

Medicine (ACOEM) states that (1) the medical documentation of each applicant should be reviewed by a physician who understands the safety risks inherent in commercial operations or the criteria for the evaluation should be included in the summary of each driver's qualifications published in the **Federal Register** and (2) additional medical testing and evaluation is merited (e.g., exercise stress test, cardiac and renal function assessment).

In response to ACOEM's first comment, the notice of final disposition published on September 3, 2003 (68 FR 52441), requires each applicant to be examined by an endocrinologist who performs a complete medical examination, including a comprehensive evaluation of the applicant's medical history and current status, and evaluation by an ophthalmologist or optometrist. As indicated previously, all applicant health data were not published in accordance with HIPPA. Close monitoring of these drivers with ITDM by an endocrinologist and other medical specialists, as well as physical qualification by a medical examiner, are required.

#### **Americans With Disabilities Act**

The American Diabetes Association expressed concerns about the application process for the exemption program. The American Diabetes Association also alleged discrimination against drivers with ITDM.

FMCSA has developed a plan and initiated numerous improvements in the application process for exemption program applicants, including the initiation of work on web-based solutions to streamline the application process and work on re-evaluating the eligibility and monitoring criteria. FMCSA notes that the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2005: A Legacy for Users (SAFETEA-LU) provides specific changes to the driving requirement for interstate operators with ITDM. These changes eliminate the three-year CMV driving requirement and significantly reduce the required time for management of the diabetic condition with insulin treatment.

FMCSA's exemption process supports drivers with ITDM who seek to operate in interstate commerce. In addition, the FMCSRs are not contrary to the Americans with Disabilities Act (ADA) of 1990. The mandates of the ADA do not require that FMCSA alter the driver qualification requirements contained in 49 CFR Part 391. The Senate report on the ADA, submitted by its Committee on

Labor and Human Resources, included the following explanation:

With respect to covered entities subject to rules promulgated by the Department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of this legislation. S. Rep. 101-116, at 27 (1989).

#### **Ability To Predict Safety Outcomes**

The Advocates for Highway and Auto Safety (Advocates) oppose granting exemptions to drivers with ITDM. Major areas of concern include: (1) Past driving history is not a predictor for future safe driving capability, (2) reliance upon previous three-year driving record is an inaccurate screening criterion, and (3) concern is significant about individual driver ability to monitor individual blood sugar while operating commercial (particularly long-haul) vehicles.

In response to the first two comments, the agency considers previous driving experience to be an appropriate means for predicting future performance, and monitors the driving record through the Commercial Driver's License Information System (CDLIS). CDLIS is a computer system linked to individual databases maintained by the 51 jurisdictions in the United States. In response to the third comment, the agency relies on the expert medical opinion of the endocrinologist and the medical examiner, who are required to analyze individual ability to control and manage the diabetic condition, including the individual ability and willingness of the driver to monitor blood glucose level on an ongoing basis.

Advocates also referred to comments filed with docket no. FMCSA-2001-9800-121 regarding the establishment of the Federal diabetes exemption program. The agency responded to these comments in its September 3, 2003, notice of final determination announcing the establishment of the Federal diabetes exemption program.

#### **Conclusion**

After considering the comments to the docket and based upon its evaluation of the four exemption applications, the FMCSA exempts Gerald E. Huelle, Lee R. Kumm, Mitchell L. Pullen, and Steven R. Zoller from the diabetes requirement in 49 CFR 391.41(b)(3), subject to the conditions listed under "Conditions and Requirements" above.

In accordance with 49 U.S.C. 31315 and 31136(e), each exemption will be valid for two years unless revoked earlier by the FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136. If the exemption is still effective at the end of the 2-year period, the person may apply to the FMCSA for a renewal under procedures in effect at that time.

FMCSA notes that Section 4129 of SAFETEA-LU requires the agency to initiate a rulemaking within 90 days of enactment to amend the Federal physical qualifications rules for truck and bus drivers to allow individuals who use insulin to treat their diabetes to operate CMVs in interstate commerce. Therefore, FMCSA will initiate a rulemaking to revise its safety regulations to allow certain insulin-treated diabetic drivers to operate CMVs in interstate commerce.

The new rule would allow health care professionals to make individual determinations about insulin-treated diabetics' ability to safely operate a CMV in interstate commerce, based on guidelines established by the agency, through a public notice-and-comment rulemaking process. Upon completion of the rulemaking required by section 4129, diabetic drivers would no longer be required to apply for, or renew exemptions to operate CMVs in interstate commerce. Until the agency issues a Final Rule, however, insulin-treated diabetic drivers must continue to apply for exemptions from FMCSA, and request renewals of such exemptions in a timely manner.

Issued on: August 29, 2005.

**Warren E. Hoemann,**

*Deputy Administrator.*

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## **DEPARTMENT OF TRANSPORTATION**

### **Federal Motor Carrier Safety Administration**

[Docket No. FMCSA-2005-21685]

### **Parts and Accessories Necessary for Safe Operation; Application for an Exemption From PINOVA**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of application for exemption; request for comments.

**SUMMARY:** The Federal Motor Carrier Safety Administration (FMCSA) requests public comment on an application for an exemption received from PINOVA on behalf of 29 motor carriers that transport short lightered wood logs and stumps from various points in North Carolina, South Carolina, Georgia, Florida, Mississippi, and Alabama to PINOVA's plant in Brunswick, Georgia. PINOVA seeks the exemption because it believes compliance with the commodity-specific rule for securing logs and stumps prevents the company from using more efficient and effective cargo securement methods. PINOVA believes the alternative cargo securement method used by its motor carriers would maintain a level of safety that is equivalent to, or greater than, the level of safety achieved without the exemption.

**DATES:** Comments must be received on or before October 3, 2005.

**ADDRESSES:** You may submit comments identified by DOT DMS Docket Number FMCSA-2005-21685 by any of the following methods:

- Web site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1-202-493-2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.
- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

**Instructions:** All submissions must include the agency name and docket number for this notice. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act heading for further information.

**Docket:** For access to the docket and to read background documents or comments received, go to <http://dms.dot.gov> and/or Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**Privacy Act:** Anyone may search the electronic form of all comments

received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477, Apr. 11, 2000). This statement is also available at <http://dms.dot.gov>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Luke W. Loy, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, MC-PSV, (202) 366-0676; Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., Washington, DC 20590-0001.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 4007 of the Transportation Equity Act for the 21st Century (Pub. L. 105-178, 112 Stat. 107, June 9, 1998) amended 49 U.S.C. 31315 and 31136(e) to provide authority to grant exemptions from motor carrier safety regulations. On December 8, 1998, the Federal Highway Administration's Office of Motor Carriers, the predecessor to FMCSA, published an interim final rule implementing section 4007 (63 FR 67600). On August 20, 2004, FMCSA published a final rule (69 FR 51589) on this subject. Under this rule, FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 315(a)). The agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The agency must also provide an opportunity for public comment on the request.

The agency reviews the safety analyses and the public comments, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the agency must be published in the **Federal Register** (49 CFR 381.315(b)). If the agency denies the request, it must state the reason for doing so. If the decision is to grant the exemption, the notice must specify the person or class of persons receiving the exemption, and the regulatory provision or provisions from which an exemption is granted. The notice must also specify the effective period of the exemption (up to two years), and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

#### The Application for Exemption

PINOVA is the world's only producer of refined pale wood rosin, vinsol<sup>®</sup> resin, and natural wood turpentine from long leaf yellow pine and slash pine lightered wood/fat wood (lightered wood). According to PINOVA's petition, "[l]ightered wood material is formed when resin collects over a period of 50 years or more in the trunk and root system of mature long leaf yellow pine and slash pine trees after the trees have died or been cut." Refined pale wood rosin and Vinsol<sup>®</sup> resin are made from the resin found in the trunk and root system of the long leaf yellow pine and the slash pine, which are only found along the southeast coastal plain of the United States. PINOVA contracts with motor carriers to transport lightered wood material from various points in the southeast coastal plain to its Brunswick, Georgia, plant.

PINOVA applied for an exemption on behalf of the motor carriers that transport lightered wood because 49 CFR 393.116(a)(3) requires that firewood, stumps, log debris and other such short logs be transported in a vehicle or container enclosed on all four sides. However, lightered wood logs and other lightered wood material, including short logs and stumps less than 4 feet in length, are typically transported on flatbed logging or stake trucks. This means the typical method of securement (i.e. flatbed logging or stake truck) used by PINOVA's contract carriers is now prohibited by § 393.116(a)(3).

PINOVA requested a class exemption from 49 CFR 303.226(a)(3) for current and future commercial motor vehicle owners and drivers who transport lightered wood/fat wood material from points in North Carolina, South Carolina, Georgia, Florida, Mississippi, and Alabama to its plant in Brunswick, Georgia. PINOVA requested that these vehicles be allowed to transport short lightered wood logs on a flatbed logging or stake truck, provided the material is securely embedded in longer lightered wood logs which are secured according to FMCSA's rules for securing longwood and shortwood logs.

PINOVA believes that granting the exemption would not adversely affect safety. The company argues that the carriers have safely transported lightered wood logs and related material, including short logs less than 4 feet in length, on flatbed logging and stake trucks for more than 50 years. The company believes the track record demonstrates that shorter material may be safely transported on vehicles without walls on all four sides provided the wood is securely embedded inside

longer material that is properly secured with tie downs, as required by FMCSA's cargo securement regulations. A copy of the PINOVA application is in the docket referenced at the beginning of this notice.

#### Request for Comments

In accordance with 49 U.S.C. 31315 and 31136(e), FMCSA requests public comment from all interested persons on PINOVA's application for an exemption from 49 CFR 393.116(a)(3). The agency will consider all comments received before the close of business on the comment closing date indicated at the beginning of this notice. Comments will be available for examination in the docket at the location listed under the address section of this notice. The agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, the FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: August 29, 2005.

**Warren E. Hoemann,**

*Deputy Administrator.*

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2005-20858; Notice 3]

#### DOT Chemical, Notice of Appeal of Denial of Petition for Decision of Inconsequential Noncompliance

DOT Chemical has appealed a decision by the National Highway Traffic Safety Administration that denied its petition for a determination that its noncompliance with Federal Motor Vehicle Safety Standard (FMVSS) No. 116, "Motor vehicle brake fluids," is inconsequential to motor vehicle safety.

Notice of receipt of the petition was published on April 14, 2005, in the **Federal Register** (70 FR 19837). On July 18, 2005, NHTSA published a notice in the **Federal Register** denying DOT Chemical's petition (70 FR 41254), stating that the petitioner had not met its burden of persuasion that the noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of DOT Chemical's appeal is published in

accordance with NHTSA's regulations (49 CFR 556.7 and 556.8) and does not represent any agency decision or other exercise of judgment concerning the merits of the appeal.

Affected are a total of approximately 50,000 containers of DOT 4 brake fluid, lot numbers KMF02 and KMF03, manufactured in June 2004. FMVSS No. 116 requires that, when tested as referenced in S5.1.7 "Fluidity and appearance at low temperature," S5.1.9 "Water tolerance," and S5.1.10 "Compatibility," the brake fluid shall show no crystallization or sedimentation. The subject brake fluid shows crystallization and sedimentation when tested as referenced in S5.1.7 at -40 °F and -58 °F, sedimentation when tested as referenced in S5.1.9 at -40 °F, and crystallization when tested as referenced in S5.1.10 at -40 °F.

DOT Chemical asserted that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. DOT Chemical stated that there are fiber-like crystals in the fluid, which are borate salts, and

are a natural part (no contamination) of DOT 4 brake fluid production (just fallen out of solution in some packaged goods) and have not demonstrated any flow restrictions even at extended periods of low temperatures at minus 40 °F. Furthermore, when the fluid is subjected to temperatures in a normal braking system, the crystals go back into solution in some cases not to reappear at all at ambient temperatures.

NHTSA reviewed the petition and determined that the noncompliance is not inconsequential to motor vehicle safety. In its denial, NHTSA noted that it granted petitions for determinations of inconsequential noncompliance of FMVSS No. 116 to Dow Corning Corporation (59 FR 52582, October 18, 1994) and to First Brands Corporation (59 FR 62776, December 6, 1994). In the case of Dow, the FMVSS No. 116 noncompliance arose from a "slush-like crystallization" that dispersed "under slight agitation or warming." NHTSA accepted Dow's argument that its 'slush-like crystallization' does not consist of 'crystals that are either water-based ice, abrasive, or have the potential to clog brake system components.' NHTSA concurred with Dow's conclusion that "the crystallization that occurred ought not to have an adverse effect upon braking." In the case of First Brands, the FMVSS No. 116 noncompliance arose from a "soft non-abrasive gel" that also dispersed under slight agitation or warming.

NHTSA determined that facts leading to the grants of the inconsequential noncompliance petitions of Dow and

First Brands are not analogous to the facts in DOT Chemical's situation. In contrast, DOT Chemical's noncompliance results from "fiber-like crystals" made of borate salts. These borate salt crystals did not disperse under slight agitation or warming, but had to be physically removed by filtration. DOT Chemical asserted that "[f]iltration, using Whatman #40 filter paper (25-30 micron particle size) removed all crystals. The crystals are approximately 30-50 microns in width and 3-5 mm in length." DOT Chemical did not explain how it can assure that crystals smaller than 25 microns in width did not remain in the brake fluid.

In its denial of DOT Chemical's petition, NHTSA stated that—even assuming that all larger-sized crystals were removed from the fluid—the agency is concerned that crystals that are of a size smaller than 25 microns by 3-5 mm would remain in the brake fluid. The thread-like nature of this type of crystallization has the potential to clog brake system components, particularly in severe cold operation conditions. Impurities such as these in the brake system may cause the system to fail, *i.e.*, to lose the ability to stop the vehicle over time due to the accumulation of compressible material in the brake lines. These impurities may also result in the failure of individual brake system components due to the corrosive nature of the contaminants themselves.

In consideration of the foregoing, NHTSA decided that the petitioner did not meet its burden of persuasion that the noncompliance it described is inconsequential to motor vehicle safety. Accordingly, its petition was denied.

In its appeal from NHTSA's denial, DOT Chemical states that "[t]he words and phrases used in the [original] petition were not identical to the descriptions in the previous cases. DOT Chemical wishes to clear up any misunderstandings from the original petition and reword to match the precedent cases."

DOT Chemical provides the following statements in its appeal:

- Our choice of the word "crystals" can also be described as "slush-like crystallization" (as in the granted petition in 1994) or a "soft non-abrasive gel," a look at the sample is worth a thousand words or even rubbing the material between the fingers.
- Our "crystals" dispersed and/or went completely into solution "under slight agitation or warming" (as in the granted petition in 1994).
- Slight Agitation: In DOT Chemical's petition the phrase "DOT Chemical tested the fluid, agitated the material before testing to insure that the crystals were part of each test" we believe implied that the