

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DEPARTMENT OF TRANSPORTATION**

**PETITION FOR DIRECT FINAL RULEMAKING
FILED BY THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.**

**FOR A DELAY IN THE MAY 21, 2014, ENFORCEMENT DATE
OF THE
NATIONAL REGISTRY OF CERTIFIED MEDICAL EXAMINERS
DOCKET NUMBER FMCSA-2008-0363**

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I. THE SUBJECT OF THE PETITION

Under 49 C.F.R. Sections 389.31 and 389.39, OOIDA petitions the Federal Motor Carrier Safety Administration to extend the May 21, 2014, deadline contained in 49 C.F.R. § 391.42, requiring all medical examinations conducted under Part 391 to be conducted by a “medical examiner who is listed on the National Registry of Certified Medical Examiners.” In the interim, OOIDA requests that drivers be permitted to obtain medical certification from persons who are both certified under the new rules and qualified under the current rules. An insufficient number of medical examiners have been accepted into the new national registry than the number that FMCSA determined would be necessary to service the applicable population of CDL holders. OOIDA is concerned that, as a result of the shortage of registered examiners, some drivers will not be able to become recertified before their current certification expires, thereby disrupting their employability and business opportunities. Those who are able to find an examiner on the national registry and schedule an appointment to be certified will face much greater costs and burdens in doing so than contemplated by the Final Rule. This presents “good cause” to justify a change to the compliance date.

Under 49 C.F.R. Section 389.31, this Petition is being addressed and hand delivered in duplicate to: Administrator, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590-0001, and filed electronically in the Certified Medical Examiner rulemaking docket, FMCSA-2008-0363.

II INTEREST OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION

OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-

business motor carriers, and professional drivers. The approximately 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The mailing address of the Association is:

Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.oida.com

The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers, including those with their own federal motor carrier operating authority. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

The vast majority of OOIDA's members are small business men and women who operate commercial motor vehicles and are subject to FMCSA's medical certification requirements. All such individuals will be subject to the new requirement that their medical certification exam be conducted by someone on the new national medical registry.

III. THE RULEMAKING

The Final Rule, National Registry of Certified Medical Examiners, was published in the Federal Register on April 20, 2012. (the “Medical Registry” rule or “Final Rule”) That Notice set the compliance date for drivers to obtain medical certification from individuals on the national registry as May 21, 2014. This rule was mandated by section 49 U.S.C. 31149, enacted by section 4116(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Public Law 109-59, 119 Stat. 1726 (Aug. 10, 2005) (SAFETEA-LU) (codified at 49 U.S.C. § 31149). The remainder of the Final Rule provides for the establishment and management of that registry and the qualification and supervision of medical examiners.

IV. THE LEGAL BASIS FOR EXTENDING THE COMPLIANCE DEADLINE

In a related rule, “Medical Certification Requirements as Part of the Commercial Driver’s License (CDL)” (the “Medical Certificate/CDL” rule), a system was created to require drivers to provide a copy of his or her medical qualification certificate to the appropriate state drivers license agency and then be relieved of the existing requirement to keep the certificate in his or her possession whenever operating a commercial motor vehicle. In a Federal Register notice published January 14, 2014, FMCSA delayed the effective date of that rule because not all states are prepared to accept and report medical certificates. 79 Fed. Reg. 2377. The legal authority relied upon by FMCSA to delay the effective date of that rule is the legal authority FMCSA may use to delay the compliance date of the Medical Registry rule.

FMCSA may issue notice of a final rule without an opportunity for public comment if the Agency finds that those procedures are impractical, unnecessary, or contrary to the public interest, and it publishes a statement of those reasons. 5 U.S.C. 553(b). Similarly, FMCSA may publish a final rule without an effective date at least 30 days after publication for “good cause”

under the Administrative Procedure Act (APA), 5 U.S.C. 553 (d)(3). FMCSA may rely upon the same authority to delay the rule linking medical certificates and commercial drivers licenses.

“Good cause” exists that allows FMCSA to change the compliance date in the rule, without public comment and with less than 30 days notice, until a sufficient number of medical examiners are listed on the new national registry.

V. **ESTIMATES IN THE REGULATORY RECORD FOR THE NUMBER OF MEDICAL EXAMINERS THAT WILL NEED TO BE ON THE REGISTRY FOR THE PROGRAM TO FUNCTION**

During the Medical Registry rulemaking process, FMCSA made several different assumptions and estimates concerning how many medical examiners would be necessary to serve the population of drivers who need to be medically certified.

- **THE NOTICE OF PROPOSED RULEMAKING ESTIMATES**

In the NPRM, FMCSA estimated that there are 4.4 million active drivers who will be subject to the Medical Registry rule. *Id.* at 73131. Understanding that the rules require all drivers to undergo medical certification at least once every two years (and that, on average, 2.2 million drivers would require certification annually), and estimating that a not-insignificant number of drivers fall into provisions of the rule that require annual medical certification (a 31% increase to the 2.2 million drivers) FMCSA estimated in the NPRM that registered medical examiners would need to perform 3 million certifications a year. NPRM at 73132.

Estimating that health care professionals “in a general practice setting commonly examine 8 to 10 patients per day,” and that each examiner would conduct an average 75 examinations per year, FMCSA estimates that 40,000 certified medical examiners would be sufficient. NPRM at 73132.

- **THE NOTICE AND REQUEST FOR COMMENTS ON AN INFORMATION COLLECTION REQUEST ESTIMATES**

In a subsequent Notice and Request for Comments published in the Medical Registry docket on March 16, 2011, however, FMCSA estimated that 7,000,000 CMV drivers were required to obtain medical certificates. Applying this number to the calculations used in the NPRM (an average of 3.5 million drivers would require medical certification each year, increased by 31% for those who must be certified more frequently than every two years) then 4,585,000 drivers would need certification each year. If each examiner performed an average 75 examinations each year, then over 61,000 medical examiners would be necessary to serve the members of the regulated industry.

- **THE “FINAL RULE REGULATORY EVALUATION” ESTIMATES**

In the “Final Rule Regulatory Evaluation” date December 2011, FMCSA estimated that there are 4 million drivers subject to the Final Rule. Assuming that, on average, 2 million drivers must be certified each year, with a 31% increase for individuals who need more frequent certification, then the Regulatory Evaluation estimates 2.6 million drivers will need to be certified each year. Assuming that each medical examiner will perform 65 examinations per year, then FMCSA estimates that 40,000 medical examiners “may be necessary to satisfy the demand for driver physical certifications.”

- **THE FINAL RULE ESTIMATES**

In the Final Rule, the agency agreed with comments from the public that there may be a demand far in excess of 3 million driver examinations each year (in the *Estimates of Frequency of Driver Examinations*) (and recited the number to be 2.6 million medical examinations per year in the *Summary of Costs and Benefits*). But even if there was demand for more than 3 million examinations each year, the agency assumes that 40,000 medical examiners would be a sufficient number to perform all of the medical examinations required. FMCSA does suggest, however,

without analysis that “even half that number of certified MEs would be sufficient to provide comprehensive national coverage.” Final Rule at 24117.

IV. THE NUMBER OF MEDICAL EXAMINERS CURRENTLY REGISTERED FALLS FAR SHORT OF THE NUMBER NEEDED FOR THE PROGRAM TO FUNCTION.

As of this date, far fewer medical examiners have been added to the national registry than FMCSA estimated would be necessary to serve the population of CDL holders requiring certification. Just as the lack of readiness among all states in the roll-out of the Medical Certificate/CDL rule would cause that program not to function, the lack of a sufficient numbers of registered medical examiners in the roll out of the National Registry rule would cause that program to not function and have serious consequences on CDL holders.

The 10,223 number of registered medical examiners as of March 28, 2014 is little more than half of those that would be needed under FMCSA’s most optimistic (although unsupported by the record) estimate that 20,000 would be a sufficient number of medical examiners to perform all of the examinations required by the regulated community. If the average annual number of examinations needed were 2.6 million, the average examiner would need to perform 130 certifications per year - a number that far exceeds FMCSA’s expectations in the record for average medical examiner performance.

The 10,223 number falls dramatically short of the 40,000 number of medical examiners FMCSA embraced in both the NPRM and the Final Rule.

And under the most conservative estimate calculable from the numbers described above from the record, if 4,585,000 certifications needed to be performed each year, and the average examiner performed 65 examinations each year, then there would need to be over 70,000 medical examiners to serve the regulated community.

VII. GOOD CAUSE EXISTS TO EXTEND THE COMPLIANCE DEADLINE

Under any of these estimates, the current number of registered medical examiners will fail to be able to examine a significant number of the CMV operators before their current medical certification expires. Many drivers will simply be unable to find registered examiners to certify them before their prior certification expires. This will cause interruptions in their employability, frustrate their ability to conduct their businesses, and do damage to their relationship with their employer or other transportation partners who rely upon them. This alone is sufficient good cause to delay implementation of the compliance date.

Other drivers will face greater burdens to obtain medical certification. They will have to wait longer for an appointment. They many need to travel farther to the next available examiner. Where those examiners are now telling drivers that they are taking no new patients, the true availability of medical examiners is not accurately reported by a simple review of FMCSA registry data. This problem is acute in areas of particularly sparse numbers of registered medical examiners. There are also instances where examiners are putting additional conditions on CDL holders before they will give them a certification appointment – including requiring the CDL holder to make that examiner their primary care physician and transfer all medical files to him or her. These are market-tightening conditions not contemplated by the regulatory record.

Under the law of supply and demand, the scarcity of examiners is also an opportunity for examiners to raise the price of certification. These additional burdens and costs add to the “good cause” basis for a delay in the compliance date to the rule. It is necessary to delay driver compliance with the rule until such a time as there are a sufficient number of medical examiners for the program to run as intended.

VIII. GOOD CAUSE EXISTS TO CHANGE THE COMPLIANCE DATE WITHOUT PUBLIC COMMENT AND WITHIN 30 DAYS OF PUBLICATION OF THIS RULE CHANGE.

At this Petition's filing date, it would be impractical to conduct notice and comment procedures in the short time remaining before the compliance date. OOIDA believes that no comments would likely be submitted concerning this requested extension, except in support of it. The record established by FMCSA during this rulemaking process supports this delay, and no further evidence is necessary to support good cause. Good cause exists to dispense with comments in accordance with the APA and the agency's Direct Rulemaking procedures (49 C.F.R. 389.31) and to delay the compliance date of the medical registry requirements until a sufficient number of medical examiners are on the registry for the program to operate as described in the regulatory record.

IX. CONCLUSION

OOIDA respectfully petitions FMCSA to extend the compliance deadline for the Medical Registry rule until the national registry contains the number of medical examiners identified by the rulemaking record as necessary for the rule to function. Thank you for your consideration of this Petition.

Respectfully submitted,

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