



ADVOCATES FOR HIGHWAY AND AUTO SAFETY

PETITION FOR RECONSIDERATION

FILED WITH THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

REGARDING THE ORDER ISSUED ON

MEDICAL CERTIFICATION REQUIREMENTS AS PART OF THE COMMERCIAL DRIVER LICENSE

49 CFR PARTS 383, 384, 390, AND 391

73 Federal Register 73096 *et seq.*, December 1, 2008

This is a petition for reconsideration of the final rule promulgated by the Federal Motor Carrier Safety Administration (FMCSA, the agency) establishing the requirements for the integration or merger of the federal medical certification requirements for interstate drivers of commercial motor vehicles (CMVs) holding commercial driver licenses (CDLs), published at 73 FR 73096 *et seq.* (Dec. 1, 2008) (“2008 final rule, final rule”). This petition is filed by Advocates for Highway and Auto Safety (Advocates) pursuant to 49 CFR Part 389.35 (Oct. 1, 2004). Petitioner delineates below the numerous reasons why major aspects of the 2008 final rule are deleterious to public safety, are not practicable, are unreasonable, contravene the agency’s own findings of record on the need to abate the issuance of invalid federal medical certificates, and are not in the public interest. Petitioner requests that the Administrator stay the effectiveness of the final rule pending an agency determination of this petition.

I. Introduction.

The rulemaking proceeding to adopt a regulation merging the medical certificate with the CDL suffers from major defects in the approach taken by the FMCSA to address the serious problem of interstate CDL holders operating CMVs who may be medically unqualified, and who operate CMVs with invalid, including fraudulently manipulated, federal medical certificates. The 2008 final rule fails to ensure that a high level of motor carrier safety will be secured by the requirements and procedures of the new regulation. The final rule does not appropriately counter the potential for operators to submit medical certificates to state driver licensing agencies (SDLAs) that are invalid for a variety of reasons, including, but not limited to, fraudulently manipulated or created medical certificates. The final rule also fails to adopt additional enforcement mechanisms to act

as a deterrent to interstate CDL holders from fraudulently securing or manipulating medical certificates.

In establishing the FMCSA as a safety agency for motor carrier operations,¹ Congress made it the fundamental goal of this new agency that it 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.” 49 U.S.C. § 113(b) (2004) (emphasis added). Safety is the paramount mission of the FMCSA. While the agency has inherited pre-existing requirements that obligate the agency also to consider the costs and benefits that its regulations may impose on the trucking industry and the public in the course of rulemaking, the touchstone of the agency mission remains and must be public safety and the safety of the truck drivers it regulates.

Section 215 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA), 49 U.S.C. § 31315 note, provides that “[t]he Secretary shall initiate a rulemaking to provide for a Federal medical certificate to be made a part of commercial driver's licenses.” Since FMCSA has asserted in the final rule that the new regulation cannot prevent fraud 73 FR 73111 (also *see*, below, at 5-6), the new regulation violates the purposes of the provision to merge the CDL with the medical certificate because administrative integration alone under the provision of the final rule does not ensure that drivers cannot continue to submit fraudulent medical certificates. This conclusion is buttressed by Congressional findings in a report issued by the House Committee on Transportation and Infrastructure that medical certificate falsification is widespread and that there is no fail-safe method in current FMCSA regulation to ensure that medical certificates accurately reflect medical examiner findings contained in the examiner’s full medical examination report (“long form”): “[W]e concluded that opportunity exists for a commercial driver to fabricate or adulterate a certificate with little risk of detection.”² This conclusion is supported by the findings of the CDL Task Force convened at the behest of Congress to improve the overall CDL process.³

¹ Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, Title I, § 106 (Dec. 9, 1999).

² *Challenges in Verifying the Authenticity of Commercial Drivers’ Medical Certificates*, prepared by Oversight and Investigations Majority staff for the Honorable James L. Oberstar, Chairman, House Committee on Transportation and Infrastructure, July 24, 2008 (House T&I Report), Executive Summary.

³ The CDL Task Force draft report contained the following consensus view of the members:
The proposed system would still be vulnerable to driver fraud. For example: It would not prevent drivers from fraudulently producing medical certificates and giving them to the SDLAs; would not address drivers who fail a physical examination before expiration of their certificate; and would not address detecting medical examiner shopping. Drivers may have an incentive to create false certificates, alter their medical certificates, or shop for an examiner to certify them.

Report to Congress on the Planned Remedies of the Vulnerabilities in the Commercial Driver’s License Program, Facilitator Draft 1.2, July 9, 2007, Attachment B. The draft report from the Task Force contained this recommendation, but it is not known whether it is still in the present version because FMCSA has not released the report. The report was statutorily required to be submitted to Congress in August 2007

II. FMCSA Has Documented the Serious Problem of Driver-Submitted Invalid Medical Certificates and of Medically Unqualified CMV Drivers.

FMCSA has compiled a long, detailed rulemaking record that acknowledges the serious, pervasive problem of the use of invalid, including fraudulent, medical certificates by interstate CMV drivers. In the Proposed Rule Regulatory Evaluation (PRE) for the proposed rule published in 2006⁴ (71 FR 66723, Nov. 16, 2006), FMCSA stated that “some physically unqualified drivers are able to obtain and maintain CDLs. It is difficult to detect such medically uncertified drivers during roadside inspections and traffic enforcement stops.” PRE at 13. Moreover,

[V]ery few States review an applicant’s long form prior to issuing or renewing an interstate CDL. A number of States require the driver to provide a copy of the medical examiner’s certificate for verification of physical qualification. However, most States do not independently verify that an interstate CDL applicant is medically certified to operate a CMV – they merely require an applicant to self-certify by signing a form stating that he or she meets the [49 CFR] Part 391 qualification standards. Since these States demand no proof of physical qualification, it is easy for CDL applicants to obtain a CDL without being medically examined, or even if they have been examined and found not to be physically qualified.

Consequently, an unknown number of drivers who are not physically qualified may obtain a CDL in violation of the FMCSRs [Federal Motor Carrier Safety Regulations]. This violation could be either deliberate or unknowing on the part of the driver, the medical examiner or the State Driver Licensing Agency (SDLA). Some drivers falsify the medical examiner’s certificate to operate a CMV. Other drivers unwittingly violate the FMCSRs, either because they or their medical examiner is unfamiliar with the medical requirements of the FMCSRs. Some certificates may even be obtained from unscrupulous medical examiners who certify for a fee. Regardless of the motivation, the end result is the same: drivers who are not medically qualified succeed in obtaining CDLs and operating CMVs.

PRE at 13-14.

It is apparent on its face that these introductory observations on the commercial driver licensing process in the PRE are directly linked to the agency’s own perceived responsibilities to abate the dissemination and use of invalid, including fraudulent, certificates by ensuring that an administrative process is adopted as part of a federal

pursuant to Sec. 4135 of the Safe, Accountable, Efficient, Flexible Transportation Equity Act for the Twenty-First Century: A Legacy for Users (Pub. L. 109-59 (Aug. 10, 2005)).

⁴ Proposed Rule Regulatory Evaluation: Physical Qualification Requirements for the Commercial Drivers’ License Process, Analysis Division, Federal Motor Carrier Safety Administration, Oct. 10, 2006 (PRE).

regulation merging the medical certification with the CDL. Following the quoted narrative in the foregoing paragraph, FMCSA in the immediately ensuing paragraph articulated its legislated responsibility to address the issues impacting such a merger under its enabling legislation:

On December 9, 1999, Congress enacted section 215 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA). (Public Law No. 106-159, 113 Stat. 1748, set as a note to 49 U.S.C. § 31305) requiring the Secretary of Transportation Secretary to initiate a rulemaking to make medical certification part of the CDL. This rulemaking would implement changes which would bring FMCSA regulations into compliance with this Congressional mandate.

PRE at 14.

This agency recognition that invalid medical certificates and medically unqualified CMV drivers pose a threat to highway and motor carrier safety was buttressed by attendant statements by FMCSA in the PRE⁵:

FMCSA conducted an investigation of medical certification fraud in Rhode Island in 1994. * * * The investigators found that up to 30 percent of drivers employed by these carriers were never examined by the medical examiner listed on their medical certificate.

* * * * *

The Rhode Island study indicates that medical certificate falsification may be a much more widespread problem than the pilot State studies indicated, and may be an indication that there are far more physically unqualified drivers holding CDLs than those studies estimate.

* * * * *

[T]he Indiana CDL program manager has estimated that errors are made during approximately 28 percent of medical examinations. * * * [T]he States has uncovered instances where required medical tests have been falsified by drivers. Given this evidence, it seems likely that a substantial number of CDL holders nationwide are physically unqualified despite the fact that they have medical examiner's certificates.

* * * * *

Data for calendar years 2002 and 2003 demonstrate that 7.1 percent of the 1.9 million level 1 inspections conducted per year resulted in a medical examiner's certificate violation. (Footnote omitted).

⁵ Against these findings of specific studies and general estimates by the agency of the size of the problem of invalid medical certificates and medically unqualified CMV drivers, FMCSA asserts in the final rule that "there are no studies to provide data on the number of medically unqualified drivers than may be currently operating CMVs in interstate commerce . . ." To the contrary, the agency has conducted state studies and made generalizations about the proportions of the problem in the PRE to use the merger of the CDL-medical certificate as one means of abating the production and submission of invalid medical certificates and reducing the number of medically unqualified CMV drivers.

PRE at 37-38.

FMCSA concluded that these findings formed the basis for the agency's estimate that "physically unqualified drivers are 10 percent more likely to be involved in an accident than their healthy counterparts, which is believed to be a conservative estimate." RE at 40. The agency also cites a report by the American Transportation Research Institute, *Predicting Truck Crash Involvement* (n.d.), that a driver's not having a valid medical certificate increased that driver's likelihood of crash involvement by 18 percent. *Id.* These considerations led FMCSA to estimate that an annual average of 334,629 crashes by CMV drivers were directly related to these drivers failing to be medically qualified at a average cost of \$69,439 per CMV crash, including as much as \$3,569,413 per combination truck crash.

Further, FMCSA asserts that the Motor Carrier Management Information System (MCMIS) likely underestimates "the true number of physically unqualified drivers, or the number of drivers who are falsifying documents." PRE at 38. This observation casts doubt on the proportions of the problem of invalid medical certificates and medically unqualified interstate CMV drivers that the agency states in the final rule. 73 FR 73098. Nevertheless, even these figures in the aggregate comprise inspection and compliance review data on 197,882 interstate CMV drivers, of whom 17.4 percent, or approximately one in six, were found to have violated the medical certificate and physical qualification requirements.⁶ *Id.*

The final rule, however, fails to address the widespread problem of invalid medical certificates and thereby fails to fulfill both the agency's obligation under Sec. 215 of MCSIA. The agency states in the preamble that:

Neither this rule nor the forthcoming NRCME [National Registry of Certified Medical Examiners] rulemaking proposal are intended to address fraud perpetuated by drivers regarding their medical certification. While we acknowledge that driver fraud is an important issue, these comments are outside the scope of this rulemaking.

Id. at 73111.

⁶ However, even these figures may significantly underestimate the problem of drivers operating CMVs in interstate commerce with serious medical conditions. A recent Government Accountability Office (GAO) report, *Commercial Drivers: Certification Process for Drivers with Serious Medical Conditions*, GAO-08-826, June 2008 (GAO Study), found that:

commercial drivers with serious medical conditions can still meet DOT medical fitness requirements to safely operate a commercial vehicle and thus hold CDLs. Further, our report acknowledged that because medical determinations rely in large part on subjective factors that are not captured in databases, it is impossible to determine from data mining and matching the extent to which commercial drivers have a medical condition that precludes them from safely driving a commercial vehicle and therefore if the certification process is effective.

GAO Study at 14.

Accordingly, the agency has no countermeasures in the final rule to ensure that medical certificates integrated with CDLs are not fraudulent and invalid. The final rule issued pursuant to the rulemaking directed by Congress does not fulfill the statutory purpose of Sec. 215 of MCSIA. In turn, the failure to ensure that medical certificates are not fraudulent violates the agency's responsibilities under its enabling legislation to "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." 49 U.S.C. § 113(b) (2004). Although FMCSA alludes in the final rule to the potential for a future, unspecified rulemaking action to address the problem of medically unqualified CMV drivers and of invalid medical certificates, 73 FR 7311, this averment does not correct the deficiencies in the Final Rule that render it likely that invalid medical certificates, including fraudulently manipulated certificates, will continue to be submitted both to SDLAs and to employing motor carriers. In fact, as will be shown below in this Petition in detail, the agency in the Final Rule openly demurs on adopting the procedures and requirements that could abate the use of invalid, including fraudulent, medical certificates. This agency demurrals also directly contradicts the findings and recommendations of the House T&I Report. Consequently, the final rule subverts the purposes of Sec. 215 of MCSAI and fails to fulfill the purposes of the provision.

III. Main Defects of the Final Rule.

A. The Regulation Does not Prevent Driver Creation and Submission of Fraudulent Medical Certificates to State Driver Licensing Agencies (SDLAs).

The agency asserts without support in the final rule that:

The final rule will also serve as a deterrent to drivers submitting falsified medical certificates because FMCSA and State enforcement personnel will now have access, via CDLIS [Commercial Driver Licensing Information System], to information about the medical certificate and the identity of the medical examiner who performed the examination.

Id. at 73098.

This assertion implies that arguments from commenters submitting comments on the notice of proposed rulemaking that the proposed regulation does nothing to deter fraud are mistaken or unwarranted: "Twenty-six commenters, 12 of whom were individuals * * * maintained that this regulation does nothing to address driver fraud and abuse of the medical certification process." *Id.* at 73099. There was a total of 73 comments filed with the docket: more than one-third of the comments filed stated that the rule did not deter medical certificate fraud. *Id.*

FMCSA in the final rule nevertheless rejects specific recommendations from the states, CVSA, Advocates, the House T&I Report, and NTSB to take several steps to deter and detect fraudulent medical certificates, while ignoring altogether the findings and recommendations of the House T&I Committee Report. The agency near the end of the long preamble section of the final rule describing and responding to specific docket comments, openly contradicts its earlier statement and implication that the CDL-medical certificate merger effected by the final rule will deter fraud:

Neither this rule nor the forthcoming NRCME [National Registry Certified Medical Examiners] rulemaking proposal are intended to address fraud perpetuated [*sic*: ‘perpetrated’] by drivers regarding their medical certification. While we acknowledge that driver fraud is an important issue, these comments are outside the scope of this rulemaking.

Id. at 73111.

This stance that the final rule achieves only formal integration of the CDL with the medical certification *via* CDLIS without specific regard to deterring and detecting fraud, is confirmed by the agency in another location in the preamble of the final rule: “This rulemaking is merely putting into place recordkeeping procedures so that licensing and enforcement personnel can detect drivers who are operating CMV[s] in interstate commerce without the proper medical certificate; and, who are required to have it.” *Id.* at 73104. This statement alone clearly acknowledges that the final rule does not stop drivers from continuing to submit invalid, including fraudulent, medical certificates to SDLAs.

Statements in different locations of the preamble of the final rule that the new regulation both can and cannot deter commercial driver medical certificate fraud are irreconcilable. Given FMCSA’s prior finding from its investigations in several states that up to 30 percent of medical certificates were invalid,⁷ it is clear that the final rule has no requirements and procedures ensuring the prevention of medical certificate fraud and the deterrence of interstate CDL holders incline to submit fraudulent or invalid medical certificates.

B. The Final Rule Does Not Prohibit the Duplication and Use of Different Medical Certificate Forms That Can Be Used to Commit Fraud.

FMCSA in the final rule fails to stop the improper use of non-standardized medical certificates, including the duplication and fraudulent use of the form publicly available from the agency. “Although FMCSA offers a prototype of a medical certificate on its website, there is no requirement that it be used. This can result in a multitude of

⁷ *See, supra*, at 3.

different certificate designs making identification of fraudulent certificates more difficult.”⁸

An absence of controls over the medical certificate itself make it relatively easy for a motivated commercial driver to circumvent the physical examination requirement. The driver can download the template off of FMCSA’s website, enter the name and license number of a medical examiner – either fictional or real – and forge a signature. In most cases, the certificates that were determined to be invalid in our survey or where we found that the examiner did not exist looked no more suspicious than the ones that were confirmed to be valid. The Federal Aviation Administration (FAA) makes it very difficult for pilots to fabricate a medical certificate by strictly controlling access to the physical certificates. The only individuals who have access to the certificates are Aviation Medical Examiners, who are trained, tested, and certified by FAA.⁹

Although the House T&I Report specifically recommended to FMCSA that it “[d]evelop a standard medical certificate template that is distinctly different in design and appearance than the current template available on its website[,]” and that “FMCSA should not put this template in the public domain[,]”¹⁰ the agency has ignored this Congressional advice in the final rule.

C. Driver-Submitted Medical Certificates Cannot Deter Fraud.

“Few incentives exist to obtain a legitimate medical certificate. Because so few attempts are made to authenticate a certificate, there is little risk that a driver will be caught if he or she forges or adulterates a certificate.”¹¹

Interstate CDL drivers may submit either the original or a copy of the medical certificate to the SDLA. *Id.* at 73096. This provides an obvious opportunity for commercial drivers to submit either an alleged original and/or a facsimile copy of the medical certificate issued by the medical examiner that has been fraudulently manipulated to represent a driver as medically qualified. As determined in the House T&I Report, “the certificates that were determined to be invalid in our survey or where we found that the examiner did not exist looked no more suspicious than the ones that were confirmed to be valid.”¹²

⁸ House T&I Report, at 8.

⁹ *Id.*

¹⁰ *Id.* at 9.

¹¹ *Id.* at 8.

¹² *Id.*

Since the agency has not prevented the use of non-standardized medical certificate forms, alleged original medical certificates may be submitted. Similarly, allowing copies, such as photostats, to be submitted provides another obvious avenue for fraudulently altering driver-submitted medical certificates. Since a commercial driver is strongly motivated to continue driving, relying on the driver to submit the medical certificate to SDLAs inherently promotes fraud. Permitting drivers to transmit medical certificates to SDLAs is a pivotal defect of the final rule.

D. The Final Rule Does not Require Submission of the Full Medical Examination Report to the SDLA.

The final rule fails to require the submission of the long form from the medical examiner to the SDLA so that licensing authorities can compare the specific findings in the “long form” with the medical certificate submitted by the driver to the SDLA. This failure by FMCSA to require the states to receive the “long form” and the consequent failure by the agency to require that SDLAs compare the “long form” to the short form essentially undermines the potential of the final rule to dramatically reduce medical certificate fraud and the safety threat posed by CMV drivers operating in interstate commerce without appropriate physical qualification and valid medical certificates. In its comments on the proposed rule, Advocates emphasized that “[t]he agency found that only a few states review an applicant’s medical examination report (long form) prior to issuing or reviewing an interstate CDL.”¹³

Advocates supports mandatory submission of the long form by CDL applicants to each state as a crucial and highly desirable requirement of the final regulation. Only this action will ensure that both the states and FMCSA can detect and dramatically reduce the use of invalid medical certificates.¹⁴

Advocates also asked the agency to institute specific oversight mechanisms to ensure that the findings of the “long form” were compared with the medical certificate submitted by a CMV driver to a SDLA:

[T]here is no visible commitment by FMCSA in this rulemaking proposal to perform a separate, vigorous oversight role both for evaluating how well the states perform in matching proffered medical certificates against ‘long forms’ and for conducting its own, separate agency investigations to ensure that invalid medical certificates do not continue to be common and widespread. * * * [T]he agency has enshrined a new recordation and data access system in this proposed rule

¹³ Comments of Advocates for Highway and Auto Safety on Commercial Driver Medical Requirements as Part of the Commercial Driver License, Notice of Proposed Rulemaking, 71 FR 66723, November 16, 2006, submitted to Docket No. FMCSA-1997-2210 (FMCSA-1997-2210-0183) on February 15, 2007, at 5 (Advocates’ Comments), at 3. (Footnote omitted.)

¹⁴ *Id.* at 5.

without also backing up this proposal with mandates to the states to match medical certificates against the ‘long forms’ and without making a commitment that FMCSA will undertake its own, intensified oversight role to ensure substantial reductions in the use of invalid medical certificates.¹⁵

None of these crucial recommendations for dramatically reducing the submission of invalid, including fraudulent, medical certificates was adopted in the final rule. As a result, the agency has issued a weak, ineffectual regulation that cannot ensure a dramatic reduction in the submission of invalid, including fraudulent, medical certificates to SDLAs.

E. The Final Rule Allows the Original Medical Certificate to Be Expunged from SDLA Records after Three Years.

The National Transportation Safety Board (NTSB) and the American College of Occupational and Environmental Medicine (ACOEM) indicated in their docket comments that the medical certificate submitted by a driver to the SDLA should be retained for at least 10 years in order to review the legitimacy of prior driver medical certificates and medical examination history. NTSB recommends that the medical certificates should be retained indefinitely by SDLAs. *Id.* at 73101. However, the agency in the final rule requires retention of the medical certificate for only 3 years. *Id.* This allows a medical certificate to be removed from SDLA records after only 3 years. This essentially blunts any potential to detect driver medical certificate fraud committed prior to the expiration of the 3-year medical certificate retention limit.

As pointed out in the ensuring subsection of these comments, the final rule also does not require SDLAs to receive and archive the medical examiner’s medical examination report (“long form”).

NTSB, ACOEM, and Advocates recommended that the actual “long form” (the medical examiner’s medical examination report) should be required to be submitted to each SDLA so that, among other purposes, the contents of the most recent report can be matched against the medical certificate submitted by the driver to the SDLA. Some states also support this practice and have indicated that this is crucial for deterring and detecting fraud. *Id.* FMCSA cites this argument, does not respond to it, and does not require that the medical examination report be submitted to the SDLA to provide corroboration of the driver-submitted medical certificate.

This recommendation was also a part of the draft report of the CDL Task Force as centrally important to deterring and detecting fraud.¹⁶ *See*, the detailed FMCSA discussion of the Task Force recommendation. 73 FR 73108. However, FMCSA in

¹⁵ *Id.* at 6.

¹⁶ *See, supra*, at 3.

response asserted that this policy recommendation was “outside the scope of this rulemaking.” *Id.*

Failure to require submission of the long form to SDLAs means that even if a licensing authority were to maintain records of driver-submitted medical certificates for more than 3 years, comparison with the contents and findings of the full medical examination reports may be impossible because patient records may no longer be obtainable from health care providers who conducted the physical examinations. It is clear that SDLAs need to have both the long forms and the short forms, and to retain both for at least a decade, in order to detect fraud in previously submitted medical certificates.

F. The Regulation Continues to Allow CDL Drivers to Self-Certify whether They Are Subject to the Physical Qualification Requirements for Interstate Commerce.

Current CDL regulations require each CDL driver to self-certify that he or she meets the physical qualification requirements of 49 CFR Pt. 391 and, hence, is required to have a current medical certificate, or that the driver is not subject to the physical qualification requirements. As Advocates pointed out in its comments on the proposed rule:

Most states do not independently verify that an interstate CDL applicant is medically qualified to operate a CMV. These states simply ask an applicant to sign a self-certification attesting to their medical qualification, an open invitation for some applicants to supply fraudulent responses. ‘Since these States demand no proof of physical examination, it is easy for CDL applicants to obtain a CDL without being medically examined, or even if they have been examined and found not be medically qualified’.¹⁷

This provides several opportunities for fraud by a driver, including falsely asserting that he or she meets the physical qualification requirements while submitting a fraudulent medical certificate. Another way for the driver to evade the physical qualification requirements is to falsely claim that he or she operates wholly intrastate and therefore is not subject to federal physical qualification and medical certificate requirements; however that driver, in fact, operates interstate on the basis of either operating across state lines or operating intrastate as part of a chain of commerce that originates or terminates outside the state in which the driver is registered for intrastate-only commercial motor vehicle (CMV) operation. Fraudulent self-certification of intrastate-only operation is available to both CDL and non-CDL CMV drivers who otherwise would be subject to federal physical qualification and medical certificate requirements. 49 CFR § 395.5; also *see* 73 FR 73096.

¹⁷ Advocates comments, at 3. (Footnote omitted.) This quotation from Advocates’ comments contains a FMCSA quotation is taken from its PRE, at 13.

G. The Final Rule Increases the Risk of Unsafe CMV Drivers by Allowing Them to Operate for up to Sixty Days without a Valid Medical Certificate.

FMCSA asserts that existing regulation requires that a state must suspend, cancel, revoke, or otherwise disqualify a driver's CDL for submitting a fraudulent medical certificate. *Id.* at 73107; also *see* 49 CFR § 383.71(a). However, this regulation allows up to 60 days before a SDLA must downgrade a CDL holder's license because of the lack of a valid medical certificate, a time period when a medically unqualified commercial driver can pose an increased crash risk. Although several commenters, including specific motor carriers, Advocates, ACOEM, and a state department of motor vehicles that 60 days was too long to allow a driver to operate CMVs without downgrading the driver's CDL because of the associated safety risk, FMCSA nevertheless adopted its proposal that a SDLA does not have to downgrade a CDL for up to 60 days after a determination that the driver does not have a valid medical certificate. 73 FR 73108.

FMCSA rejects the arguments of SDLAs, UniGroup (parent company of United Van Lines and Mayflower Transit), a practicing medical examiner, Advocates, NTSB, Schneider National (a freight motor carrier), ACOEM, and First Advantage (a transportation risk analysis company) that 60 days is too long to allow a medically unqualified commercial driver to continue to operate because this poses an increased threat to highway and motor carrier safety. *Id.* at 73106. This rejection of reducing the safety risk associated with a driver operating a CMV for up to 2 months without a valid medical certificate fails to uphold the agency's paramount mission of advancing safety to the highest feasible degree under its enabling legislation.

H. The Final Rule Does not Require That a Driver Found without a Valid Medical Certification be immediately Placed out of Service.

Simply being found without a medical certificate is currently not grounds for an out of service order to the driver. "[I]nspectors have limited tools to punish drivers for not maintaining a valid medical certificate. Not having a certificate; or possessing an expired or false certificate are not out-of-service violations."¹⁸

Even if an inspector is able to confirm that a medical certificate is expired, forged, or that the driver simply does not have a certificate, it is not an out-of-service offense. The inspector can cite this failure in the inspection report, but cannot detain the driver, unless he or she obviously poses a safety threat. FMCSA says that inspectors will cite medical car violations in inspection reports, which it uses to identify high-risk carriers; however, FMCSA conducts so few compliance reviews each year that higher priority violations – such as accidents or equipment violations – outweigh risk associated with medical card violations in targeting companies for reviews.¹⁹

¹⁸ House T&I Report, Executive Summary.

¹⁹ *Id.* at 8-9.

FMCSA also rejects the Commercial Vehicle Safety Alliance (CVSA) recommendation that CDL drivers found operating in interstate commerce with a medical certification status of “not-certified” be immediately placed out of service. 73 FR 73109. FMCSA asserts that this is not necessary in light of existing civil and criminal penalties, and the potential for a driver to be ordered out of service as an imminent hazard if there is a substantial likelihood of serious injury or death. *Id.* However, the agency provides no data or other information on such penalties and imminent hazard declarations that demonstrate the extent to which interstate CMV drivers found without valid medical certificates are stopped from driving in order to abate the safety risk of allowing them to continue to operate.

If FMCSA had promulgated an effective final rule that ensured proper fail-safe procedures and oversight mechanisms to guard against the submission of invalid or fraudulent medical certificates, reliance upon enforcement authorities to detect medically unqualified commercial drivers would have been dramatically reduced.

I. The Final Rule Fails to Require That a Driver Be Disqualified if the Driver Operates a CMV in Interstate Commerce without the Required Medical Certificate.

Several states, Advocates, and CVSA urged FMCSA to add operation of a CMV in interstate commerce without a medical certificate a disqualifying violation in 49 CFR § 383.51. However, FMCSA rejects this, asserting that the agency does not have statutory authority to include this offense as a serious traffic violation. 73 FR 73109.

IV. The Final Rule Should Be Reconsidered Given the Inadequacy of Its Provisions to Deter and Abate Submission of Invalid Medical Certificates to the States.

In its comments responding to the proposed rule of November 16, 2007, Advocates stated that:

The various procedures proposed by FMCSA in this rulemaking proposal for integrating the medical certificate with the CDL cannot provide, in themselves, corroboration of whether any given medical certificate is actually valid and has not been forged, is outdated, was mistakenly issued by the medical examiner, or is contradicted by the findings contained in the medical examiner’s report (the ‘long form’). Although FMCSA has the discretion to expand the reach of this regulation to ensure that medical certificates presented to the states are accurate and valid, it has failed to exercise that authority. The agency continues to fail to respond to open recommendations from NTSB issued as long ago as 1999 urging FMCSA to ensure that there is a system of review and validation that corroborates information on the medical certificate attested by the applicant commercial driver and the medical ‘long form’. In fact, the persistent failure of FMCSA to respond affirmatively to this major recommendation, including its failure in this

rulemaking proposal, has resulted in NTSB listing its recommendation that medically unqualified commercial drivers be prevented from driving large trucks and buses in its 2006 Most Wanted Transportation Safety Improvements and designating it as of the highest priority by terming it 'Condition Red'.²⁰

The final rule is patently ineffective for deterring and detecting the creation and submission of invalid, including fraudulent, medical certificates. The rule also rejects several major recommendations from several states, medical practitioners, motor carriers, CVSA, Advocates, NTSB, as well as specific findings and recommendations contained in the House T&I Report for strengthening the states' and FMCSA's oversight of the medical certification process both to detect and deter fraud. The House T&I Report emphasized in its findings and recommendations that:

The NPRM does not . . . allow authorities to confirm that the certificate provided to the State is valid. The Louisiana Department of Public Safety commented on this problem in the proposed rulemaking by saying, 'This proposal in no way "validates" a medical [certificate]. The fact that the certification is completed does not mean the driver is qualified . . . or the person who completes it is actually a medical person...'²¹

One of the central measures for preventing fraud was recommended by Advocates in its comments to the docket, the submission of the original medical examiner's report or long form to the SDLA.²² The lack of any vigorous countermeasures and oversight procedures in the final rule to stop drivers with invalid medical certificates from continuing to operate CMVs in interstate commerce openly conflicts with FMCSA's asserted emphasis on elevating oversight and enforcement attention to driver behavior over equipment issues because of the agency's belief that the primary reason for CMV crashes are driver deficiencies. This failure to seek countermeasures, and oversight and enforcement measures, that will reduce the chances of physically unqualified CMV drivers continuing to operate trucks and buses in interstate commerce contradicts the fundamental rationale of the FMCSA's Compliance Safety Analysis 2010 (CSA 2010) to concentrate more heavily on the construction and application of more driver safety interventions in order to reduce CMV crashes: "The ultimate goal of CSA 2010 is development of an optimal operational model that will allow FMCSA to focus its limited resources on improving the safety performance of high-risk operators." 71 FR 61131,

²⁰Advocates' Comments at 5. (Footnotes omitted.) The NTSB recommendations to FMCSA asking for a fail-safe system of medical certificate validation was issued in its report, *Work Zone Collision between a Tractor-Semitrailer and a Tennessee Highway Patrol Vehicle, Jackson, Tennessee, July 26, 2000*, NTSB Recommendation H-01-21. The elevation of this recommendation to the NTSB Most Wanted list is contained in *NTSB Most Wanted Transportation Safety Improvements*, National Transportation Safety Board, November 14, 2006.

²¹ House T&I Report at 9.

²² Advocates' Comments at 5-6, 13.

61132 (Oct. 17, 2006). “[E]fforts to assess safety performance and to apply interventions to improve performance should focus on drivers. *Id.*”

The final rule merging the CDL with the medical certificate is antithetical to the agency’s express goal of improving CMV driver safety by more timely and carefully targeted interventions to reduce CMV crashes through CSA 2010. Failing to require that drivers with no medical certificates, or who offer expired, forged, or otherwise invalid medical certificates, are placed out of service and also disqualified clearly undercuts the force and effect of FMCSA’s driver-concentrated efforts in this initiative to reform how the agency detects and counters motor carrier and highway safety threats due to unqualified and impaired CMV drivers.

FMCSA concluded that the findings of the PRE on the proportions of the medically unqualified driver problem formed the basis for the agency’s estimate that “physically unqualified drivers are 10 percent more likely to be involved in an accident than their healthy counterparts, which is believed to be a conservative estimate.” PRE at 40. The agency also cites a report by the American Transportation Research Institute, *Predicting Truck Crash Involvement* (n.d.), that a driver’s not having a valid medical certificate increased that driver’s likelihood of crash involvement by 18 percent. *Id.* These considerations led FMCSA to estimate that an annual average of 334,629 crashes by CMV drivers were directly related to these drivers failing to be medically qualified at a average cost of \$69,439 per CMV crash, including as much as \$3,569,413 per combination truck crash. These are staggering costs due directly to medically unqualified commercial drivers operating trucks and buses in interstate commerce. The final rule does not substantially reduce these enormous costs to society.

For the foregoing reasons, Advocates for Highway and Auto Safety requests the Administrator of FMCSA to reconsider this final rule for the purpose of enhancing motor carrier safety and fulfilling the agency’s statutory responsibilities set forth in its enabling legislation.

Respectfully submitted,

ORIGINAL SIGNED

Judith L. Stone,

President