutory language contained in section 4007 of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), Pub. L. 105-178, 112 Stat. 107 (1998) (codified at 49 U.S. C. § 3 1315). The statute requires that the Secretary, prior to issuing waivers and exemptions, determine whether granting a waiver or exemption "is likely to achieve a level of safety **that is equivalent to or greater than, the** level of safety that would have been achieved" absent the waiver or exemption. 49 U.S.C. § 3 1315 (a) & (b)(1) (emphasis added).<sup>9</sup> By its express terms, the law requires the Secretary, based on evidence in the record, to find that any waiver or exemption will not reduce safety, but will achieve a safety result that is equal to or greater than the level of safety that would have been experienced had the waiver or exemption not been granted.

This statutory language of equivalent or greater safety sets a very high standard that is no less stringent than the previous statutory standard which required that waivers be consistent with safety. See 49 U.S.C. § 31136(e) (1997). The standard of safety in section 31515 (a) & (b) is not a lower or more flexible standard than the prior legislative mandate that waivers must be "consistent with . . . the safe operation of commercial motor vehicles."<sup>10</sup> The express wording of section 3 1315 requires a degree or level of safety that is at least equal to the degree or level of safety that existed prior to the granting of the waiver or exemption, **i.e.**, no reduction in safety is countenanced. Any attempt to gloss the standard of safety established in section 3 1315 as a less demanding safety standard than the prior waiver standard is a misinterpretation of the unambiguously clear statutory language.

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<sup>9</sup> In order to grant a waiver the Secretary must also find that it is in the public interest. 49 U.S.C. § 3 1315(a).

<sup>10</sup> Indeed, the language of the prior waiver provision, that a waiver must be "consistent with the public interest and the safe operation of commercial motor vehicles," (49 U.S.C. § 3 1136(e)(1997)), provides a less strict safety standard than the current statutory terminology.

FMCSA appears to endorse the position of OMCS that under the TEA-21 wording exemptions are to be considered “slightly more lenient than the previous law.” 64 Fed. Reg. 66964. OMCS relied on arguments previously made by FHWA which, in turn, cited legislative history addressing section 31315 to assert that “Congress changed the statutory standard to give the agency greater discretion to consider exemptions.” 64 Fed. Reg. 27025. According to the agency’s reasoning, requiring that an “‘equivalent’ level of safety be achieved by the exemption, [ ] would allow for more equitable resolution of such matters, while ensuring safety standards are maintained.” *Id.*, citing H.R. Conf. Rep. No. 105-550, 105<sup>th</sup> Cong. , 2d Sess. 489 (1998). This legislative history asserts that “[t]o deal with the [court’s] decision, this section substitutes the term “equivalent” to describe a reasonable expectation that safety will not be compromised.” *Id.* Neither these statements by FHWA, nor the cited legislative history, support the interpretation that section 31315 reflects a lower or more flexible standard.

The plain meaning of the statutory language is unambiguous. The statutory standard, that an “exemption would likely **achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver,**” requires no elucidation. 31315(b)(1) (emphasis added). The term ‘equivalent’ indicates a condition which is “equal in force, amount, or value” and is “corresponding or virtually identical esp. in effect or function.”<sup>11</sup> Nothing whatever in the use of the word ‘equivalent’ in section 31315, as a substitute for the expression ‘consistent with’ used in the prior statutory provision, can be distorted to connote or imply any increased flexibility, diminution, or other abridgement of the enacted safety standard for granting and administering waivers and exemptions. OMCS’ contention that lowering the standard for granting waivers (exemptions) was “unquestionably the intention of Congress in drafting section 4007,” 64 Fed. Reg. 66964, is a contention that is in conflict with the express language and wording of the statute. Where Congress has addressed the issue in clear and unambiguous terms that ends the inquiry. See ***Chevron U.S.A., Inc., v. N.R.D.C.***, 467 U.S. 837 (1984).

Even if the standard set forth in section 31315 were not clear and unambiguous, reliance on the legislative history in this instance is unavailing. First, the statute makes no reference to providing a more flexible safety standard than had existed in the past. While “legislative history may give meaning to ambiguous statutory provisions, courts have no authority to **enforce** alleged principles gleaned solely from legislative history that has no statutory reference point.” ***International Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO, v. N.L.R.B.***, 814 F.2d 697, 699 (D.C. Cir.1987) (emphasis in original). Second, the cited legislative history relied on by in the past by OMCS and FHWA is taken from the Senate amendment to the original House bill, but was not restated in the Conference substitute adopted with enactment of TEA-21. As such, it is both a matter of pragmatic fact

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<sup>11</sup> See Webster’s New Collegiate Dictionary (1971).

and legal precedent that this statement of one committee in one house of Congress, which was not adopted by the Conference Committee, is not the applicable legislative history accompanying the law.<sup>12</sup> See H.R. Conf. Rep. 105-550 at 490-91. Indeed, the Conference legislative history makes no mention of granting greater discretion to the Secretary to grant waivers and exemptions nor does it reflect any intent to overturn a judicial decision. Therefore, the legislative history relied on by the agency is not authoritative. Moreover, to the extent that the legislative history openly conflicts with and contradicts the will and purpose of Congress as clearly expressed in the statute, the legislative history carries no legal weight or analytic value at all. Finally, according to the legislative history relied on by the FMCSA's predecessor agencies for their reasoning, the term 'equivalent' was selected by Congress for exactly the contrary purpose espoused by the agency, *viz.*, to provide "a reasonable expectation **that safety will not be compromised.**" H.R. Conf. Rep. 105-550 at 489 (emphasis added).<sup>13</sup> Thus, reliance on the appropriate conference report language actually bolsters the clear and unambiguous meaning of the statute that no decrease in safety is contemplated.

### Supreme Court Decision on Vision Waivers

In *Albertsons, Inc. v. Kirkingburg*,<sup>14</sup> No. 98-591 (June 23, 1999), the U.S. Supreme Court specifically rejected vision waivers<sup>14</sup> as a regulatory modification of the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs). "[W]e think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard. . . ." *Albertsons, slip op.* at 15. The Court refuted the view that "the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule [vision standard] had been modified by some different safety standard made applicable by grant of a waiver." *Id.* The Court reached this opinion based on the FHWA's own assertion that it had no facts on which to base a revised visual acuity standard either before **or after** the vision waiver program. "The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards

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<sup>12</sup> It is evident, from an examination of the wording of the Senate amendment when compared with the provision enacted by Congress, that the report language which accompanied the Senate amendment is not applicable to section 3 1315. The wording of the Senate amendment did not extend the scope of an exemption to applications by individuals, but was "limited to a class of persons, vehicles or circumstances." H.R. Conf. Rep. 105-550 at 490. The statute as enacted, however, allows for exemptions to be granted to "a person or a class of persons." 49 U.S.C. § 3 1315(b)(1). Thus, Congress did not adopt the Senate amendment -- and cannot be said to have adopted, by its silence, a gloss contained in legislative report language accompanying an amendment that was not enacted into law.

<sup>13</sup> In fact, the rigorous controls of section 3 1315 are a paradigm shift in the level of procedural adequacy required to be observed by FMCSA in reviewing the legitimacy of and for awarding waivers and exemptions.

<sup>14</sup> The Court was adjudicating the issuance of a waiver pursuant to 49 U.S.C. § 3 1136(e), which has since been transmuted into exemptions under 49 U.S.C. § 31315.

could be lowered consistently with public safety.” *Id.* at 19. According to the Court, “there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter.” *Id.*

In making these statements and reaching its conclusion, the Supreme Court relied heavily on the administrative record compiled and the decision of the Court of Appeals rendered in ***Advocates for Highway Safety v. FHWA***, 28 F.3d 1288 (CA DC 1994). The Supreme Court summed up the agency’s basis for the Vision Waiver Program as follows:

the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program ***was simply an experiment with safety***, however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.

***Albertsons***, *slip op.* at 20 (emphasis added) (citation omitted).

Indeed, although ***the Advocates*** case was not before it, the Supreme Court went out of its way to endorse the decision reached by the Court of Appeals, noting that it was “hardly surprising that . . . the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. ***See Advocates for Highway Safety v. FHWA***, 28 F.3d 1288, 1289 (CA DC 1994).” *Id.*, at note 21. The Court went on to emphasize that the agency has tried to have things both ways.

It has said publicly, based on reviews of the data collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. [Citations omitted]. It has also noted that its medical panel has recommended ‘leaving the visual acuity standard unchanged,’ see 64 Fed. Reg. 16518 (1999) [citations omitted], a recommendation which the FHWA has concluded supports its ‘view that the present standard is reasonable and necessary as a general standard to ensure highway safety.’ 64 Fed. Reg. 16518 (1999).

***Id.***

The Supreme Court concluded that employers do not have the burden of defending their reliance on existing safety standards in the FMCSRs in the face of FHWA waivers. According to the Court, were it otherwise,

[t]he employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government merely had begun an experiment to provide data to consider changing the underlying specifications.

***Id.*** at 22.

It is clear from the Supreme Court's opinion that whatever validity the Vision Waiver Program may have had (and Advocates does not concede that it ever had any scientific validity), was based on the premise of collecting empirical data in order to revise the visual acuity standard. This was the announced purpose of the program and the basis for data collection methodology. The Vision Waiver Program was not conceived or designed to serve any other legitimate scientific purpose. Since the program was subsequently discontinued by court order, and since the agency has acknowledged that the data collected is not sufficient to revise the existing standard, there is no appropriate use to which the data can properly be applied. Advocates does not accept, and neither FHWA nor OMCS has not proven, that data collected about drivers who voluntarily participated in the Vision Waiver Program can be used as the basis for granting exemptions (waivers) to drivers who did not participate in that program. There is no credible basis for making such an extrapolation, particularly when FMCSA claims it is making individual assessments of each applicant. The Supreme Court's discussion in *Albertsons* supports Advocates' view that the agency cannot fairly and credibly rely on data collected in the discredited Vision Waiver Program. The Supreme Court was eloquent in its conclusion that the vision waivers were not a credible substitute for the underlying standard. Since the data collected in the program cannot be used for its intended purpose to rewrite the vision standard, it cannot be used for any other legal, regulatory, or policy purpose including to justify the issuance of additional exemptions from the vision standard.

In previous notices regarding the Vision Waiver Program and vision exemptions, FHWA persistently invoked the Americans with Disabilities Act (ADA) as the rationale for the Vision Waiver Program and the subsequent issuance of vision waivers, now referred to as exemptions. During the Vision Waiver Program litigation in federal court, and even after the Court of Appeals nullified that program, the FHWA steadfastly maintained that the issuance of vision waivers was required in order to comply with the ADA. Advocates has long contended that the ADA does not override existing safety standards contained in the FMCSRs, and that the issuance of waivers is not a viable means of addressing requirements in the vision standard and other medical and physical qualifications for commercial drivers that are purported to be overly stringent. We were gratified to read that OMCS admitted that the ADA "does not apply to the Federal regulations." 64 Fed. Reg. 66965; see *also* 64 Fed. Reg. 66965. Thus, the OMCS at least, agreed that the vision waiver program and other programs of its kind,

including waivers and exemptions, are not statutorily required by the ADA. This admission should lead the agency to reevaluate its position under the lower court decision in *Rauenhorst v. U.S. DOT, FHWA*, 95 F.3d 715 (1996). That decision, which predates the U.S. Supreme Court opinion in *Albertsons*, was predicated on the assumption that the ADA applied to federal safety and medical qualification standards. Since the OMCS admitted that this is not the case, and in light of the Supreme Court decision more narrowly interpreting the ADA, the FMCSA should reassess its policy of grant numerous exemptions to the vision standard.

While it may be technically correct that the decision in *Albertsons* does not “*directly* affect the exemption program,” 64 Fed. Reg. 66965 (emphasis added), it is very clear that from a factual standpoint the Court disdained the agency’s granting waivers in such an arbitrary and capricious manner. Clearly, the Supreme Court did not place much credence in the waivers issued by FHWA since it determined that employers subject to the federal requirements were free to ignore the waivers and did not have to hire drivers who held waivers. The common sense impact of the Court’s decision is equally applicable to exemptions issued by the FMCSA. Advocates has always maintained that the appropriate procedure is to revise the standards based on relevant and sufficient medical and safety information. In *Albertsons*, the Supreme Court unanimously agreed with this position.

In reaching its decision, the Supreme Court discussed the legislative history of the ADA. As Advocates previously contended, the Court concluded that “[w]hen Congress, enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law.” *Albertsons*, *slip op.* at 18. The Court cited the understanding of Congress that “ ‘a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of the legislation.’ ” S. Rep. No. 101-116, pp. 27-28 (1998) [sic].” *Id.* The relevant Congressional committees did request that the Secretary of Transportation conduct a thorough review of knowledge about disabilities and make required changes within 2 years of enactment of the ADA. While FHWA and OMC failed to conduct such a review of the FMCSRs and medical qualifications in general, a review of the vision standard found no empirical evidence on which to base any change in that standard. Thus, the waiver program did not fulfill the Congressional request to make necessary changes to the standards following a review because “the regulations establishing the vision waiver program did not modify the general visual acuity standards.” *Albertsons*, *slip op.* at 18. It cannot be contended that Congress, in enacting the ADA, sought to undermine existing safety standards on an *ad hoc* basis by permitting the employment of persons who do not meet the extant safety requirements mandated by the Department of Transportation.<sup>15</sup> As a result, the Supreme Court concluded that it

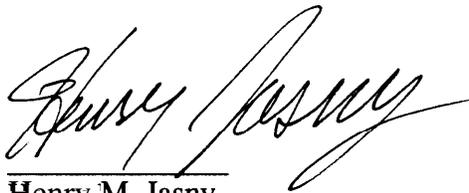
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<sup>15</sup> Vision waivers or exemptions are not appropriate nor required methods of providing a reasonable accommodation for persons who do not meet the requirements of the underlying safety standard.

is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

***Id.*** at 22.

In light of the decision in *Albertsons*, the FMCSA should revisit the position previously taken by both FHWA and OMCS, re-evaluate the significance of the lower court decision in *Rauenhorst*, and reconsider the agency's policy of issuing experimental vision exemptions based on surrogate, non-visual criteria.



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