

ADVOCATES FOR HIGHWAY AND AUTO SAFETY

October 22, 2001

Docket No. FMCSA-98-4334 and 98-3637
Dockets Management Facility
Room PL-401
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Qualification of Drivers; Exemption Applications; Vision 66 FR 48504, September 20, 2001

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 renewal of 13 exemptions from the federal vision requirement, 49 Code of Federal Regulations 391.41(b)(10).

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 renewed the exemptions, effective September 20, 2001, without an opportunity for public input prior to the decision to renew. Renewals of exemptions are subject to the same notice and comment process as required for the initial determination to grant the initial exemption. According to the statute, the agency is required to provide public notice and an opportunity for comment prior to making its determination to grant an exemption.

(4) Notice and comment.--

(A) Upon receipt of a request.—Upon receipt of an exemption request, the Secretary shall publish in the Federal Register a notice explaining the request that has been filed and shall 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(4)(A). In this and other instances of drivers seeking a second two-year exemption from the federal vision requirement, the agency only provides an opportunity for public comment after the determination to grant the exemption has already been granted and made effective by the agency.

The FMCSA notice of renewal of these exemptions contends that the statute is “satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequently [sic] comments submitted by interested parties.” 66 FR 17994, 17995 (April 4, 2001). This response does not

overcome the clear and express intent of Congress that the notice be published upon receipt of a request for an exemption, which includes a request for a subsequent two-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. This is the appropriate construction of the statute and the agency statement that it prefers to proceed in a different manner does not explain its failure to abide by the statutorily mandated process.

FMCSA characterizes the request for an additional two-year exemption as a “renewal” of an existing exemption. The treatment of the application for a renewed exemption indicates that the agency does not believe that it must afford the public the same due process that accompany the application for an initial two-year exemption.¹ The agency does not provide prior notice and opportunity for public comment on applications for renewals of exemptions and, as is discussed below, the agency does not disclose the same type of driver record information that is part of the initial exemption application process. This dependence on nomenclature is misplaced because Congress made no such distinction in the statute. The statutory scheme requires a full new evaluation of the basis for granting a subsequent exemption even if part of the evaluation is background information from the previous determination. Thus, driver record information reflecting the applicants’ driving experience during the initial two-year exemption period must be disclosed to the public. Moreover, the agency cannot make the safety determination for second and subsequent two-year exemption periods without providing the public with the appropriate prior notice and opportunity for comment. FMCSA, however, has truncated the statutorily required evaluation, both substantively and procedurally, into a *pro forma* rubber stamp approval conducted by the agency without prior notice and comment.

Furthermore, as mentioned above, FMCSA’s reliance on the term “renewal” 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. A request for a “renewal” is simply an application for a two-year exemption and the same process obtains for a second or subsequent exemption request under 31315(4)(A) as for the first such application.

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 Administrative Procedure Act

¹FMCSA, and its predecessor agency, the Office of Motor Carrier Safety within the Federal Highway Administration, 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 “preliminary” 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 “renewals” of vision exemptions.

(APA), 5 U.S.C. § 553 *et seq.* The agency is not at liberty to abrogate public notice and comment due process simply because it is convenient. The agency propounds no legitimate argument to support its short-circuiting of APA required procedural due process.

Furthermore, FMCSA has decided that updated factual information regarding the driving record of the applicant do not have to be disclosed to the public for second (“renewal”) exemption requests. The notice of renewal does not provide any information regarding the applicant’s driving history during the two-year exemption period, precisely the type of information that the agency relies on and discloses prior to granting the initial two-year exemption to each applicant. The summary information provided regarding applications for a second two-year exemption does not afford the public an “opportunity to inspect the safety analysis and any other relevant information known to the Secretary.” *Id.* The agency notice provides only a summary statement that the applicants have provided sufficient information to qualify for a second exemption, but does not share that information in the public notice. No factual recitation is provided regarding the driving experience, crash and citation record of the applicants during the two-year exemption period -- records that are directly relevant to their application for a second two-year exemption. This same information was viewed by the agency as important to its safety determination and was disclosed to the public when the agency was considering the applications with respect to the initial two-year exemption. Although the agency makes specific reference to the fact that each applicants’ vision impairment remains stable, the agency summarily concludes that “a 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.”² 66 FR 48505.³ 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, the agency is required to provide the public with the specific information on which its safety determination is based. On the basis of this secret information, however, FMCSA unilaterally concludes that each applicant should be granted a second two-year exemption. *Id.* As a result, the public cannot form its own views, raise particular questions or provide informed comment to the agency.

The FMCSA has also not directly responded to this argument made by Advocates in this and in previous exemption renewal dockets. The agency inaccurately asserts in this notice that it has

²Advocates is unaware of any “standard” for vision exemptions. Rather, the exemptions are exceptions to the vision standard based on surrogate criteria for visual capability that are used in lieu of the direct measures of visual acuity, perception and field-of-view that form the basis of the vision standard in 49 C.F.R. 391.41(b)(10).

³The identical wording is used by the agency in all renewal notices. *See, e.g.*, 66 FR 41656, 41657 (Aug. 8, 2001).

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previously addressed Advocates' contention that the agency has failed to disclose material information regarding the driving records of the applicants. *Id.*, citing, 66 FR 17994. 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 safety determination. The agency claimed that its evaluation of the two-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 requirements for the granting of an exemption to the vision standard. But the agency does not engage in any explanation of why the public must rely on the agency's conclusion without having the underlying facts and pertinent driving record of each applicant disclosed.

For these reasons Advocates requests that the FMCSA reconsider its treatment of applications for second vision exemptions.

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