



July 8, 2016

Mr. T.F. Scott Darling, III  
Acting Administrator  
Federal Motor Carrier Safety Administration  
1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

**Re: Docket Nos. FMCSA-2015-0419 and FRA-2015-0111, Evaluation of Safety Sensitive Personnel for Moderate-to-Severe Obstructive Sleep Apnea.**

Dear Acting Administrator Darling:

The American Bus Association (ABA) appreciates the opportunity to respond to the joint Advanced Notice of Proposed Rulemaking (ANPRM or Proposal) issued by the Federal Motor Carrier Safety Administration (FMCSA) and the Federal Railroad Administration (FRA) (collectively, the Agencies), seeking information regarding the prevalence of moderate-to-severe obstructive sleep apnea (OSA) among safety sensitive personnel in highway and rail transportation. Docket No. FMCSA-2015-0419 and FRA-2015-0111.

Per the request in the ANPRM, the ABA is interested in this rulemaking based on its role as the leading trade association representing the private and over-the-road passenger motor carrier transportation industry. The ABA and its member organizations pride themselves on their commitment to safety, a commitment that extends to our employees, and most notably our motorcoach drivers. It is in this context we submit these comments.

As an initial point, ABA is troubled by the decision to issue a joint proposal by FMCSA and FRA, two agencies with vastly different medical oversight regulatory schemes. As highlighted in the ANPRM, FMCSA has a far more comprehensive medical oversight regulatory scheme than FRA, well established, historically, by statute. The FMCSA's regulatory approach to license and physically qualify drivers is more akin to the Federal Aviation Administration's approach to commercial airline pilots, rather than any FRA medical standards. Although FRA may have broad authority to regulate "every area of railroad safety,"<sup>1</sup> historically the agency has chosen to limit its medical oversight only to vision and hearing qualifications for locomotive engineers and conductors. Considering the level of sophistication of FMCSA's medical oversight program, including the statutory requirement for medical examiners in 49 USC 31136, the creation of the Medical Review Board in 2005 and the recent establishment of the National

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<sup>1</sup> Fed. Reg. Notice p. 12643

Registry for Certified Medical Examiners, there is no procedural basis for these two agencies to pursue a joint rulemaking effort.

Further, the two modes of transportation regulated by FMCSA and FRA are vastly different as well. In fact, the only similarity between the two modes is that they are often termed or categorized as “surface transportation” modes. Short of this fact, there is very little similarity between motor carrier operations and railroad operations. The safety risk factors identified for purposes of addressing OSA issues, i.e. fatigue, attention deficits, concentration, situational awareness and memory, may be relevant to both modes of transportation; however, the activities and responsibilities of motor carrier drivers and locomotive engineers and conductors, are dissimilar. In contemplating a regulatory approach to addressing OSA, each agency must take into account the unique nature of its respective transportation operation mode in order to effectively address the medical concern while balancing the employee’s ability to work. Although it may be the agencies intent to “ensure consistency in addressing”<sup>2</sup> OSA risk in terms of safety sensitive transportation employees across the operating administrations, safety sensitive positions vary among the modes and these variances matter – as indicated by FMCSA’s approach to medical oversight versus FRA’s approach.

For these various reasons, ABA urges the agencies to bifurcate the current rulemaking initiative, to: 1) provide greater assurance any regulatory proposals will indeed be appropriate for each agency’s physical qualifications program and suitable to the transportation mode; 2) reduce the risk of confusion based on involving two vastly different transportation operations and physical qualifications programs; and 3) provide greater transparency in terms of evaluating proposals, regulatory impact analyses, alternatives and cost/benefits.

As well, ABA is concerned the science involved in both risk assessment, diagnoses and treatment of OSA remains unsettled. As FMCSA notes in the ANPRM, the agency’s prior attempt to provide guidance with the advisory criterion issued in 2000, was reliant on MEs having “sufficient experience or information”<sup>3</sup> with OSA. An Expert Panel<sup>4</sup> made recommendations on “Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety” and highlighted how sound science must play a role in clearly defining the parameters of OSA conditions that should identify and potentially disqualify CMV drivers. Clearly, OSA as a medical condition requiring treatment is difficult to diagnose *and* treat, as there remains sufficient disagreement in the medical community as to risk factors, effective diagnostic methodologies, the evolutionary stage of appropriate treatments, and the lack of unity on management of the condition, i.e. when is the condition sufficiently controlled through treatment

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<sup>2</sup> Ibid. p. 12646

<sup>3</sup> Ibid. p. 12645

<sup>4</sup> The report of the Medical Expert Panel on Prenatal Care entitled “Obstructive Sleep Apnea and Commercial Motor Vehicle Driver Safety” was presented to FMCSA on January 14, 2008: Sonia Ancoli-Israel, PhD; Charles A. Czeisler, MD PhD; Charles F.P. George, MD FRCPC; Christian Guilleminault, MD BiolD; Allan I. Pack, MB, ChB, PhD

to enable an employee to safely return to work<sup>5</sup>. The ABA would caution FMCSA from proceeding with any initiative that cannot provide clear guidance, based on sound research and universally accepted practices within the medical community, and would instead leave an overabundance of discretion to Medical Examiners (ME) resulting in inconsistent application. This outcome would not address the safety concerns discussed in the ANPRM; it would hamper motor carrier operations as well as unduly deprive drivers of their employment.

Finally, per the Federal Aviation Administration (FAA) approach outlined in the ANPRM<sup>6</sup>, ABA urges FMCSA to recognize the need to strike an appropriate balance in crafting a regulatory framework that does not unduly hinder an employee's ability to work or a passenger motor carrier's ability to operate. Like other medical conditions, governance of assessment, diagnoses and treatment of OSA must include sufficient flexibility to enable people to work. The FAA, facing similar challenges, managed to develop and implement an OSA regulation for the passenger carrier aviation industry. We believe FMCSA would do well to examine the research, methodology and framework FAA employed in crafting regulatory framework.

As to the specific questions posited in the ANPRM, ABA, as a transportation trade association, is not in a position to provide specific medical or operational data, in response to the Proposal. We do, however, encourage our members to contribute such data, if available and support their efforts.

The ABA has a vital interest in this rulemaking effort. As previously noted, our members pride themselves on their commitment to safety, along with the welfare of their employees. The lifeblood of our industry and the "ambassador" for almost every motorcoach company, is its drivers. Further, the private motorcoach industry is largely comprised of small business entities with family-based, generational ownership structures<sup>7</sup>. It is not unique for the owner of a company to also be a driver for the company. These facts, coupled with the importance of moving passengers as a commodity and the costly investment in the equipment<sup>8</sup> required to engage in the industry, all bear upon the value passenger motor carriers place on their drivers. For these various safety reasons, ABA members are keenly interested in this rulemaking. It is of vital importance passenger carrier drivers are in good health and available to operate. However, FMCSA's efforts to date on this subject have left passenger motor carriers frustrated, do the lack of clear guidance and inconsistent application of diagnostic and treatment requirements by MEs, with little to no recognition of the costs involved both to drivers and operators.

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<sup>5</sup> See, for example, "American Academy of Sleep Medicine Response to the ACP Clinical Practice Guideline for the Diagnosis of Obstructive Sleep Apnea in Adults," by Timothy I. Morgenthaler, September 2014; "Diagnosis of Obstructive Sleep Apnea in Adults: A Clinical Practice Guideline From the American College of Physicians," by A. Qaseem, MD, PhD, MHA; P. Dallas, MD; D. Owens, MD, MS; M. Starkey, PhD; J. Holty, MD, MS; P. Shekelle, MD, PhD, published in the *Annals of Internal Medicine*, Vol. 161, No. 3, August 5, 2014; "Obstructive Sleep Apnea: From pathogenesis to treatment: Current controversies and future directions" by P. Eastwood, A. Molhotra, L. Palmer, E. Kezirian, R. Horner, M. Ip, R. Thurnheer, N. Antic, and D. Hillman; published in *Respirology*, Vol. 15, Iss. 4, pp. 587-595, May 2010.

<sup>6</sup> Ibid. pp. 12644-12645

<sup>7</sup> The average ABA bus operator member operates about eight motorcoaches. (ABA Foundation Motorcoach Industry Census - <http://www.buses.org/assets/images/uploads/general/Motorcoach%20Census%202015.pdf>)

<sup>8</sup> Currently, the retail price for a new motorcoach is approximately \$500,000. (<http://roitit.com/wordpress/wp-content/uploads/2014/12/2014-Motor-Coach-of-the-Year-Results-Revised.pdf>)

Again, ABA appreciates the opportunity to respond the ANPRM, and is available to answer any questions regarding these comments. We look forward to working with FMCSA as this initiative proceeds to ensure the interests of our members are considered during the rulemaking process. However, from a fundamental standpoint, we urge FMCSA and FRA to bifurcate this rulemaking effort to address appropriate risks, minimize confusion, and tailor proposals specific to their respective oversight jurisdictions; as well as enable both the motor carrier and railroad industries, respectively, to fairly participate in the process.

Respectfully,

A handwritten signature in black ink, appearing to read "Brandon Buchanan", with a long horizontal flourish extending to the right.

Brandon Buchanan  
Director of Regulatory Affairs