



**DEPARTMENT OF TRANSPORTATION**

**[4910-EX-P]**

**Federal Motor Carrier Safety Administration**

**49 CFR Part 382**

**[Docket No. FMCSA-2010-0031]**

**RIN 2126-AB18**

**Commercial Driver's License Drug and Alcohol Clearinghouse**

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

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** FMCSA proposes to establish the Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse), a database under the Agency's administration that will contain controlled substances (drug) and alcohol test result information for the holders of commercial driver's licenses (CDLs). The proposed rule would require FMCSA-regulated motor carrier employers, Medical Review Officers (MROs), Substance Abuse Professionals (SAPs), and consortia/third party administrators (C/TPAs) supporting U.S. Department of Transportation (DOT) testing programs to report verified positive, adulterated, and substituted drug test results, positive alcohol test results, test refusals, negative return-to-duty test results, and information on follow-up testing. The proposed rule would also require employers to report actual knowledge of traffic citations for driving a commercial motor vehicle (CMV) while under the influence (DUI) of alcohol or drugs. The proposed rule would establish the terms of access to the database, including the conditions under which information would be submitted, accessed, maintained, updated, removed, and released to prospective employers, current employers, and other authorized entities. Finally, it would require laboratories that

provide FMCSA-regulated motor carrier employers with DOT drug testing services to report, annual, summary information about their testing activities. This rule is mandated by Section 32402 of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act.

**DATES:** You must submit comments by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.].

**ADDRESSES:** You may submit comments, identified by docket number FMCSA-2010-0031 or RIN 2126-AB18, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>.
- Fax: 1-202-493-2251.
- Mail: Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.
- Hand delivery: Same as mail address above, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** [Mr. Juan Moya](#),, Office of Enforcement and Program Delivery, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590-0001, by telephone at (202.366.4844, or via email at [fmcsadrugandalcohol@dot.gov](mailto:fmcsadrugandalcohol@dot.gov).. FMCSA office hours are from 9 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions on

viewing or submitting material to the docket, contact Barbara Hairston, Acting Program Manager, Docket Operations, telephone (202) 366-9826.

**SUPPLEMENTARY INFORMATION:  
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**I. Public Participation and Request for Comments**

FMCSA encourages you to participate in this rulemaking by submitting comments, data, and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal and/or copyrighted information you provide.

**A. Submitting Comments**

You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and in the search box insert the docket number “FMCSA-2010-0031” and click the search button. When the new screen appears, click on the blue “Comment Now!” button on the right hand side of the page. On the new page, enter information required including the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

#### B. Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble, To submit your comment online, go to <http://www.regulations.gov> and in the search box insert the docket number “FMCSA-2010-0031” and click “Search.” Next, click “Open Docket Folder” and you will find all documents and comments related to the proposed rulemaking.

#### C. Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the USDOT Privacy Act system of records notice for the DOT Federal Docket

Management System (FDMS) in the **Federal Register** published on December 29, 2010 (75 FR 82132) at <http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32876.pdf>.

## **II. Executive Summary**

### **A. Purpose of the Clearinghouse**

CDL drivers who use drugs or alcohol while operating a CMV pose a significant risk to public safety. Under the current drug and alcohol screening program, employers do not have the tools to identify CDL holders who have received positive drug or alcohol test results, have refused a drug or alcohol test, or have otherwise violated the drug and alcohol testing requirements and thus, are not qualified to operate a CMV. Employers must rely on information provided by the driver, who might not disclose prior positive drug or alcohol test results, or refusals to test. As a result, such drivers continue to operate CMVs after violating the drug and alcohol regulations without completing the required return-to-duty process.

This proposed rule would require employers and service agents to report information about current and prospective employees' drug and alcohol test results to a repository, the Drug and Alcohol Clearinghouse. It would also require employers and certain service agents to search the database for current and prospective employees' positive drug and alcohol test results, and refusals to test, as a condition of permitting those employees to perform safety-sensitive functions. This would provide FMCSA and employers the necessary tools to identify drivers who are prohibited from operating a CMV based on DOT drug and alcohol program violations and ensure that such drivers receive the required evaluation and treatment before performing safety-sensitive functions.

The Moving Ahead for Progress in the 21st Century Act (MAP-21), enacted on July 6, 2012,<sup>1</sup> mandates that the Secretary of Transportation (Secretary) establish a national clearinghouse for controlled substance and alcohol test results of commercial motor vehicle operators. The FMCSA also has authority to promulgate safety standards under the Motor Carrier Safety Act of 1984 (Pub. L. 98-554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act), which provides authority to regulate drivers, motor carriers, and vehicle equipment and requires the Secretary to prescribe minimum safety standards for CMVs.

## **B. Summary of Major Provisions**

The proposed rule would revise 49 CFR part 382, Controlled Substances and Alcohol Use and Testing to establish the Drug and Alcohol Clearinghouse. It would require employers and service agents to report information about current and prospective employees' positive drug and alcohol test results to the Clearinghouse. In addition, it would require employers to search the Clearinghouse for positive drug and alcohol test results, and refusals to test, on an annual basis for current employees and as a part of the pre-employment process for prospective employees. Finally, this proposal would require laboratories to provide FMCSA with annual summary reports on the testing activities of FMCSA-regulated motor carrier employers for whom they have provided testing services.

Reporting positive test results and refusals to test would create a database employers could check to determine whether current or prospective employees are prohibited from operating CMVs under the DOT drug and alcohol screening program. This would diminish or eliminate the problem of a currently-employed commercial-

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<sup>1</sup> Pub. L. 112-141, 126 Stat. 405 (July 6, 2012).

driver's-license (CDL) holder testing positive for illegal drug or alcohol use with a second employer or another potential employer while continuing to operate commercial motor vehicles (CMVs) under his or her current employment without the current employer knowing and acting on the positive test.

It would also diminish or eliminate the problem of a driver with previous positive tests seeking and obtaining work without prospective employers knowing and acting on that information. This could occur if a driver is fired for a positive test but does not inform prospective or future employers about the previous positive test result. This could also occur if a new driver entering the workforce tests positive for drugs or alcohol during a pre-employment test, waits for the drugs to leave his/her system, then takes and passes another pre-employment test and gets hired without the employer having any knowledge of the previously failed pre-employment test.

Currently motor carrier employers are required to implement DOT drug and alcohol testing programs for CDL holders and they must provide FMCSA with a summary of their annual drug and alcohol testing results. To improve employers' compliance, the proposed rule would require all laboratories performing DOT drug and alcohol testing for FMCSA-regulated employers to file annual summary reports identifying the motor carrier employers for whom they performed testing services. The FMCSA would use the data provided by the laboratories to identify employers of CDL drivers that do not have an active drug and alcohol testing program.

### **C. Benefits and Costs**

The Agency estimates about \$187 million in annual benefits from increased crash reduction from the rule—\$53 million from the annual queries and \$134 million from the

pre-employment queries. FMCSA also estimates that the rule would result in \$186 million in total annual costs, which include costs for employers to complete the annual (\$28 million) and pre-employment (\$10 million) queries; employers to designate service agents and service agents to input information from drivers undergoing the return-to-duty process (\$3 million); various entities to report positive tests and refusals (\$1 million); various entities to register with the Clearinghouse, verify authorization, and become familiar with the rule (\$5 million); for employers to obtain drivers' consent for release of their information (\$35 million); for development of the Clearinghouse and management of records (\$3 million); and the cost for drivers to go through the return-to-duty process (\$101 million). The estimated costs are about equal to its benefits: Total net benefits of the rule are just \$1 million annually. The ten-year projection of net benefits is \$8 million when discounted at seven percent and \$9 million when discounted at three percent. However, estimated benefits include only those associated with reductions in CMV crashes. FMCSA could not precisely quantify improved health, quality-of-life improvements, and increased life expectancy for CMV drivers. The Agency believes these non-quantified benefits are significant, and, if they were included in the benefits estimates, would clearly demonstrate the positive net benefits of this rule.

Total Net Benefit Projection Over a Ten-Year Period			
Total	Annual	Ten-Year	Ten-Year
Discount Rate		7%	3%
Total Benefits	\$187,000,000	\$1,406,000,000	\$1,643,000,000
Total Costs	\$186,000,000	\$1,398,000,000	\$1,634,000,000
Total Net Benefits	\$1,000,000	\$8,000,000	\$9,000,000

### III. Background

## **A. Legal Basis for the Rulemaking**

The Agency proposes to revise 49 CFR part 382, Controlled Substances and Alcohol Use and Testing, to establish a database, identified as the “Commercial Driver's License Drug and Alcohol Clearinghouse” or “Clearinghouse,” for reporting of verified positive, adulterated, and substituted drug test results, positive alcohol test results, test refusals, negative return-to-duty test results, and information on follow-up testing. The proposed rule would also require employers to report actual knowledge of traffic citations for driving a CMV while under the influence of alcohol or drugs. Under the proposed rule, motor carrier employers would be required to query the Clearinghouse for drug and alcohol test result information on current and prospective employees subject to FMCSA drug and alcohol testing requirements. The proposed rule is intended to increase compliance with these testing requirements.

Section 32402 of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) (Pub. L. 112-141, 126 Stat. 405), codified at 49 U.S.C. § 31306a, directs the Secretary of Transportation (Secretary) to establish a national clearinghouse for controlled substance and alcohol test results of commercial motor vehicle operators. This proposed rule would implement that mandate.

In addition, FMCSA has general authority to promulgate safety standards, including those governing drivers' use of drugs or alcohol while operating a CMV. The Motor Carrier Safety Act of 1984 (Pub. L. 98-554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act), as amended, provides authority to regulate drivers, motor carriers, and vehicle equipment and requires the Secretary to prescribe minimum safety standards for CMVs. At a minimum, the regulations shall ensure that— (1) CMVs are maintained,

equipped, loaded, and operated safely; (2) the responsibilities imposed on CMV operators do not impair their ability to operate the vehicles safely; (3) the physical condition of CMV operators is adequate to enable them to operate the vehicles safely; (4) CMV operation does not have a deleterious effect on the physical condition of the operators; and (5) CMV drivers are not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a CMV in violation of regulations promulgated under 49 U.S.C. 31136 or under 49 U.S.C. chapters 51 or 313 (49 U.S.C. 31136(a)). Section 211 of the 1984 Act also grants the Secretary broad power, in carrying out motor carrier safety statutes and regulations, to “prescribe recordkeeping and reporting requirements” and to “perform other acts the Secretary considers appropriate” (49 U.S.C. 31133(a)(8) and (10)).

The FMCSA Administrator has been delegated authority under 49 CFR 1.87 (e),(f) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313 and 49 U.S.C. chapter 311, subchapters I and III, relating to CMV programs and safety regulation. This proposed rule would implement, in part, the Administrator’s delegated authority under the 1984 Act to ensure that the physical condition of CMV operators is adequate to enable them to operate vehicles safely by increasing compliance with drug and alcohol testing requirements. FMCSA believes that this proposed rule would likely have the effect of preventing employers from exercising coercive influence over drivers. The proposed rule would also exercise the broad recordkeeping and implementation authority under Section 211. The other subsections of Section 206(a) do not apply because this rulemaking would only address the physical condition of CMV drivers.

The Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102-143, Title V, 105 Stat. 917, at 952, October 28, 1991, codified at 49 U.S.C. 31306) mandated the alcohol and controlled substances (drug) testing program for DOT. OTETA required the Secretary to promulgate regulations for alcohol and drug testing for persons in safety-sensitive positions in four modes of transportation—motor carrier, airline, railroad, and mass transit. Those regulations, including subsequent amendments, are codified at 49 CFR part 40, “Procedures for Transportation Workplace Drug and Alcohol Testing Programs.” Part 40 establishes requirements for all DOT-regulated parties, including employers of drivers with CDLs subject to FMCSA testing requirements, for conducting drug and alcohol tests. Part 40 also defines the roles and responsibilities of service agents, including MROs, SAPs, and C/TPAs, who perform critical functions under DOT-wide drug and alcohol testing program requirements.

In 1994, FMCSA’s predecessor agency published a final rule addressing the OTETA and creating regulations, including penalties, codified in 49 CFR part 382, “Controlled Substances and Alcohol Use and Testing.” In 2001, FMCSA revised its regulations in 49 CFR part 382 to make FMCSA’s drug and alcohol testing procedures consistent with and non-duplicative of the revised regulations at 49 CFR part 40.

This proposed rule would incorporate many of the findings and recommendations contained in FMCSA’s March 2004 report to Congress, which was required under section 226 of the Motor Carrier Safety Improvement Act of 1999 (Pub. L. 106-159, 113 Stat. 1748, December 9, 1999).

## **B. Current Regulations**

Agency regulations at 49 CFR part 382 apply to persons and employers of such persons who operate CMVs in commerce in the United States and who are subject to the CDL requirements in 49 CFR part 383 or the equivalent CDL requirements for Canadian and Mexican drivers (49 CFR 382.103(a)). Part 382 requires that employers conduct pre-employment drug testing, post-accident testing, random drug and alcohol testing, and reasonable suspicion testing, as well as return-to-duty testing and follow-up testing for those drivers who test positive or otherwise violate DOT drug and alcohol program requirements.

Motor carrier employers are prohibited from allowing an employee to perform safety-sensitive functions, which include operating a CMV, if the employee tests positive on a DOT drug or alcohol test, refuses to take a required test, or otherwise violates the DOT drug and alcohol testing regulations. The prohibition on performing safety-sensitive functions continues until the employee satisfies all of the requirements of the return-to-duty process prescribed in 49 CFR part 40, subpart O. Additionally, part 382 provides that an employer may not allow a covered employee to perform safety-sensitive functions when the employer has actual knowledge concerning the driver's use of alcohol or drugs while performing safety-sensitive functions. An employer has "actual knowledge" of drug or alcohol use while performing safety-sensitive functions based upon the employer's direct observation of employee drug or alcohol use, an admission by the employee of drug or alcohol use, information provided by a previous employer, or if the employee receives a traffic citation for driving a CMV while under the influence of drugs or alcohol. An employer may not use a driver under these circumstances until the driver has completed the return-to-duty process prescribed in 49 CFR part 40, subpart O.

Positive test results or instances of employers having actual knowledge can lead to termination of the driver's employment without the opportunity to complete the return-to-duty process.

The Federal Motor Carrier Safety Regulations (FMCSRs) require that a motor carrier employer obtain information from job applicants that includes the names and addresses of the applicant's employers for the past 3 years, and whether or not the applicant was subject to the FMCSRs and to the drug and alcohol testing requirements under 49 CFR part 40 (49 CFR 391.21(b)). Interstate motor carrier employers are then required to investigate the applicant's history under the DOT drug and alcohol testing program by contacting the named DOT-regulated employers to determine whether the applicant has, within the past 3 years, violated the drug and alcohol prohibitions under part 382 or the testing requirements under part 40 (49 CFR 391.23(e)). A similar background check requirement exists in part 40. *See* 49 CFR 40.25 (DOT-regulated employers must contact all of the applicant's employers for the 2 years prior to the employee application and obtain drug and alcohol test information, including information that these employers obtained from previous employers).

Part 40 defines an "employee" as "any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing" including "applicants for employment subject to pre-employment testing" (49 CFR 40.3). Pursuant to this definition, an individual is an employee of any DOT-regulated employer for whom the individual takes a pre-employment drug test, regardless of whether the individual is subsequently hired by the employer. As a result, an individual would be required to list

such employer, when applying for a new covered position (see 49 CFR 40.25 and 391.21(b)).

In addition to pre-employment drug testing, the background check process detailed above is currently the primary means by which an employer determines whether a job applicant is qualified to perform a safety-sensitive function such as operating a CMV.

### **C. Discussion of the Proposed Rule**

#### **1. Clearinghouse for CDL drivers' drug and alcohol test results**

The current background check system does not provide employers with enough tools to accurately identify CDL holders who have received positive drug or alcohol test results or have otherwise violated the drug and alcohol testing requirements and who are, therefore, not qualified to operate a CMV prior to completing the return-to-duty process. Employers must rely on information provided by the driver, who might not list part-time driving jobs or a prior or prospective employer that has records of positive drug or alcohol tests or other related violations. Or, after testing positive with one prospective employer, the driver might wait until the substance is out of his or her system and apply with a different carrier. As a result, such drivers continue to operate CMVs after violating the drug and alcohol regulations without completing the required return-to-duty process.

CDL drivers who use drugs or alcohol while operating a CMV pose a significant risk to public safety. In 1999, a New Orleans bus crash resulted in 22 passenger fatalities. The motorcoach driver's post-accident drug test showed use of marijuana and a sedating anti-histamine prior to going on duty. The driver had also failed pre-employment drug testing when applying for previous positions, a fact not revealed or known to the current

employer. The driver also failed to disclose on his employment application a previous employer who fired him after a positive drug test. As a result of the investigations of the 1999 New Orleans bus crash, the National Transportation Safety Board (NTSB) recommended that FMCSA “develop a system that records all positive drug and alcohol test results and refusal determinations resulting from the U.S. Department of Transportation (DOT) testing requirements, require prospective employers to query the system before making a hiring decision, and require certifying authorities to query the system before making a certification decision.” (“Highway Accident Report: Motorcoach Run-Off-The-Road, New Orleans, Louisiana, May 9, 1999,” NTSB Report Number: HAR-01-01, NTSB, Washington, DC, page 67 (<http://www.nts.gov/doclib/reports/2001/HAR0101.pdf>)). This rulemaking addresses the NTSB’s recommendations.

Two 2008 Government Accountability Office (GAO) reports<sup>2</sup> also analyzed the issue of CMV drivers who test positive or refuse to submit to drug or alcohol testing for one employer and then fail to disclose this information to a subsequent employer. GAO identified 43 instances in which a CMV driver tested positive for illegal drugs, such as cocaine, marijuana, and amphetamines, with one employer and subsequently tested negative with another employer who was unaware of the prior positive test. In its recommendations to Congress, GAO proposed establishing a national database, as outlined in this rulemaking, as a possible solution to these “job hopping” scenarios.

Through MAP-21, Congress directed FMCSA to establish this clearinghouse to improve compliance with DOT’s drug and alcohol testing program, as well as enhance

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<sup>2</sup> See GAO-08-600 “Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them Off the Road,” May 15, 2008, and GAO-08-829R, “Examples of Job Hopping by Commercial Drivers After Failing Drug Tests,” June 30, 2008.

safety by reducing accidents and injuries resulting from the misuse of alcohol and drugs by CDL holders. MAP-21 directed a number of specific requirements that FMCSA has incorporated into this proposed rule. For example, in accordance with the requirements of MAP-21, this proposed rule would require employers and service agents to report information about current and prospective employees' drug and alcohol test results to the Clearinghouse and would require employers and certain service agents to check current and prospective employees against the database. In addition, employers would only access data in the clearinghouse to determine whether an employment prohibition exists (e.g., a positive test result or a refusal for which an individual has not completed the return-to-duty requirements).

The proposed rule would provide FMCSA and regulated employers the necessary tools to identify drivers who are prohibited from operating a CMV based on DOT drug and alcohol program violations and ensure that such drivers receive the required evaluation and treatment before continuing to perform safety-sensitive functions. It would apply to persons and employers of such persons who operate CMVs in commerce in the United States and are subject to the CDL requirements in 49 CFR part 383 or the equivalent CDL requirements for Canadian and Mexican drivers. The proposed rule would not supersede an employer's obligation to comply with the current requirements of parts 40 and 382. The rule would also affect service agents, including MROs, C/TPAs and SAPs. MROs are licensed physicians responsible for independently receiving and reviewing laboratory drug test results generated by an employer's testing program. Under the proposed rule, MROs would report to the Clearinghouse all positive, adulterated, or substituted drug test results and refusals to test that require an MRO determination.

C/TPAs are consortia and third party administrators who coordinate testing services for regulated motor carrier employers. FMCSA regulations require any employer who employs only himself/herself as a driver to join a random test selection pool. Consortia are the entities that manage these pools (49 CFR 382.103(b)). Third party administrators, which often include consortia, are entities that regulated motor carrier employers contract with to implement drug and alcohol testing programs. Under the proposed rule, C/TPAs would be subject to the same reporting requirements as employers when they assume a regulated employer's drug and alcohol testing functions. Specifically, C/TPAs that are required by regulation to perform employer functions (e.g., for self-employed drivers) would be required to report positive alcohol tests, drug or alcohol test refusals, negative return-to-duty tests, and successful completion of all follow-up tests. Employers may contract with C/TPAs to perform reporting functions, but employers, in addition to their C/TPAs, remain responsible for meeting the reporting requirements.

SAPs evaluate, assess and refer drivers for education and/or treatment after a positive test or refusal as a part of the return-to-duty process (49 CFR part 40, subpart O). Under the proposed rule, SAPs would be required to report to the Clearinghouse the date that a driver began and successfully completed the return to duty process specified in 49 CFR part 40, subpart O, indicating driver eligibility for return-to-duty testing. The SAP would also be required to report information on the follow-up testing plan.

The requirements of this rule would also affect motor carriers employing owner-operators. The drug and alcohol testing regulations in part 382 impose requirements upon employers and drivers; owner-operators can function as both. Currently, when an owner-

operator acts as a driver for another employer, FMCSA requires that the employer treat the owner-operator as if he or she were an employee for the purposes of the employer's DOT drug and alcohol testing program. As a result, the proposed rule would require motor carriers employing owner-operators to treat those drivers as employees for purposes of querying and reporting to the database.

## 2. FMCSA oversight of motor carrier implementation of drug and alcohol testing programs

FMCSA primarily monitors motor carrier compliance with DOT drug and alcohol test program requirements through motor carrier compliance reviews and new entrant safety audits. In 2010, the Agency and its State partners conducted new entrant audits and compliance reviews on approximately 50,000 motor carriers. Although FMCSA and its State partners have significantly increased the number of carriers that it reviews through enhanced new entrant rules and improved compliance programs, the Agency captures only a small percentage of the more than 520,000 motor carrier employers subject to the DOT drug and alcohol testing requirements. As a result, many motor carrier employers that do not have a testing program may go undetected. Based on the Agency's oversight activities, some motor carrier employers are not in compliance with the drug and alcohol program requirements<sup>3</sup>.

Current regulations require motor carrier employers to implement DOT drug and alcohol testing programs for CDL holders and to provide FMCSA with a summary of their annual drug and alcohol testing results upon the Agency's request (49 CFR 382.403). Every year, FMCSA randomly selects and requires approximately 3,000

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<sup>3</sup> FMCSA has found that eighty-six percent of new entrant audit failures include either not having or not properly implementing a drug and alcohol program. (FMCSA, Office of Enforcement)

employers to submit a summary of testing program results through FMCSA's Drug and Alcohol Testing Survey. See Drug and Alcohol Testing Survey: 2008 Results, [http://www.fmcsa.dot.gov/facts-research/research-technology/report/Drug\\_Alcohol\\_Survey\\_2008.pdf](http://www.fmcsa.dot.gov/facts-research/research-technology/report/Drug_Alcohol_Survey_2008.pdf). The survey has been largely used to determine appropriate random testing rates for carriers and has not generally been used to monitor employer compliance with testing requirements. To improve employers' compliance with the requirement to implement a drug and alcohol testing program, the proposed rule would require all laboratories performing DOT drug testing for FMCSA-regulated employers to file annual summary reports identifying the motor carrier employers for whom they performed testing services. The FMCSA would use the data provided by the laboratories to identify employers of CDL drivers that do not have an active drug and alcohol testing program.

#### **IV. Section-by-Section Discussion of Regulatory Changes**

FMCSA is proposing to amend 49 CFR part 382 in the following ways.

##### Section 382.103

Some of the proposed changes to 49 CFR part 382 in today's NPRM affect service agents. As a result, FMCSA proposes to amend existing § 382.103(a), "Applicability," by adding an express statement that the rules codified in 49 CFR part 382 would apply to service agents.

##### Section 382.107

FMCSA proposes to add a new definition, "Commercial Driver's License Drug and Alcohol Clearinghouse," to existing § 382.107. The definition would explain that the Clearinghouse is a drug and alcohol testing information database to which this rule would

require employers and service agents to report drug and alcohol testing information and that the rule would require employers and certain service agents to query for information on current and prospective employees' drug and alcohol test results. FMCSA proposes to add a definition for "positive alcohol test" to eliminate any confusion as to the type of alcohol test that constitutes a violation of the Agency's drug and alcohol program. As such FMCSA proposes to add a definition for "negative return to duty test result" to clarify that it is a negative drug test and/or an alcohol test with an alcohol concentration of less than 0.02.

### Section 382.123

FMCSA proposes to add a new § 382.123 that would require employers to provide specific information on the Alcohol Testing Form (ATF) and Federal Drug Testing Custody and Control Form (CCF) that identifies drivers by use of their CDL number and State of issuance. Recording CDL number and State of issuance as the primary method of identification serves a critical data quality function. Using CDLs along with State of issuance and their unique record numbers to identify drivers and their test information will prevent misidentification resulting from similar names or the use of nicknames or initials. This proposal would allow employers to shift from reliance on the use of Social Security numbers on the current ATF and CCF and to identify drivers by better utilizing other types of readily-available and reliable information. Paragraph (a) would require that the employer list the driver's CDL number and State of issuance in Step 1, section B of the ATF. Under this proposal, employers would not be permitted to record drivers' Social Security numbers, and the only permitted employee ID number would be the driver's CDL number and State of issuance. If the driver tests positive for

alcohol in violation of 49 CFR parts 40 and 382, the employer or consortium responsible for reporting this information would use the driver's CDL number and State of issuance to report information to the Clearinghouse. Paragraph (a) would also require the employer to enter its USDOT or Internal Revenue Service (IRS)-issued Employer Identification Number (EIN) in Step 1, section C of the ATF, in addition to the information requested in that section of the ATF (i.e., employer name, street, city, State, and zip code). FMCSA would use the USDOT or EIN number as an employer identification to avoid confusion between similarly-named employers that enter information in the Clearinghouse. These numbers would be used to identify the employer for all aspects of the part 382 requirements, including reporting employers' drug and alcohol test results and the annual summary laboratory test reports that proposed § 382.404 would require.

Paragraph (b) would require the employer to record its USDOT number or EIN in Step 1, section A of the CCF. This provision would clarify that for FMCSA's purposes, the USDOT number or EIN fulfills the form's requirement for an employer "I.D. No." Paragraph (b) would also require the employer to record the driver's CDL number and State of issuance in Step 1, section C of the CCF. This proposal would change the current requirement that permits employers to use Social Security numbers or employee ID numbers. Under this proposal, employers would not be permitted to record drivers' Social Security numbers, and the only permitted employee ID number would be the driver's CDL number and State of issuance. If the driver tests positive for drugs in violation of 49 CFR parts 40 and 382, the MRO responsible for reporting this information would use the

driver's CDL number and State of issuance as employee identification to report information to the Clearinghouse.

FMCSA is aware that some self-employed drivers who are not required to have USDOT numbers use their Social Security numbers as their EINs for tax purposes. Any driver who is not comfortable using his or her Social Security number as an EIN could pursue one of two options. First, he or she could obtain a USDOT number. Drivers can get more information about obtaining USDOT numbers at <http://www.fmcsa.dot.gov/registration-licensing/registration-licensing.htm>. Second, he or she could change his or her EIN to a number that is different from his or her Social Security number. Drivers can get more information about changing their EINs by contacting the IRS.

#### Section 382.217

FMCSA proposes to add a new § 382.217 that would provide that an employer must not allow a driver to operate a CMV if the Clearinghouse has a record that shows that a driver has not successfully completed the return-to-duty process required by 49 CFR 40.305. This section would implement that portion of MAP-21, codified at 49 U.S.C. 31306a(f)(3), that requires employers to use the Clearinghouse to determine whether any employment prohibitions exist for prospective CMV drivers.

#### Section 382.401

FMCSA proposes to amend existing § 382.401(b)(1)(vi) to require employers to maintain records related to drivers' traffic citations that establish the employer's actual knowledge of an employee driving a CMV under the influence of drugs or alcohol in violation of §§ 382.205 and 382.213(b). This change clarifies that employers who have

actual knowledge of these types of traffic citations must maintain a record of them, just as they must for other aspects of their drug and alcohol testing programs. As is currently required of all records that must be retained under § 382.401(b)(1), these records must be maintained for a minimum of 5 years.

#### Section 382.404

FMCSA proposes to add a new § 382.404 to require each laboratory to submit to FMCSA an annual, aggregate statistical summary of test results for each motor carrier employer regulated under part 382 for which the laboratory performs DOT testing services. The reports would draw from the information laboratories are currently required to provide to employers under part 40, Appendix B, but would be limited to the annual number of drug tests conducted by type of test. This report would include all employers who are testing under the FMCSA and DOT requirements, and would be organized by employer's USDOT number or EIN. The filing date would coincide with the January filing date required under § 40.111(a). FMCSA proposes to require laboratories to file this information electronically. FMCSA envisions designating a specific format for filing, such as a commonly-available spreadsheet that the affected laboratories might already be using.

FMCSA would use this information to improve its enforcement efforts in identifying employers who are not in compliance with drug and alcohol testing requirements.

FMCSA seeks comments on what, if any, burden this reporting requirement would place on laboratories. Specifically, FMCSA would like comments on whether laboratories could use existing data collected as a part of existing business practices, or

whether they would have to establish new processes and controls to collect and aggregate this information. In addition, FMCSA seeks comment on what type of electronic format would be the easiest and least burdensome method for reporting this information, or whether other less burdensome cost effective methods could be used to similarly identify employers who are not in compliance with drug and alcohol testing requirements.

#### Section 382.405

Section 382.405(d) currently requires employers to make copies of all DOT drug and alcohol test results available to the Secretary, any DOT agency, or any State or local officials with regulatory authority over the employer. FMCSA proposes to extend these requirements to service agents who maintain records for an employer. This change is designed to make sure that the appropriate officials have access to all test results when employers use service agents to manage their drug and alcohol testing programs.

Section 382.405(e) currently authorizes the NTSB to require employers of CDL drivers involved in crashes under investigation to produce information on an employer's administration of post-accident alcohol and drug tests. FMCSA proposes to amend § 382.405(e) by adding a new paragraph authorizing FMCSA to provide the NTSB access to a CDL driver's records in the Clearinghouse when that driver is involved in a crash under investigation. This change would implement the statutory requirement, codified at 49 U.S.C. 31306a(i), that the Agency establish a process for NTSB access and would provide the NTSB with additional tools to help it fulfill its safety mission.

#### Section 382.409

FMCSA proposes to amend § 382.409(c) by including the Clearinghouse in the list of entities to which an MRO or C/TPA is authorized to release a driver's drug test

results. FMCSA also proposes to amend the title of § 382.409 to add the words “or consortium/third party administrator” so that it reads “Medical review officer or consortium/third party administrator record retention for controlled substances” to reflect more accurately the contents of the section.

#### Section 382.415

FMCSA proposes to add a new § 382.415 that would require a driver to notify, in writing, all of his or her employers if he or she violates the drug and alcohol testing regulations in parts 40 or 382. Current regulations do not require drivers who work for more than one employer to report this information to their other employers. This change would place an affirmative obligation on drivers to report drug and alcohol violations to all current employers. The penalties in current § 382.507, which include civil and criminal penalties, would apply to all drivers who do not comply with this section.

Employers are reminded that, once each employer is notified that an employee has violated the drug and alcohol regulations, each employer must separately follow the return-to-duty provisions of Parts 40 and 382 before allowing an employee to serve in a safety-sensitive position.. This includes the requirement that each employer needs to implement a follow-up test plan on its own for each employee.

#### Section 382.601

Current § 382.601 requires employers to promulgate a policy on the misuse of drugs and alcohol and to provide educational materials on the subject to its new and current employees. FMCSA proposes to add a new § 382.601(b)(12), that would require employers to notify drivers that information about verified positive, adulterated, or substituted drug test results; positive alcohol test results; refusals to submit to any test

required by subpart C of this part; employers' reports of actual knowledge that the driver received a traffic citation for driving a CMV while under the influence of alcohol or drugs; negative return-to-duty tests; employers' reports of completion of follow-up testing; and SAP reports will be reported to the Clearinghouse. Under this proposed requirement, employers must include all of this information in the educational materials they provide to their drivers, regardless of their internal employment policies regarding drivers violating drug and alcohol testing requirements. Employers may clarify internal employment policies pursuant to existing § 382.601(c).

#### Part 382, subpart G (§ 382.701 to § 382.727)

FMCSA proposes adding a new subpart G, entitled "Requirements and Procedures for Implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse," to part 382. Subpart G would describe employers' and drivers' rights and responsibilities with respect to the Clearinghouse, including how employers and service agents become authorized to submit information to the Clearinghouse and to obtain information from the database. It also would establish procedures for correcting and/or updating information in the database. New subpart G would implement Congress's general mandate in MAP-21 that the Agency develop a Clearinghouse to track CDL holders' positive drug and alcohol test results, and refusals to submit to drug and alcohol tests.

#### Section 382.701

New § 382.701 establishes employers' obligations to conduct pre-employment and annual queries of the database and prohibits them from using drivers in safety-sensitive positions when the queries return results showing certain violations of

FMCSA's drug and alcohol program. The scope of the queries is covered later under proposed section 382.719.

Paragraph (a) would establish an employer's obligation to conduct pre-employment queries by prohibiting the employer from hiring drivers without first conducting a search of the Clearinghouse for drug and alcohol violations. Paragraph (a) would implement the requirement in MAP-21, codified at 49 U.S.C. 31306a(f)(3), that employers search the Clearinghouse for drug and alcohol violations prior to hiring an individual to drive a CMV. Paragraph (b) would establish an employer's obligation to conduct an annual query on all currently-employed drivers. Paragraph (b) would implement the requirement, codified at 49 U.S.C. 31306a(f)(4), that employers conduct annual searches of drivers' drug and alcohol test result histories using the Clearinghouse. These requirements, which would apply to all drivers subject to the drug and alcohol testing regulations at part 382, are designed to make all current and prospective employers aware of applicants' and employees' reported drug and alcohol violations. Paragraph (c) would implement the statutory provision, codified at 49 U.S.C. 31306a(b)(3)(A), that requires FMCSA to notify an employer if new information about a driver is entered into the Clearinghouse within seven days of an employer conducting a query under this section.

Paragraph (d) would allow employers to hire but would prohibit employers from allowing a driver to perform safety-sensitive functions if a query of the database shows any of the following violations of the drug and alcohol testing program: a verified positive, adulterated, or substituted drug test result; a positive alcohol test result; a refusal to submit to any test required by subpart C of this part; or an employer's report of actual

knowledge that the driver received a traffic citation for driving a CMV while under the influence of alcohol or drugs. However, FMCSA does not propose to require employers and service agents to report all violations of subpart B.

Under current regulations, an employer may not allow a driver to perform safety-sensitive functions if the employer has actual knowledge that the driver has used drugs or alcohol. Actual knowledge is defined at § 382.107 to mean that an employer has actual knowledge of drug or alcohol use based on: direct observation of an employee; information provided by the driver's previous employer(s); a traffic citation for driving a CMV while under the influence of drugs or alcohol; or an employee's admission of drug or alcohol use (except as provided in § 382.21). As a part of this proposed rule, employers would only be required to report to the Clearinghouse violations based on actual knowledge of employees receiving a citation for operating a CMV under the influence of drugs or alcohol. FMCSA proposes to require only this one category of actual knowledge violation because a traffic citation provides objective documentation on which to base a report to the Clearinghouse. In the case of direct observation or an employee's admission, the employer has the obligation to remove the employee from performing safety-sensitive functions until he or she completes the return-to-duty process, but there is no requirement to report the observation or admission to the Clearinghouse. In the case of information provided by a previous employer, current rules require the employer to report the information to prospective employers during the pre-employment background check required by §§ 40.25 and 391.23. If the background check reveals prior drug or alcohol violations for which the employee has not

successfully completed the return-to-duty process, the employer is prohibited from hiring the employee to perform safety-sensitive functions, such as driving.

New § 382.701(d) would also provide that, if the database search revealed one of these violations, an employer could nonetheless allow a driver to perform safety-sensitive functions if the driver completed the return-to-duty process in subpart O of part 40.

Under subpart O, a driver who has completed the return-to-duty process, but has not completed all follow-up tests, would also be able to perform safety-sensitive functions provided the current employer assumes responsibility for managing the follow-up testing process. Finally, an employer may allow a driver to perform safety-sensitive functions if, after the time for final adjudication has expired, a traffic citation for driving under the influence of drugs or alcohol does not result in a conviction (as defined at 49 CFR 383.5). This provision does not permit an employer to allow a driver to perform a safety-sensitive function after receiving a DUI traffic citation, prior to receiving a final adjudication. All of the above provisions of paragraph (d) would implement the employment prohibitions required by MAP-21, codified at 49 U.S.C. 31306a(f)(3) & (h)(1)(D).

In accordance with the statutory mandate codified at 49 U.S.C. 31306a(h)(1)(c), paragraph (e) would establish a record keeping requirement under which employers would be required to retain for three years a record of each query made under this section and the information received in response. However, FMCSA would also retain that information in the Clearinghouse for a minimum of three years for research and enforcement purposes. The Agency does not believe that it is necessary to burden employers with a redundant recordkeeping requirement. Accordingly, FMCSA will deem

an employer to have satisfied this recordkeeping requirement if it conducts its query in accordance with a valid registration and the requirements of new subpart G.

### Section 382.703

In accordance with the requirements of 49 U.S.C. § 31306a(h)(1)(A), new § 382.703 would prohibit disclosure of information in the Clearinghouse without a driver's consent. Paragraph (a) would require an employer to obtain consent from drivers before querying the database to determine if there is any information in the database on that driver. Paragraph (b) would require the employer to obtain written consent from the driver for access to information in the Clearinghouse.

These consents apply to the proposed requirement (§ 382.701) that employers conduct two types of queries: pre-employment and annual. To reduce the burden on employers who would be required to conduct annual queries on multiple drivers at the same time, FMCSA envisions establishing two levels of queries. The first level, or "full query," would grant employers or prospective employers access to the reportable information in a driver's record and would require the employer to obtain written consent from the driver for access to Clearinghouse information. FMCSA envisions using technology similar to that it currently uses in its Pre-Employer Screening Program (PSP) to verify a driver's identity. FMCSA would then allow the driver to designate which employer(s) or prospective employer(s) may view his or her record. All employers would be required to conduct a full query to satisfy the pre-employment query requirement.

The second level, or "limited query," would not grant access to information in the Clearinghouse but would only indicate whether information *exists* in the database about a particular driver. Prior to conducting a limited query, an employer would have to obtain

written consent from a driver. Employers would be required to retain this consent for 3 years after conducting a query and would be subject to audit.

Employers would only be able to use the limited query in connection with annual searches on currently employed drivers. If the query indicates that information exists in the Clearinghouse on a particular driver, then the employer would be required to conduct a full query, requiring the employer to obtain written consent from the driver to view the information in the Clearinghouse.

FMCSA envisions that employers would require drivers to give blanket consent to allow employers to conduct a limited query on an annual basis for the duration of their employment. However, no driver may give blanket consent for a full query of his or her information in the Clearinghouse. Drivers must give specific written consent each time they allow employers to view their personal information in the Clearinghouse.

Paragraph (c) would prohibit employers from using any driver who does not grant consent to search the Clearinghouse. If a driver refuses to grant consent for either the full or limited query, that driver could not perform any safety-sensitive function, including driving. Paragraph (d) would make clear that the consent granted under this proposed section would include consent for FMCSA to notify employers of information on a driver that was entered into the Clearinghouse within seven days of the employer conducting a query.

#### Section 382.705

In accordance with Congress's mandate that drug and alcohol refusals and positive test results be reported to the Clearinghouse (codified at 49 U.S.C. 31306a(g)), new § 382.705 would establish reporting requirements, assigning responsibility for

inputting and updating information to individuals and entities. Paragraph (a) would require MROs to report to the Clearinghouse within 1 business day all verified positive, adulterated, or substituted drug test results and refusals to test that require a determination by the MRO as specified in 49 CFR 40.191. In the event an MRO changes the outcome of a test in accordance with 49 CFR part 40, he or she would be required to report this change within 1 business day. This paragraph would also require the MRO to provide the reason for the test; the Federal Drug Testing CCF specimen ID number; the collection site name and address; the driver's name, date of birth, and CDL number, and the State that issued the CDL; the employer's name, city/State, and USDOT or EIN; the date of the test; the date of the verified result; and the test result. The test result would either be (1) positive; (2) refusal to test: adulterated; (3) refusal to test: substituted; or (4) refusal to provide a specimen. This information will allow tracking and identification of specific test results. Information about the driver (i.e., name, date of birth, CDL number, and issuing State) and the employer (i.e., name, address, and USDOT or EIN number) is intended to assist in making a positive identification of the driver in the Clearinghouse, because information about more than one driver with the same name may be present in the database.

FMCSA proposes to have MROs, rather than employers, report this information to the Clearinghouse. A large number of small motor carrier employers (approximately 86%) are responsible for administering drug and alcohol programs. Based on the Agency's observation that smaller employers have lower compliance rates with FMCSA's drug and alcohol testing program, due in part to the inherent business interests small companies have in retaining employees, the Agency believes that requiring MROs

to report verified drug results would produce more accurate and comprehensive reporting to the Clearinghouse.

The above notwithstanding, under DOT rules, MROs do not verify alcohol test results. As a result, paragraph (b) would require employers to report the following information to the Clearinghouse: alcohol test results with an alcohol concentration of 0.04 or greater; negative return-to-duty tests; drug and alcohol test refusals; reports that drivers have successfully completed all follow-up tests; and reports of actual knowledge that a driver received a traffic citation for driving a CMV under the influence of drugs or alcohol. This section would also require that employers report the reason for the test; the driver's name, date of birth, CDL number and the State that issued the CDL; the employer's name, address, and USDOT number or EIN; date of the test; date the result was reported; and test result. The test result would be one of the following: negative (for return-to-duty tests only), positive, or refusal. This information is required so that information about drivers with similar or identical names is not erroneously posted to the wrong driver's record.

Employers would also be required to report each instance in which they have actual knowledge that an employee-driver received a traffic citation for driving a CMV under the influence of drugs or alcohol. The report would include the following information: the driver's name, date of birth, CDL number and State that issued the CDL; employer's name, address, and USDOT number or EIN; the date of the traffic citation; the date the employer became aware of the traffic citation; the name and State of the law enforcement agency issuing the traffic citation; the ticket or docket number associated with the citation; and the specific charge alleged in the traffic citation. This information is

designed to ensure that a driver can identify any traffic citation reported to the database and verify that the information is correctly reported with the law enforcement agency that issued it. If the citation does not result in a conviction, a driver may request that FMCSA remove the employer's report from the Clearinghouse (see proposed § 382.719). In that circumstance, the information FMCSA proposes to require in this paragraph will be important for tracking the citation and its subsequent adjudication. To the extent an employer uses a TPA to comply with his or her reporting duties, the employer remains responsible for ensuring that the TPA makes the required reports.

Similar to the requirements in paragraph (b) that apply to employers, paragraph (c) would require C/TPAs acting on behalf of an employer who employs himself/herself, as required by 49 CFR 382.103(b), to report the following information to the Clearinghouse: alcohol test results with an alcohol concentration of 0.04 or greater; negative return-to-duty tests; drug and alcohol test refusals; and reports that drivers have successfully completed all follow-up tests. This section would also require that C/TPAs report the reason for the test; the driver's name, date of birth, CDL number and the State that issued the CDL; the employer's name, address, and USDOT number or EIN; date of the test; date the result was reported; and test result. The test result would be one of the following: negative (for return-to-duty tests only), positive, or refusal.

Paragraph (d) would require SAPs to report information to the Clearinghouse about drivers who begin the return-to-duty process. That would include information identifying the SAP and the driver; the date of the initial SAP assessment. The SAP would also enter the date the SAP determined that the driver successfully completed the education and/or treatment process and was eligible for return-to-duty testing; and the

frequency, number, and type of required follow-up tests; the duration of the follow-up testing plan; and any subsequent modifications to the plan. This information is important to potential future employers so that they may require a negative return-to-duty test and comply with the follow-up testing requirements. SAPs would be required to report this information within 1 business day of determining that the driver has completed the return-to-duty requirements.

Paragraph (e) would require persons reporting information to the Clearinghouse to do so truthfully and accurately. FMCSA proposes to prohibit anyone from reporting false or inaccurate information. Anyone making an inadvertent error should make a correction immediately upon discovering the error. Anyone violating the provisions of this paragraph would be subject to the civil and criminal penalties set forth in current § 382.507, as well as any other applicable penalties.

#### Section 382.707

In accordance with the statutory requirement, codified at 49 U.S.C. 31306a(g)(4), that requires the Agency to notify individuals about changes to their records in the Clearinghouse, new § 382.707 would require FMCSA to notify a driver when information about that driver is entered in, revised, or removed from the Clearinghouse. It would also require FMCSA to notify a driver when information from the Clearinghouse is released to an employer and to state the reason for the release. The default method of notification would be to send a letter by U.S. Mail to the address on record with the SDLA that issued the driver's CDL. However, drivers would be able to provide an alternate address or method of communications, such as electronic mail. This section would require FMCSA to alert a driver each time a change occurred to his or her record

in the Clearinghouse. The driver would then be able to access the Clearinghouse to review the new or revised data and request changes, if appropriate.

#### Section 382.709

As mandated by MAP-21 and codified at 49 U.S.C. 31306a(j)(1), new § 382.709 would grant a driver the right to review information in the Clearinghouse about himself or herself, except as otherwise restricted by law, but reminds drivers that consistent with Part 40, drivers cannot obtain their follow-up testing plan.

#### Section 382.711

New § 382.711, implements the statutory requirement, codified at 49 U.S.C. 31306a(h)(1) that the Agency establish a process for employers and/or their agents to request information from the Clearinghouse. This section would establish strict registration procedures for employers and service agents. Only employers and designated service agents — MROs, C/TPAs, and SAPs — would be authorized to submit information on a driver to the Clearinghouse. All Clearinghouse registrants would be required to provide their names, addresses, and telephone numbers, as well as any other information necessary to validate identity. In addition, employers would be required to submit their USDOT numbers or EINs and the name of the person or persons authorized to access the Clearinghouse. C/TPAs would also be required to identify the person or persons authorized to access the Clearinghouse. Employers and C/TPAs would be required to update annually the names of the people they authorize to access the Clearinghouse. MROs and SAPs would be required to provide a certification and evidence that they meet the DOT's qualifications and training requirements under 49 CFR part 40 in order to register.

DOT recognizes the uniqueness of “owner-operators” in the motor carrier industry. 49 CFR §§40.355(f)(h) & (j) provide specific exceptions to enable service agents (e.g., SAPs, C/TPAs, and MROs) to better manage this situation where the employee is also the employer. Under 49 CFR §382.305, FMCSA requires owner-operators to participate in a consortium for random testing. New § 382.711(b) would expressly require employers that are owner-operators to identify the C/TPA that it uses for testing purposes and authorize that C/TPA to submit information on a driver, including themselves, to the Clearinghouse. This section would be mandatory for owner-operator and self-employed individuals and permissive for other employers that may use C/TPAs to perform testing services.

#### Section 382.713

New § 382.713 would set forth the terms under which Clearinghouse registrations would remain active, or would be revoked or cancelled. The initial Clearinghouse registration term would be 5 years unless the Agency took action to revoke or cancel it. The Agency proposes to cancel any registrant that does not use the Clearinghouse to view or input information for 2 years. The Agency would also have the authority to revoke the Clearinghouse registration of entities who do not comply with Clearinghouse regulations.

If an entity’s Clearinghouse privileges are revoked, they would still be obligated to perform all of the functions under this rule. If it was unable to do so because of revocation, then FMCSA staff would become involved and process the requests on behalf of the employers. There is no reason why an entity could not request reconsideration if its registration were revoked.

#### Section 382.715

New § 382.715 would require employers to designate C/TPAs before the C/TPA could enter information relating to them into the Clearinghouse.

#### Section 382.717

New § 382.717 would implement the statutory requirement, codified at 49 U.S.C. 31306a(j)(2), that the Agency provide a dispute resolution procedure to remedy administrative errors in an individual's Clearinghouse record. This section would establish procedures for drivers to petition FMCSA to correct inaccurate information in the Clearinghouse. Drivers would be required to submit a petition within 18 months of the date the information in question was reported to the Clearinghouse. Drivers would need to include information identifying themselves and the information they want to be corrected, the reasons they believe the information is inaccurate, and evidence supporting their challenge. Drivers would not be able to challenge the accuracy or validity of the alcohol or controlled substance test results under these new procedures. Nothing in this rule would change the limitation on a driver's ability to challenge the validity of a test result or a refusal.

The procedures that would be established under this section would be used to correct clerical errors, such as reporting results to the wrong driver's record; an incorrect name or CDL number; a misidentified test type, such as a pre-employment identified as a random test; or other inaccuracies in the reported data. These procedures could also be used to request that an employer's report of actual knowledge of a traffic citation for driving a CMV under the influence of drugs or alcohol be removed from the Clearinghouse if the citation did not result in a conviction. FMCSA would resolve petitions and notify the driver of its decision within 90 days of receiving a complete

petition. The rule would also establish an expedited review to elevate those petitions seeking correction of critical information as opposed to those petitions addressing errors that do not impact an individual's ability to perform safety-sensitive functions. In this manner, the Agency will be able to provide the critical function served by this section and appropriately manage any number of petitions that seek less-critical, but nevertheless valid, requests for data correction. If resolution of the decision would affect the driver's ability to perform safety-sensitive functions, he or she could request expedited review. If FMCSA granted expedited review, it would inform the driver of its decision within 30 days of receiving a complete petition.

This section would also give drivers the opportunity to request administrative review of FMCSA's disposition of a petition to correct information in the Clearinghouse. A driver challenging FMCSA's decision would be required to present his or her request in writing to the Associate Administrator for Enforcement and Program Delivery, along with an explanation of the error he or she asserts FMCSA made and documentation to support his or her position. The Associate Administrator would make a decision within 60 days, and this would constitute final Agency action.

With respect to the administrative review procedures for denials of requests for data correction in 382.717(f), we would note that this is not an appeal of a factual or evidentiary nature it is a second level of review of a data correction system. The Agency based the procedures for administrative review in the NPRM on existing procedures in FMCSA regulations where the administrative review is similarly based on "agency error." See 49 CFR §§ 385.15 (administrative review of safety ratings), 385.113 (administrative review of Mexican carrier safety ratings), 385.327 (administrative review

of new entrant safety audits), 385.423 (administrative review of hazmat safety permit denials). None of these existing processes include an explicit standard for review, explanation of how decisions will be made by the identified deciding official, or evidentiary standards. None of these sections have been deemed inadequate. The standard, as here, is whether the Agency erred in making its initial decision. In addition, all petitioners will have the right to obtain counsel if they so choose.

#### Section 382.719

New § 382.719 would provide that an employer seeking to determine whether an employment prohibition exists would not have access to information about a particular violation once certain conditions are met. FMCSA proposes that once a driver successfully completes all aspects of the return-to-duty process, information about a positive test result or a refusal will remain accessible to employers for a period of either three or five years. FMCSA proposes both options based on two provisions in MAP-21 that can be interpreted to require employers to have access to this information for either a three or five-year period. Compare 49 U.S.C. §31306a(f) (requiring employers to determine whether a driver has had an employment prohibition for a three-year period prior to hiring), with 49 U.S.C. §31306(g)(6) (requiring the Secretary to retain records in the clearinghouse for five years, and remove records after five years, “unless the individual fails to meet a return-to-duty or follow-up requirement under title 49, Code of Federal Regulations”).

Based on this analysis, FMCSA proposes the following requirements to determine when records will no longer be available for review by employers conducting queries of the database: (1) the SAP reports that the driver has successfully completed the

prescribed education and/or treatment as required by 49 CFR 40.305 and is eligible for return-to-duty testing; (2) the employer or C/TPA reports that the driver has received negative return-to-duty test results; (3) the driver's present employer or employer's consortium (for owner/operators) reports that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with §§40.307, 40.309, and 40.311; and (4) 3 years have passed since the date of the violation determination. As an alternate to subparagraph (4), FMCSA proposes to limit the time period during which an employer could access information about a violation that the driver has addressed by successful completion of the return to duty process to a period of five years from the date of violation instead of three years. FMCSA seeks comment on whether three or five years from the date of the violation is the appropriate amount of time to make this test result information available after a driver has completed the return-to-duty process.

Regardless of whether three years or five years has passed since the date of the violation determination, this section would also provide that violation information would remain in the Clearinghouse indefinitely and be available to employers conducting a query if a driver failed to complete the return-to-duty process. The above notwithstanding, FMCSA will remove information about a traffic citation for driving a CMV under the influence of drugs or alcohol within 2 business days of making the determination that it did not result in a conviction. This section would also make clear that FMCSA could continue to use data removed from the Clearinghouse for research, auditing, and enforcement purposes.

#### Section 382.721

As authorized by 49 U.S.C. 31306a(e), new § 382.721 would establish the Agency's ability to collect reasonable fees from entities that are required to query the Clearinghouse. The Agency would be prohibited from collecting fees from drivers accessing their own records.

### Section 382.723

New § 382.723 would prohibit anyone from accessing the Clearinghouse except as authorized by this proposed rule. It would also prohibit anyone from reporting inaccurate or misleading information to the Clearinghouse. No one would be permitted to disclose or disseminate any information obtained from the Clearinghouse, except as otherwise authorized by law. As required by statute, codified at 49 U.S.C.

31306a(h)(1)(D), employers would be specifically prohibited from using information from the Clearinghouse for any purpose other than to assess or evaluate whether a driver is prohibited from operating a CMV. Employers would be further prohibited from divulging any such information to anyone not directly involved in that assessment or evaluation, as required by 49 U.S.C. 31306a(h)(1)(E)(ii). Anyone who violates this rule would be subject to the civil and criminal penalties established by existing § 382.507. In addition, employers and service agents remain subject to the requirements concerning "Confidentiality and Release of Information" found in 49 CFR part 40, subpart P. These provisions are incorporated and made applicable to motor carrier employers in 49 CFR 382.105. This section would not, however, prohibit FMCSA from accessing the information in the Clearinghouse for research or enforcement purposes. For example, FMCSA could use the information in the database to identify trends in testing data that could help the Agency focus its oversight activities.

### Section 382.725

In accordance with Congress's mandate in MAP-21 (codified at 49 U.S.C. 31306a(h)(2)), new § 382.725 would grant each State chief commercial driver's license official the right to access information in the Clearinghouse about an applicant for a commercial driver's license for the purpose of determining whether that applicant is qualified to operate a CMV. The applicant is not required to grant prior consent; an applicant is deemed to have granted consent by virtue of applying for a commercial driver's license. The chief commercial driver's license officials are required to protect the privacy and confidentiality of the information they receive under this proposed section. Failure to comply with the terms of this proposed section would result in the official losing his or her right of access.

### Section 382.727

As directed by Congress in MAP-21 (codified at 49 U.S.C. 31306a(k)), new § 382.727 would establish civil and criminal penalties for violations of the proposed Clearinghouse regulations. As stated above, 49 CFR § 382.507 already establishes civil and criminal liability for employers and drivers that violate any provision of 49 CFR part 382. However, new § 382.727 would extend civil and criminal liability to all employees, medical review officers and service agents for violations of 49 CFR subpart G.

### Summary of Responsibilities and Data Access

Table 1 summarizes the obligations of each entity responsible for reporting information to the Clearinghouse database.

**Table 1: Reporting Entities and Circumstances**

<b>Reporting Entity</b>	<b>When Information Would Be Reported to Clearinghouse</b>
Prospective Employer of CDL Driver	<ul style="list-style-type: none"> <li>— Positive pre-employment test result</li> <li>— Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191</li> </ul>
Current Employer of CDL Driver	<ul style="list-style-type: none"> <li>— Positive alcohol test result</li> <li>— Refusal to test (alcohol) as specified in 49 CFR 40.261</li> <li>— Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191</li> <li>— Citations (DUI in a CMV)</li> <li>— Negative return-to-duty test results</li> <li>— Completion of follow-up testing</li> </ul>
MRO	<ul style="list-style-type: none"> <li>— Verified positive, adulterated, or substituted drug test result</li> <li>— Refusal to test (drug) requiring a determination by the MRO as specified in 49 CFR 40.191</li> </ul>
Third Party Administrator (if designated by employer to report on its behalf)	<ul style="list-style-type: none"> <li>— Positive alcohol test result</li> <li>— Refusal to test (alcohol) as specified in 49 CFR 40.261</li> <li>— Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191</li> <li>— Negative return-to-duty test results</li> </ul>
Consortium (reporting for owner/operators)	<ul style="list-style-type: none"> <li>— Positive alcohol test result</li> <li>— Refusal to test (alcohol) as specified in 49 CFR 40.261</li> <li>— Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191</li> </ul>
SAP	<ul style="list-style-type: none"> <li>— Identification of driver and date the initial assessment was initiated</li> <li>— Successful completion of treatment and/or education and the determination of eligibility for return-to-duty testing</li> <li>— Follow-up testing requirements</li> </ul>

Table 2 summarizes the conditions under which entities would be able to view information in the Clearinghouse.

**Table 2: Querying Entities and Information Obtained from the Clearinghouse**

<b>Querying Entity</b>	<b>Type of Data Obtained</b>	<b>Requirements to Obtain Data</b>
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<b>Querying Entity</b>	<b>Type of Data Obtained</b>	<b>Requirements to Obtain Data</b>
Prospective Employer of CDL Driver (full query)	Records in the Clearinghouse pertaining to the applicant concerning: — positive alcohol test result; — verified positive, adulterated, or substituted drug test result; — refusal to test (alcohol or drug) — citations (actual knowledge) — return-to-duty negative test result — follow-up testing program information	Employer obtains written consent from driver
Current Employer of CDL Driver (full query)	Records in the Clearinghouse pertaining to the CDL driver concerning: — positive alcohol test result — verified positive, adulterated, or substituted drugs test result; — refusal to test (alcohol or drug) — citations (actual knowledge) — return-to-duty negative test result — follow-up testing program information	Employer obtains written consent from driver
Current Employer of CDL Driver (limited query)	Notice of whether information for the driver exists in the Clearinghouse	Employer obtains written consent for a limited query
CDL Driver	Records in the Clearinghouse pertaining to the CDL driver	Specific request of the CDL driver; FMCSA verifies driver identity.
MRO	No access	
SAP	No access	
Consortium (full query)	Records in the Clearinghouse pertaining to the CDL driver concerning: — positive alcohol test result — verified positive, adulterated, or substituted drugs test result; — refusal to test (alcohol or drug) — citations (actual knowledge) — return-to-duty negative test result — follow-up testing program information.	Consortium obtains written consent for a full query

<b>Querying Entity</b>	<b>Type of Data Obtained</b>	<b>Requirements to Obtain Data</b>
Consortium (limited query)	Notice of whether information for the driver exists in the Clearinghouse	Consortium obtains written consent for a limited query
Third Party Administrator	Access limited to authority delegated by employer to review data in Clearinghouse	TPA obtains written consent for a limited or full query; TPA must have specific written consent from the employer of the CDL driver
FMCSA	Full access	No consent required
NTSB	Records of driver involved in accidents under investigation	No consent required

Table 3 summarizes the types of queries that an employer is required to conduct.

**Table 3: Types of Queries**

<b>Type of Query</b>	<b>Type of Consent</b>	<b>When Required</b>	<b>Type of Data Obtained</b>
Full query	Employer obtains written consent from driver	Pre-employment screening	Information on driver's drug and alcohol test results
Full query	Employer obtains written consent from driver	Annual query results show that the driver has drug or alcohol testing information in the Clearinghouse	Information on driver's drug and alcohol test results
Limited query	Employer must obtain and maintain written consent for at least 3 years following the query	Annually	Notice of whether information for the driver exists in the Clearinghouse

## **V. Regulatory Analyses and Notices**

### Executive Order 12866

This proposed rule is a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review. The Office of Management

and Budget has reviewed it under that Order. It requires an assessment of potential costs and benefits under section 6(a)(3) of that Order. A draft Regulatory Impact Analysis (RIA) is available in the docket where indicated under the “Public Participation and Request for Comments” section of this preamble. A summary of the RIA follows:

#### RIA Estimates of Benefits and Costs

All employers subject to the drug and alcohol testing regulations would be required to query the database (1) on an annual basis to examine each driver’s positive test record and (2) as part of a prospective driver’s pre-employment screening process.

Given the established, sizeable success of mandatory testing programs on crash reduction,<sup>4 5</sup> concrete improvements in the process of disseminating positive-test results and making them accessible to employers are expected to bring substantial benefits.

The Agency estimates about \$187 million in annual benefits from increased crash reduction from the rule—\$53 million from the annual queries and \$134 from the pre-employment queries. FMCSA estimates about \$186 million in total annual costs, which include costs for: employers to complete the annual (\$28 million) and pre-employment (\$10 million) queries; employers and drivers to designate service agents and report driver information (\$3 million); various entities to report positive tests (\$1 million) and to register, verify authorization, and become familiar with the rule (\$5 million); consent to release driver information (\$35 million); clearinghouse development and records management (\$3 million); and the cost for drivers to go through the return-to-duty

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<sup>4</sup> Jacobson, Mireille, “Drug Testing in the Trucking Industry: The Effect on Highway Safety,” *The Journal of Law and Economics*, April 2003, Vol. 46, pp.130-156.

<sup>5</sup> Brady, Joanne E., Susan P. Baker, Charles DiMaggio, Melissa McCarthy, George W. Rebok, and Guohua Li, “Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes,” *American Journal of Epidemiology*, Vol. 170, No. 6, pp.775-782 (Advance Access Publication 19-August-2009).

process (\$101 million). The estimated costs are about equal to its benefits: Total net benefits of the rule are just \$1 million annually. The ten-year projection of net benefits is \$8 million when discounted at seven percent and \$9 million when discounted at three percent. However, estimated benefits include only those associated with reductions in CMV crashes. FMCSA could not precisely quantify improved health, quality-of-life improvements, and increased life expectancy for CMV drivers. The Agency believes these non-quantified benefits are significant, and, if they were included in the benefits estimates, would clearly demonstrate the positive net benefits of this rule. The table below summarizes these net-benefit estimates.

Total and Annual Net Benefit Projection Over a Ten-Year Period			
Total	Annual	10-Year	10-Year
Discount Rate		7%	3%
Total Benefits	\$187,000,000	\$1,406,000,000	\$1,643,000,000
Total Costs	\$186,000,000	\$1,398,000,000	\$1,634,000,000
Total Net Benefits	\$1,000,000	\$8,000,000	\$9,000,000

The RIA contains sections describing the benefits and costs associated with implementing the following provisions of the proposed rule:

- MANDATORY QUERIES
  - a. Employers would be required to query the Clearinghouse annually for each of their drivers in order to ascertain if any of them failed drug or alcohol tests during the previous year.
  - b. Prospective employers would be required to query the Clearinghouse as part of their pre-employment screening process of potential hires in order to ascertain if a prospective employee failed a drug or alcohol test with a previous employer or prospective employer.

- DESIGNATING SERVICE AGENTS
  - c. Employers would be required to designate (and submit authorization for) their C/TPAs and SAPs with the Clearinghouse.
- REPORTS AND NOTIFICATIONS OF POSITIVE TESTS
  - d. MROs would report verified positive controlled-substances test results for CDL drivers to the Clearinghouse. Each test would be identified as pre-employment, post-accident, random, reasonable suspicion, return-to-duty, or follow-up. MROs would also be required to report certain drug test refusals to the Clearinghouse.
  - e. FMCSA would notify each driver testing positive that information about them has been reported to, revised or removed from the Clearinghouse. The drivers would also have the opportunity to review this information.
  - f. SAPs would report to the Clearinghouse information about the evaluation and treatment process as well as the number of required follow-up tests to be given after a return-to-duty test.
  - g. Employers or C/TPAs acting on the employer's behalf would report verified alcohol test results at or above 0.04 alcohol concentration for CDL drivers to the Clearinghouse, subsequent follow-up test results stemming from the initial test at or above 0.04 alcohol concentration, and refusals. Each test would be identified as pre-employment, post-accident, random, reasonable suspicion, return-to-duty, or follow-up.

Employers or TPAs would also report negative return-to-duty test results.

- h. All employers subject to 49 CFR part 382, or C/TPAs acting on the employer's behalf would report information on refusals to test.
- i. Employers would be required to report actual knowledge of a driver's traffic citation for driving a CMV under the influence of drugs or alcohol).

- CLEARINGHOUSE REGISTRATION

- j. Employers, C/TPAs, MROs, and SAPs would be required to register with the Clearinghouse.
- k. Employers (and C/TPAs) would be required to verify, on an annual basis, the names of person(s) authorized to report and obtain information from the Clearinghouse.

- DRIVER CONSENT VERIFICATION

- l. Written consent must be obtained from the driver prior to release of information from the Clearinghouse.

- SUBMISSION OF ANNUAL REPORTS

- m. All drug-testing laboratories would submit employer specific summary reports of test results directly to FMCSA annually.

### Benefit analysis

The benefits to the rule derive from reductions in crashes due to the additional information on employee-failed and refused drug and alcohol tests disseminated to

employers solely because of the annual and pre-employment queries. This represents information that employers would not otherwise know about and act on.

The current drug-testing program is estimated to generate \$160 million in annual crash-reduction benefits from 35,145 annual positive tests, which averages to approximately \$4,600 per positive drug test ( $\$160 \text{ million} / 35,145$ , rounded to the nearest hundred). The mandated annual query in the proposed rule would result in 9,200 instances of employer alerts to positive drug tests of their drivers that current employers would not otherwise have known about. A requirement that disseminates additional information on 9,200 other positive testing drivers can be estimated to generate the same proportion of benefits that the 35,145 from the current program generates. If 35,145 positive tests and consequent alerts generate \$160 million in benefits, then 9,200 additional alerts would generate \$42 million in benefits ( $(\$160 \text{ million} / 35,145) = (\$41.9 \text{ million} / 9,200)$ , rounded to the nearest million).

The current alcohol testing program is estimated to generate \$43 million in annual crash-reduction benefits from 3,465 annual positive alcohol tests, which averages to approximately \$9,200 per positive alcohol test ( $\$43 \text{ million} / 3,465$ , rounded to nearest hundred). The mandated annual query in the proposed rule would result in 900 instances of employer alerts to positive tests of their drivers that current employers would not otherwise have known about. A requirement that disseminates additional information on 900 other positive testing drivers can be estimated to generate the same proportion of benefits that the 3,465 from the current program generates. If 3,465 positive tests and consequent alerts generate \$43 million in benefits, then 900 additional alerts would

generate about \$11 million in benefits ( $(\$43 \text{ million} / 3,465) = (\$11.2 \text{ million} / 900)$ , rounded to the nearest million).

With annual benefits to the drug-testing side of the annual queries estimated at \$42 million and the alcohol-testing side at \$11 million, total annual benefits to mandated annual queries are thus estimated at \$53 million ( $\$42 \text{ million} + \$11 \text{ million}$ ).

The mandated pre-employment query in the proposed rule would result in 23,100 instances of employer alerts to positive drug tests that prospective employers would not otherwise have known about. A requirement that disseminates additional information on 23,100 other positive drug testing drivers can be estimated to generate the same proportion of benefits that the 35,145 from the current program generates. If 35,145 positive tests and consequent alerts generate \$160 million in benefits, then 23,100 additional alerts would generate \$105 million in benefits ( $(\$160 \text{ million} / 35,145) = (\$105.2 \text{ million} / 23,100)$ , rounded to the nearest million).

The mandated pre-employment query in the proposed rule would result in 2,300 instances of employer alerts to positive alcohol tests of their drivers that prospective employers would not otherwise have known about. A requirement that disseminates additional information on 2,300 other positive testing drivers can be estimated to generate the same proportion of benefits that the 3,465 from the current program generates. If 3,465 positive tests and consequent alerts generate \$43 million in benefits, then 2,300 additional alerts would generate \$29 million in benefits ( $(\$43 \text{ million} / 3,465) = (\$28.5 \text{ million} / 2,300)$ , rounded to the nearest million).

With annual benefits to the drug-testing side of the pre-employment queries estimated at \$105 million and the alcohol-testing side at \$29 million, total annual benefits

to mandated pre-employment queries are thus estimated at \$134 million (\$105 million + \$29 million).

Given the \$53 million in annual benefits from the information on positive tests disseminated because of the mandatory annual queries (\$42 million drug and \$11 million alcohol) and the \$134 million in annual benefits from the information on positive tests disseminated because of the mandatory pre-employment queries (\$105 million drug and \$29 million alcohol), the total benefits to the proposed rule are **\$187 million annually**.

The table below presents these benefit totals.

Total Annual Benefits of the Rule			
Queries	Drug	Alcohol	Total
Annual	\$42,000,000	\$11,000,000	\$53,000,000
Pre-Employment	\$105,000,000	\$29,000,000	\$134,000,000
Total	\$147,000,000	\$40,000,000	<b>\$187,000,000</b>

Based on the annual benefits of \$187 million, the 10-year benefit projection is **\$1.406 billion** when discounted at 7 percent and \$1.643 billion when discounted at 3 percent

By reducing drug and alcohol abuse by drivers, this rule could also lead to improved health, quality-of-life improvements, and increased life expectancy for drivers beyond those associated with reductions in vehicle crashes.

#### Cost analysis

FMCSA estimates that the costs of the proposed rule total \$186 million annually, which can be separated into nine categories. From the above descriptions of the requirements of the rule (a though m above): (a) the cost to employers to complete the annual queries of their drivers is estimated at \$28 million annually; (b) the cost to

prospective employers to complete pre-employment queries as part of the pre-employment screening process is \$10 million annually; (c) the cost to employers to designate their C/TPAs and SAPs to input driver information is \$3 million annually; (d, e, f, g, h, and i) the cost to MROs, SAPs, C/TPAs, and employers to report positive tests to the Agency totals \$1 million annually; (j and k) the cost for employers, C/TPAs, MROs, and SAPs to register with the Agency, verify persons authorized to access, and become familiar with the new processes (this familiarization is not, per se, “required” by the rulemaking, but is an obvious result of it) is \$5 million annually: (l) the cost to process access requests is \$35 million annually, (m) the cost to FMCSA to develop the clearinghouse and manage driver records is \$3 million annually, the cost for drivers to undergo the return-to-duty process is \$101 million annually, and the cost for laboratories to submit annual reports of test results to FMCSA is insignificant (less than \$1,500). These components of the cost estimate are presented in the table below and FMCSA seeks comment on the estimates summarized here and discussed further in the RIA.

Summary of the Total Annual Costs of the Rule		
Cost Category	Entity	Annual Cost
Annual Queries	Employers	\$28,000,000
Pre-Employment Queries	Employers	\$10,000,000
Designate Service Agents / Input Driver Information	Employers	\$3,000,000
Report Positive Tests	Various	\$1,000,000
Register, Rule Familiarize, Verify Authorization	Various	\$5,000,000
Access	Drivers	\$35,000,000
Development and Records Management	FMCSA	\$3,000,000
Return-to-Duty Process	Drivers	\$101,000,000
<b>Grand Total</b>		<b>\$186,000,000</b>

Based on the annual cost of \$186 million, the ten-year cost projection would be \$1.398 billion when discounted at 7 percent and \$1.634 billion when discounted at 3 percent.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), (5 U.S.C. 601-612), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations (or proposals) on small entities, and mandates that agencies shall strive to lessen any adverse effects on these businesses. The initial Regulatory Flexibility Analysis (IRFA) must cover the following topics:

**(1) A description of the reasons why action by the Agency is being considered.**

A 1999 bus crash in New Orleans resulted in 22 passenger fatalities. The driver of the motor-coach had failed pre-employment drug testing when applying for previous positions. He had also failed to disclose on his employment application that a previous employer had fired him after he tested positive for a controlled substance. His employer at the time of the crash did not know about any of this.

As a result, the National Transportation Safety Board (NTSB) made recommendations to the Agency pertaining to the reporting of CMV driver drug and alcohol testing results. Specifically, the NTSB recommended that FMCSA “develop a system that records all positive drug and alcohol test results and refusal determinations that are conducted under the U.S. Department of Transportation (USDOT) testing requirements, require prospective employers to query the system before making a hiring decision, and require certifying authorities to query the system before making a certification decision.” This proposed rulemaking addresses the NTSB’s recommendation.

Two recent Government Accountability Office (GAO) reports discuss “job hopping” by CMV drivers after failing, or refusing to submit to, drug or alcohol tests (see: GAO-08-600 and GAO-08-0829R). The GAO identified and verified 43 cases (based on insider information supplied by a third party to a Congressman) where CMV drivers had tested positive for illegal drugs (such as cocaine, marijuana, and amphetamines) with one employer and within 1 month tested negative with another employer. In its recommendations to Congress, the GAO advocated a national database and this rulemaking as possible methods to eliminate the job-hopping problems.

The purpose of this rule is to mandate that employers annually query the Clearinghouse to determine whether each of their drivers has tested positive for illegal drug or alcohol use in the previous year. Additionally, the rule mandates that employers query the Clearinghouse as part of their pre-employment screening process of prospective drivers.

The purpose of the annual query is to diminish or eliminate the problem of a currently-employed CDL holder testing positive for illegal drug or alcohol use with another or prospective employer, but then simply continuing to operate CMVs with his or her current employer without that employer knowing and acting on the positive test.

The purpose of the pre-employment query is to diminish or eliminate the problem of a driver with previous positive tests seeking and obtaining work without prospective employers knowing and acting on the information. This could occur if a driver is fired for a positive test—for example, failing a post-accident or reasonable-suspicion test—but does not inform future employers about the previous employer that fired her.

This could also occur if a new driver entering the workforce tests positive for drugs or alcohol during a pre-employment test, waits for the drugs to leave her system, then takes and passes another pre-employment test and gets hired without the employer having any knowledge of the previously failed pre-employment test.

**(2) A succinct statement of the objectives of, and legal basis for, the proposed rule.**

The Agency proposes to revise 49 CFR part 382, Controlled Substances and Alcohol Use and Testing, to establish a database, identified as the “Commercial Driver's License Drug and Alcohol Clearinghouse,” for reporting of verified positive, adulterated, or substituted drug test results; positive alcohol test results; refusals; and negative return-to-duty test results. Under the proposed rule, motor carrier would be required to query the Clearinghouse for drug and alcohol test result information on employees and prospective employees. The proposed rule is intended to increase compliance with drug and alcohol testing requirements.

FMCSA has general authority to promulgate safety standards, including those

governing drivers' use of drugs or alcohol while operating a CMV. The Motor Carrier Safety Act of 1984 (Pub. L. 98-554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act) provides authority to regulate drivers, motor carriers, and vehicle equipment and requires the Secretary to prescribe minimum safety standards for CMVs. The Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102-143, Title V, 105 Stat. 917, at 952, October 28, 1991, codified at 49 U.S.C. 31306) mandated the alcohol and controlled substances (drug) testing program for DOT. OTETA required the Secretary of Transportation to promulgate regulations for alcohol and drug testing for persons in safety-sensitive positions in four modes of transportation, motor carrier, airline, railroad, and mass transit.

**(3) A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.**

Carriers are not required to report revenue to the Agency, but are required to provide the Agency with the number of CMVs they operate, when they register with the Agency, and to update this figure biennially. Because FMCSA does not have direct revenue figures for all motor carriers, CMVs serve as a proxy to determine the carrier size that would qualify as a small business given the SBA's revenue threshold. In order to produce this estimate, it is necessary to determine the average revenue generated by a CMV.

With regard to truck CMVs, the Agency determined in the Hours-of-Service Supporting Documents Rulemaking RIA<sup>6</sup> that a CMV produces about \$173,000 in

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<sup>6</sup> FMCSA Regulatory Analysis, "Hours of Service of Drivers," Final Rule. Federal Register/ Vol. 76, No. 248/ Tuesday, December 27, 2011/ Rules and Regulations, p. 81181. Using data from the 2007 Economic Census, FMCSA estimated that the average carrier earns roughly \$160,000 in annual revenue per truck (in year 2007 dollars).

revenue annually (adjusted for inflation to 2012 dollars).<sup>7</sup> According to the SBA, motor carriers with annual revenue of \$25.5 million are considered small businesses.<sup>8</sup> This equates to about 147 CMVs ( $147.4 = \$25,500,000 / \$173,000$ ). Thus, FMCSA considers motor carriers of property with 147 CMVs or fewer to be small businesses for purposes of this analysis. The Agency then looked at the number and percentage of property carriers with recent activity that would fall under that definition (of having 147 CMVs or fewer). The results indicate that at least 99 percent of all interstate property carriers with recent activity have 147 CMVs or fewer.<sup>9</sup> This amounts to 515,000 carriers (99 percent of 520,000 active motor carriers = 514,800, rounded to the nearest thousand). Therefore, an overwhelming majority of interstate carriers of property would be considered small entities.

To provide a conservative estimate on the impact of small entities, the Agency assumes that every active motor carrier would be subject to this regulation because *under full participation* all carriers would complete annual and pre-employment queries. Hence the rule applies to all (estimated) 515,000 motor carriers considered small entities.

Assuming there are 1.05 drivers per CMV<sup>10</sup> and a maximum of 147 CMVs per small entity, FMCSA estimates that at most 154 drivers ( $154.35 = 147 \times 1.05$ ) would be annually queried by a small entity. With an annual average of 1,876,000 drug pre-employment tests conducted on 4 million CDL drivers, the estimated rate of pre-

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<sup>7</sup> GDP Deflator. Available from the Bureau of Economic Analysis online, NIPA tables, Section 1, Table 1.1.4, "Price Indexes for Gross Domestic Product," years 2007 - 2012. Accessed on July 29, 2013 at [http://www.bea.gov/iTable/index\\_nipa.cfm](http://www.bea.gov/iTable/index_nipa.cfm)

<sup>8</sup> U.S. Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification System (NAICS) codes, effective January 7, 2013. See NAIC subsector 484, Truck Transportation. Accessed on July 26, 2013 at [http://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>9</sup> An August 24, 2012 MCMIS snapshot indicates that carriers possessing 100 CMVs or less comprise of 99.26 percent of all interstate motor carriers with recent activity.

<sup>10</sup> There was a total of 4,211,880 interstate drivers and 4,020,464 CMVs according to a MCMIS August 24, 2012 snapshot based on count of interstate drivers and CMVs ( $4,211,880 / 4,020,464 = 1.05$ ). Further, the driver-to-CMV ratio remains at 1.05 when considering carriers that possess 200 CMVs or less.

employment tests per population would be 47 percent ( $0.469 = 1,876,000 / 4,000,000$ ). With the assumption that this rate is proportionate to a 154-driver entity, it would result in about 72 pre-employment tests (47 percent of 154 drivers) and consequently 72 pre-employment queries per year, on average. In total, the maximum number of annual and pre-employment queries that a small entity may encounter would be 226 per year (154 annual + 72 pre-employment).

At ten minutes per query, 38 hours would be required to complete 226 queries ( $37.67 = 226 \text{ queries} \times 1/6 \text{ queries per hour}$ ). About another half-hour would be necessary to designate and verify a C/TPA (10 minutes), register with the Clearinghouse (10 minutes) and become familiar with the rule (10 minutes). In total, then, a 154-driver small entity would need to spend 38.5 hours ( $38 + \frac{1}{2}$ ) to comply with the rule.

The occupational salary of a bookkeeping, accounting, or auditing clerk is taken as the median of \$16.91 per hour (BLS, May 2012).<sup>11</sup> Two adjustments are made to this hourly compensation estimate. First, employee benefits are estimated at 50 percent of the employee wage.<sup>12</sup> Second, the employee wage and benefits are increased by 27 percent to include relevant firm overhead.<sup>13</sup> Applying the estimated 50 percent of wages for employee benefits and 27 percent for overhead results in \$32.21 in hourly compensation for the clerk ( $\$32.21 = \$16.91 \times (1 + 0.50) \times (1 + 0.27)$ ). Given \$32.21 per hour for 38.5

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<sup>11</sup> Occupational Employment Statistics, Occupational Employment and Wages, May 2012, 43-3031 Bookkeeping, Accounting, or Auditing Clerks. Accessed on July 29, 2013 at <http://www.bls.gov/oes/current/oes433031.htm>.

<sup>12</sup> See FMCSA's calculation of the employee benefit rate at Section 7.1, above.

<sup>13</sup> Berwick, Farooq. "Truck Costing Model for Transportation Managers". Upper Great Plains Transportation Institute, North Dakota State University (2003). Weighted average management and overhead costs total \$10,721 annually for a truck travelling 100,000 miles (page 29), or \$0.107 per mile ( $\$10,721 / 100,000$  on page 47). Labor costs total \$0.39 per mile (pages 42-43). Management/overhead costs are thus 27% of labor costs ( $0.107 / 0.390$ ). Accessed at <http://ntl.bts.gov/lib/24000/24200/24223/24223.pdf> on 8-March=2011.

hours, the annual cost of the queries incurred by a bookkeeping clerk would be \$1,240 ( $\$1,240.22 = 38.5 \times \$32.21$ , rounded to the nearest dollar) for a 154-driver small entity.

In addition, a fee would be required to access the Clearinghouse during the query process. A full query would cost \$5 and a limited query would cost \$2.50. Full queries are required by all pre-employment screening. Given 72 pre-employment queries for a 154-driver small entity, fees for access would be \$360 ( $72 \times \$5$ ). If an annual query indicates that information exists on a particular driver in the Clearinghouse, then a limited query would lead to a full query. As explained in Section 7.6, there are an estimated 512,000 full queries, annually. Given 4,000,000 drivers in the industry, there would be a 12.8 percent chance ( $512,000 / 4,000,000 = 0.128$ ) that a driver would require a full query during an annual screening. Therefore, a 154-driver small entity is estimated to perform about 20 full queries annually ( $154 \times 0.128 = 19.7$ ). The amount of limited queries to be performed would be 134 (154 total queries – 20 full queries). Accordingly, the cost of access requests for annual queries is \$335 ( $134 \times \$2.50$ ) for limited queries and \$100 ( $20 \times \$5$ ) for full queries. In sum, the annual cost of fees for access for pre-employment and annual queries is \$795 ( $\$360 + \$335 + \$100$ ) for a 154-driver small entity.

The maximum possible cost to a small entity thus totals \$2,035 annually ( $\$1,240 + \$795$ ). This sets the maximum cost for a small entity as defined by the SBA Most motor carriers, however, employ significantly fewer drivers than the estimated 154 SBA limit. The Agency estimates that nearly 75 percent of motor carriers employ three drivers or less.<sup>14</sup> Under this proposed rule, a motor carrier would incur approximately \$13.22 per driver ( $\$2,035 / 154$  drivers) annually. Accordingly, a motor carrier that employs four

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<sup>14</sup> From an August 24, 2012 MCMIS snapshot, less than 74.5 percent of active interstate motor carriers employed 3 CMVs or less.

drivers - a more typical carrier in the industry - would pay less than \$40 annually for this testing.

The table below summarizes the cost analysis.

Maximum Possible Cost to Small Entities				
Maximum Number for a Small Entity	Annual	Fees for Access		Notes
		Limited Query	Full Query	
CMVs	147			Small Entity Maximum
Drivers Per CMV	1.05			MCMIS
Drivers and Annual Queries	154	134	20	$147 \times 1.05 = 154 - (0.128 \times 154) = 0.128 \times 154$
Estimated Percentage of Pre-Employment Queries	47%			$1,876,000 / 4,000,000$
Pre-Employment Queries	72	0	72	47% of 154
Total Queries	226	134	92	$154 + 72$
Hours Per Query (10 minutes)	1/6			10 minutes
Total Hours for Annual and Pre-Employment Queries	38			$226 \times 1/6$
Hours for Designation and Verification of a C/TPA	1/6			FMCSA Estimate
Hours for Registration and Rule Familiarization	1/3			FMCSA Estimate
Total Hours	38.5			$38 + 1/6 + 1/3$
Wage (\$) Per Hour	\$16.91			BLS, General Office Clerk
Fringe Benefits (as a % of Wage)	50%			BLS, Employee Compensation
Overhead (as a % of Wage and Fringe Benefits)	27%			BLS, Employee Compensation
Total Compensation Per Hour/Fee per Query	\$32.21	\$2.50	\$5.00	$\$16.91 \times (1 + 0.50) \times (1 + 0.27)$
Cost for Annual and Pre-Employment Queries	\$1,240	\$335	\$460	$38.5 \text{ hrs} \times \$32.21 \text{ per hr.} = 134 \times \$2.50. \quad 92 \times \$5$

Total Cost (146 Drivers)	\$2,035	\$1,240 + \$335 + \$460
Total Cost per Driver	\$13.22	\$2,035 / 154 drivers

**(4) Reporting, record keeping, and other compliance requirements (for small entities) of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.**

There are an estimated 82,900 annual positive drug (75,800) and alcohol (7,100) test-results at full participation (including refusals). Each positive drug test result would be reported by an MRO. Each positive alcohol test would be reported by an employer or a C/TPA. Each driver’s subsequent return-to-duty process for positive test results and test refusals would be reported by an SAP. Ninety-nine percent of motor carriers, MROs, C/TPAs, and SAPs are most likely small entities. FMCSA estimates that bookkeeping clerks would perform this reporting.

**(5) Duplicative, overlapping, or conflicting Federal rules.**

FMCSA is not aware of any other rules which *conflict* with the proposed action. The proposed rule would require laboratories to report summary test information on each motor carrier covered by FMCSA’s drug and alcohol rules for which they perform tests. The purpose of this requirement is to help FMCSA identify motor carriers that do not comply with mandatory drug and alcohol testing requirements. Currently, there exists a DOT-wide requirement for laboratories to report summary information on testing services provided to DOT-regulated entities, but does not require the information to be broken down on a carrier-by-carrier basis. The DOT-wide report overlaps with the proposed rule in the sense that it contains some of the same aggregate information that would be required under the proposed rule. However, since the reports do not contain summary information specific to each motor carrier for which the laboratory provide

services, FMCSA cannot use this information to identify non-compliant motor-carriers. In addition the Agency requests drug and alcohol testing summary reports from approximately 3,000 employers per year through FMCSA's Drug and Alcohol Testing Survey. This information is not collected from every covered motor carrier. Instead, the purpose of the survey is to produce nationally representative estimates for drug and alcohol usage rates among CDL drivers, in order to determine whether to increase or decrease random testing rates in accordance with 49 CFR 382.305(c).

**(6) A description of any significant alternatives to the proposed rule which minimize any significant impacts on small entities.**

The Agency did not identify any significant alternatives to the rule that could lessen the burden on small entities without compromising its goals or the Agency's statutory mandate. Because small businesses are such a large part of the demographic the Agency regulates, providing alternatives to small business to permit noncompliance with FMCSA regulations is not feasible and not consistent with sound public policy.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532, et seq.) requires Agencies to evaluate whether an Agency action would result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$151 million or more (as adjusted for inflation) in any one year, and if so, to take steps to minimize these unfunded mandates. The proposed rulemaking would result in private sector expenditures of \$186 million, which is in excess of the \$151 million threshold. The estimated costs are about equal to its benefits: Total net benefits of the rule are just \$1 million annually. The ten-year projection of net benefits is \$8 million when discounted at seven percent and \$9 million when discounted at three percent. However, estimated benefits include

only those associated with reductions in CMV crashes. FMCSA could not precisely quantify improved health, quality-of-life improvements, and increased life expectancy for CMV drivers. The Agency believes these non-quantified benefits are significant, and, if they were included in the benefits estimates, would clearly demonstrate the positive net benefits of this rule.

Executive Order 12988 (Civil Justice Reform)

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

FMCSA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. We have determined preliminarily that this rulemaking would not create an environmental risk to health or safety that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

A rule has implications for Federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. FMCSA recognizes that, as a practical matter, this rule may have an impact on the States. Accordingly, by

letters sent March 28, 2011, the Agency sought advice from the National Governors Association (NGA), National Conference of State Legislators (NCSL), and the American Association of Motor Vehicle Administrators (AAMVA) on the topic of developing a database that the Agency believes may increase the effectiveness of its drug and alcohol testing program. (Copies of the letters are available in the docket for this rulemaking.) FMCSA offered NGA, NCSL, and AAMVA officials the opportunity to meet and discuss issues of concern to the States. FMCSA did not receive a response to this letter. State and local governments will also be able to raise Federalism issues during the comment period for this NPRM.

In addition, § 32402 of MAP-21 preempts State and local laws inconsistent with the Clearinghouse. Preemption specifically applies to the reporting of drug and alcohol tests, refusals and any other violation of FMCSA's drug and alcohol testing program. MAP-21 does not preempt State laws related to a driver's CDL or driving record.

#### Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

#### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. §§ 3501-3520), a Federal agency must obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. FMCSA analyzed this proposal and preliminarily determined that its implementation would create a new information collection burden on CDL holders, motor carriers, and entities that provide services as

part of the FMCSA's mandatory alcohol and controlled substances testing process under 49 CFR part 382. FMCSA will seek approval of the information collection requirements in a new information collection to be entitled "Commercial Driver's License Drug and Alcohol Clearinghouse."

The collected information encompasses information that is generated, maintained, retained, disclosed, and provided to, or for, the Agency under a proposal for a database that will be entitled the "Commercial Driver's License Drug and Alcohol Clearinghouse" or Clearinghouse.

DOT currently has approval for two information collections for its alcohol and controlled substances testing programs: (1) the Federal Chain of Custody and Control Form, OMB control number 0930-0158, and (2) the U.S. Department of Transportation Alcohol and Controlled Substances Testing Program, OMB control number 2105-0529. Although the proposed Clearinghouse will obtain information from the forms covered by the two information collections, this proposal does not create any revisions or additional burden under those collections.

This proposal would create a new information collection to cover the requirements set forth in the proposed amendments to 49 CFR parts 382. These amendments would create new requirements for CDL drivers, carriers/employers of CDL drivers, MROs, SAPs, and C/TPAs to register with the new database, which would be created and administered by the FMCSA. Clearinghouse registration will be a prerequisite to both placing information in the database and obtaining information from the database. Access to information in the database will be strictly limited and controlled,

and available only with the consent of the CDL holders about whom information is sought.

Prospective employers of CDL drivers would be required to query the Clearinghouse to determine if job applicants have controlled substance or alcohol testing violations that should preclude them, under existing FMCSA regulations in part 382, from carrying out safety-sensitive functions. Employers will also be required to query the database once annually for information about drivers whom they currently employ. Carriers, C/TPAs that perform testing and other services for carriers, MROs, and SAPs will place information into the database about alcohol and controlled substances testing violations. The proposed rule contains procedures for correcting information in the database and specifies that most interactions with the database will be carried out using electronic media.

The total burden to respondents for queries, designations, registration, familiarization, reporting, and recordkeeping to the Clearinghouse is estimated at about

1.86 million hours annually. The hours attributed to each activity are presented in the table below.

Total Annual Number of Burden Hours					
Submissions	Responsible	Performed by	Instances	Minutes	Total Hours
Annual Queries	Carriers	Bookkeeping Clerk	5,200,000	10	866,667
Pre-Employment Queries	Carriers	Bookkeeping Clerk	1,876,000	10	312,667
Designate C/TPAs	Carriers	Bookkeeping Clerk	520,000	10	86,667
SAPs Inputting Driver Information	SAPs	SAPs	82,900	10	13,817
Report/Notify Positive Tests	Various	Bookkeeping Clerk	165,800	10	27,633
Register / Familiarize / Verify	Various	Bookkeeping Clerk	792,750	20. 10	155,083
Driver Consent Verifications	Drivers	Drivers	2,388,000	10	398,000
Annual Summaries	Laboratories	Bookkeeping Clerk	32	90	48
Total Instances/Hours			11,025,482		1,860,581

FMCSA has prepared an information collection request and supporting statement that is being submitted to the Office of Management and Budget and that will be made available for public comment pursuant to a notice to be published in the Federal Register.

#### National Environmental Policy Act and Clean Air Act

FMCSA analyzed this proposal for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.). FMCSA conducted an environmental assessment (EA) of the proposed alternatives considered by FMCSA and determined that if the rule reduced CMV crashes as estimated, there would be a small net benefit to the environment. These benefits result from the reduction of CMV crashes and include: lives saved and injuries prevented from reducing CMV crashes, the reduction of fuel consumed and prevention of air emissions from traffic congestion caused by a CMV crash, the reduction of solid waste generated in CMV crashes from damaged vehicles, infrastructure and goods, and hazardous materials spilled during a CMV crash. FMCSA does not, however, expect these environmental impacts to be considered significant under NEPA and do not require further analysis in an Environmental Impact Statement. FMCSA does not believe the EA results require any type of mitigation, as the impacts to the environment are beneficial in nature. The EA has been placed in the rulemaking docket. FMCSA requests comments on this EA.

In addition to the NEPA requirements to examine impacts on air quality, the Clean Air Act (CAA) as amended (42 U.S.C. 7401 et seq.) also requires FMCSA to analyze the potential impact of its actions on air quality and to ensure that FMCSA actions conform to State and local air quality implementation plans. The additional reductions to air emissions from either of the alternatives are expected to fall within the

CAA de minimis standards and are not expected to be subject to the Environmental Protection Agency's General Conformity Rule (40 CFR parts 51 and 93).

Executive Order 13211 (Energy Effects)

FMCSA has analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. While FMCSA's analysis shows a small reduction in fuel used due to eliminating traffic idling caused by CMV crashes, we have determined preliminarily that it would not be a "significant energy action" under that Executive Order because it would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

Privacy Impact Assessment

FMCSA conducted a privacy impact assessment of this rule as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Pub. L. 108-447, 118 Stat. 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the final rule on the privacy of information in an identifiable form and related matters. FMCSA has determined that this NPRM would impact the handling of PII. FMCSA has also determined the risks and effects the rulemaking might have on collecting, storing, and sharing PII and has examined and evaluated protections and alternative information handling processes in developing the proposal in order to mitigate potential privacy risks. The PIA for this proposed rulemaking is available for review in the docket for this rulemaking.

**List of Subjects in 49 CFR Part 382**

Administrative practice and procedure, Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Safety, Transportation

For the reasons discussed in the preamble, the Federal Motor Carrier Safety Administration proposes to amend 49 CFR part 382 as follows:

**PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING**

1. The authority citation for part 382 continues to read as follows:

**Authority:** 49 U.S.C. 31133, 31136, 31301 et seq., 31502; and 49 CFR 1.73.

2. Amend § 382.103 by revising the introductory text of paragraph(a) to read as follows:

**§ 382.103 Applicability.**

(a) This part applies to service agents and to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State and is subject to:

\* \* \* \* \*

3. Amend § 382.107 to add the following definitions in alphabetical order:

**§ 382.107 Definitions.**

\* \* \* \* \*

Commercial Driver’s License Drug and Alcohol Clearinghouse (Clearinghouse)

means the FMCSA database that subpart G of this part requires employers and service agents to report information to and to query regarding drivers who are subject to the DOT controlled substance and alcohol testing regulations.

\*\*\*\*\*

Negative return-to-duty test result means a negative drug test result and/or an

alcohol test with an alcohol concentration of less than 0.02.

\* \* \* \* \*

Positive alcohol test means a DOT alcohol confirmation test having an alcohol concentration of 0.04 or greater.

\* \* \* \* \*

4. Add new § 382.123 to read as follows:

**§ 382.123 Driver identification.**

(a) Identification information on the Alcohol Testing Form (ATF). For each alcohol test performed under this part, the employer shall provide the following information, which must be recorded as follows:

(1) The driver's commercial driver's license number and State of issuance in Step 1, section B of the ATF.

(2) The employer's USDOT number or Internal Revenue Service Employer Identification Number (EIN) and the employer's name and other identifying information required in Step 1, section C of the ATF.

(b) Identification information on the Federal Drug Testing Custody and Control Form (CCF). For each controlled substance test performed under this part, the employer shall provide the following information, which must be recorded as follows:

(1) The employer's USDOT number or Internal Revenue Service Employer Identification Number (EIN) in Step 1, section A of the CCF.

(2) The driver's commercial driver's license number and State of issuance in Step 1, section C of the CCF in place of the "donor SSN or Employee I.D. No."

5. Add new § 382.217 to read as follows:

**§ 382.217 Employer responsibilities.**

No employer may allow, require, permit or authorize a driver to operate a commercial motor vehicle during any period in which an employer determines that a driver is not in compliance with the return-to-duty requirements in 49 CFR part 40, subpart O, after the occurrence of any of the following events:

(a) The driver receives a positive, adulterated, or substituted drug test result conducted under part 40 of this title;

(b) The driver receives a positive alcohol test result of 0.04 or higher alcohol concentration conducted under part 40 of this title; or

(c) The driver refused to submit to a test for drugs or alcohol required under part 382 of this chapter.

(d) An employer has actual knowledge that a driver has used alcohol or controlled substances, as defined at § 382.107.

6. Amend § 382.401 by revising paragraph (b)(1)(vi) to read as follows:

**§ 382.401 Retention of records.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(vi) Records related to the administration of the controlled substances and alcohol testing programs, including records related to traffic citations establishing employer actual knowledge of driving under the influence of alcohol or controlled substances, and

\* \* \* \* \*

7. Add § 382.404 to read as follows:

**§ 382.404 Laboratories' duty to report controlled substances test results.**

(a) Annually, each laboratory performing controlled substances testing for an employer regulated by this part must submit an aggregate statistical summary of the number of drug tests, by drug test type, organized by employers' USDOT number or Internal Revenue Service issued Employer Identification Number (EIN).

(b) The summary must be sent by January 31 of each year for January 1 through December 31 of the previous year.

(c) The summary must be submitted in electronic format to: Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, 1200 New Jersey Avenue, SE, Washington, DC 20590.

8. Amend § 382.405 by revising paragraphs (d) and (e) to read as follows:

**§ 382.405 Access to facilities and records.**

\* \* \* \* \*

(d) Each employer, and each service agent who maintains records for an employer, must make available copies of all results for DOT alcohol and/or controlled substances testing conducted by the employer under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(e) When requested by the National Transportation Safety Board as a part of a crash investigation:

(1) Employers must disclose information related to the employer's administration of a post-accident alcohol and/or a controlled substances test administered following the crash under investigation; and

(2) FMCSA will provide access to information in the Clearinghouse concerning drivers that are involved with the crash under investigation.

\* \* \* \* \*

9. Amend § 382.409 by revising the section heading and paragraph (c) to read as follows:

**§ 382.409 Medical review officer or consortium/third party administrator record retention for controlled substances.**

\* \* \* \* \*

(c) No person may obtain the individual controlled substances test results retained by a medical review officer or a consortium/third party administrator, and no medical review officer or consortium/third party administrator may release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph (c) shall prohibit a medical review officer or a consortium/third party administrator from releasing to the employer, the Clearinghouse, or to officials of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances and alcohol testing program under this part, the information delineated in part 40, subpart G, of this title.

10. Add a new § 382.415 to read as follows:

**§ 382.415 Notification to employers of a controlled substances or alcohol testing program violation.**

Each person holding a commercial driver's license and subject to the DOT controlled substances and alcohol testing requirements in this part who has violated the alcohol and controlled substances prohibitions under parts 40 or 382 of this title, must notify in writing all current employers of such violation(s). The notification must be made before the end of the business day following the day the employee received notice of the violation, or prior to performing any safety-sensitive function, whichever comes first.

11. Amend § 382.601 by adding a new paragraph (b)(12) to read as follows:

**§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.**

\* \* \* \* \*

(b) \* \* \*

(12) The requirement that the following personal information collected and maintained under this part shall be reported to the Clearinghouse:

(i) A verified positive, adulterated, or substituted drug test result;

(ii) A positive alcohol test result;

(iii) A refusal to submit to any test required by subpart C of this part;

(iv) An employer's report of actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances;

(v) A substance-abuse-professional report of the successful completion of the return-to-duty process, and the follow-up testing plan;

(vi) A negative return-to-duty test; and

(vii) An employer's report of completion of follow-up testing.

\* \* \* \* \*

12. Add a new Subpart G to part 382 to read as follows:

**Subpart G – Requirements and Procedures for Implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse**

Sec.

382.701 Drug and Alcohol Clearinghouse.

382.703 Driver consent to permit access to information in the Clearinghouse.

382.705 Reporting to the Clearinghouse.

382.707 Notice to drivers and employers of placement, revision, removal, or release of information.

382.709 Drivers' access to information in the Clearinghouse.

382.711 Clearinghouse registration.

382.713 Duration, cancellation, and revocation of access.

382.715 Authorization to enter information into the Clearinghouse.

382.717 Procedures for correcting information in the database.

382.719 Availability and removal of information.

382.721 Fees.

382.723 Unauthorized access or use prohibited.

382.725 Access by State licensing authorities.

382.727 Penalties.

**Subpart G – Requirements and Procedures for Implementation of the Commercial Driver’s License Drug and Alcohol Clearinghouse**

**§ 382.701 Drug and Alcohol Clearinghouse.**

(a) Employers may not employ a driver subject to controlled substances and alcohol testing under this part to perform a safety-sensitive function without first conducting a pre-employment query of the Clearinghouse to obtain information on whether the driver has a verified positive, adulterated, or substituted controlled substances test result; has a positive alcohol test result; has refused to submit to any test required by subpart C of this part; or that an employer has reported actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances.

(b) Employers must conduct annual queries of the Clearinghouse for information on all employees subject to controlled substance and alcohol testing under this part to determine whether information exists in the Clearinghouse about those employees. If an annual query indicates that information exists in the Clearinghouse, the employer must conduct the same query required in paragraph (a) of this section.

(c) If any information described in paragraph (a) of this section is entered into the Clearinghouse about a driver during the seven-day period immediately following an employer conducting a query of that driver’s records, FMCSA will notify the employer of that additional information.

(d) No employer may allow a driver to perform any safety-sensitive function if the results of a database query demonstrate that the driver has a verified positive,

adulterated, or substituted controlled substances test result; has a positive alcohol test result; has refused to submit to any test required by subpart C of this part; or that an employer has reported actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances, except where a query of the Clearinghouse demonstrates the following circumstances:

(1) The driver has successfully completed the substance-abuse-professional evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title; achieves a negative return-to-duty test result; and completes the follow-up testing process prescribed by the substance abuse professional.

(2) If the driver has not completed all follow-up tests as prescribed by the substance abuse professional in accordance with § 40.307 of this title and specified in the substance-abuse-professional report required by § 40.311 of this title, the employer may only use the driver in a safety-sensitive position if the driver has completed the substance-abuse-professional evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title and achieves a negative return-to-duty test result, and the employer assumes the responsibility for managing the follow-up testing process associated with the testing violation.

(e) Employers must retain for three years a record of each query and all information received in response to each query made under this section. Exception: An employer with valid registration that queries the Clearinghouse in accordance with the requirements of this subpart, will be deemed to have satisfied this requirement.

**§ 382.703 Driver consent to permit access to information in the Clearinghouse.**

(a) No employer may search the Clearinghouse to determine whether a record exists on any particular driver without first obtaining that driver's written consent. The employer conducting the search must retain the written consent for 3 years from the date of the last search.

(b) Before receiving access to information contained in the Clearinghouse record, the employer must obtain written consent from the driver for access to the following specific records:

(1) A verified positive, adulterated, or substituted controlled substances test result;

(2) A positive alcohol test result;

(3) A refusal to submit to any test required by subpart C of this part;

(4) An employer's report of actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances;

(5) A substance-abuse-professional report of the successful completion of the return-to-duty process, and the follow-up testing plan;

(6) A negative return-to-duty test; and

(7) An employer's report of completion of follow-up testing.

(c) No employer may permit a driver to perform a safety-sensitive function if the driver refuses to grant the consent required by paragraphs (a) and (b) of this section.

(d) A driver granting consent under this section grants consent for FMCSA to release information to an employer in accordance with § 382.701(c).

**§ 382.705 Reporting to the Clearinghouse.**

(a) Medical Review Officers (MROs). (1) Within 1 business day of making a

determination or verification, medical review officers must report the following information about a driver to the Clearinghouse:

- (i) Verified positive, adulterated, or substituted controlled substances test results;
- (ii) Refusal-to-test determination by the medical review officer as described in 49

CFR 40.191.

(2) medical review officers must provide the following information for each controlled substances test result specified in paragraph (a)(1) of this section:

- (i) Reason for the test;
- (ii) Federal Drug Testing Custody and Control Form specimen ID number;
- (iii) Driver's name, date of birth, and commercial driver's license number and

commercial driver's license-issuing State's abbreviation (U.S Postal Service abbreviation. See Publication 59, "Abbreviations for Use with ZIP Code," U.S. Postal Service, October 1963);

(iv) Employer's name, address, and USDOT number or Internal Revenue Service issued Employer Identification Number (EIN);

(v) Date of the test;

(vi) Date of the verified result; and

(vii) Test result. The test result must be one of the following:

(A) Positive (including the controlled substance(s) identified);

(B) Refusal to test: adulterated;

(C) Refusal to test: substituted; or

(D) Refusal to provide a sufficient specimen after the MRO makes a

determination, in accordance with § 40.193 of this title, that the employee does not have a

medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine.

(3) Within 1 business day of making any change to the results report in accordance with paragraph (a)(1) of this section, a medical review officer must report that changed result to the Clearinghouse.

(b) Employers. (1) Employers must report the following information about a driver to the Clearinghouse within 1 business day of obtaining that information:

(i) An alcohol test result with an alcohol concentration of 0.04 or greater;

(ii) A negative return-to-duty test result;

(iii) A refusal to take an alcohol test pursuant to 49 CFR 40.261;

(iv) A refusal pursuant to 49 CFR 40.191;

(v) A report that the driver has successfully completed all follow-up tests as prescribed in the substance-abuse-professional report in accordance with §§ 40.307, 40.309, and 40.311 of this title; and

(vi) Actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances.

(2) Employers must report the following information concerning each positive alcohol test result, refusal to submit to alcohol testing pursuant to 49 CFR 40.261, and refusal to provide a specimen for controlled substances testing listed in 49 CFR 40.191:

(i) Reason for the test;

(ii) Driver's name, date of birth, and commercial driver's license number and the commercial driver's license-issuing State's abbreviation;

(iii) Employer name, address, and USDOT number or Internal Revenue Service-issued Employer Identification Number (EIN);

(iv) Date of the test;

(v) Date of result reported; and

(vi) Test result. The test result must be one of the following:

(A) Negative (only required for return-to-duty tests administered in accordance with § 382.309);

(B) Positive; or

(C) Refusal to take a test.

(3) Employers must report the following information concerning each instance in which the employer has actual knowledge that a driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances, as defined at § 383.5 of this chapter:

(i) Driver's name, date of birth, commercial driver's license number, and the commercial driver's license-issuing State abbreviation;

(ii) Employer name, address, and USDOT number or Employer Identification Number (EIN);

(iii) Date of the traffic citation;

(iv) Date the employer became aware of the traffic citation.

(v) The name and State of the law enforcement agency issuing the traffic citation;

(vi) The ticket or docket number associated with the citation; and

(vii) The specific charge alleged in the traffic citation.

(c) C/TPAs. (1) C/TPAs acting on behalf of an employer who employs himself/herself, as required by § 382.103(b) must immediately report the following information about a driver to the Clearinghouse within one business day of obtaining that information:

- (i) An alcohol test result with an alcohol concentration of 0.04 or greater;
- (ii) A negative return-to-duty test result;
- (iii) A refusal to take an alcohol test pursuant to 49 CFR 40.261;
- (iv) A refusal to provide a specimen for controlled substances testing pursuant to 49 CFR 40.191;
- (v) A report that the driver has successfully completed all follow-up tests as prescribed in the substance-abuse-professional report in accordance with §§ 40.307, 40.309, and 40.311 of this title; and

(2) C/TPAs acting on behalf of an employer who employs himself/herself, as required by 49 CFR 382.103(b) must report the following information concerning each positive alcohol test result, refusal to submit to alcohol testing pursuant to 49 CFR 40.261, and refusal to provide a specimen for controlled substances testing listed in 49 CFR 40.191:

- (i) Reason for the test;
- (ii) Driver's name, date of birth, and commercial driver's license number and the commercial driver's license-issuing State's abbreviation;
- (iii) Employer name, address, and USDOT number or Internal Revenue Service-issued Employer Identification Number (EIN);
- (iv) Date of the test;

- (v) Date of result reported; and
- (vi) Test result. The test result must be one of the following:
  - (A) Negative (only required for return-to-duty tests administered in accordance with § 382.309);
  - (B) Positive; or
  - (C) Refusal to provide a specimen or take a test.
- (d) Substance Abuse Professionals (SAPs). (1) Substance abuse professionals must report to the Clearinghouse for each driver who has completed the return-to-duty process for a DOT verified positive, adulterated, or substituted controlled substances test result, a positive alcohol test result, a testing refusal, or actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances the following information:
  - (i) Substance abuse professional's name, address, and telephone number;
  - (ii) Driver's name, date of birth, and commercial driver's license number and the commercial driver's license-issuing State's abbreviation;
  - (iii) Date of the initial substance-abuse-professional assessment;
  - (iv) Date the substance abuse professional determined that the driver successfully completed the education and/or treatment process as defined in 49 CFR part 40, subpart O, and was eligible for return-to-duty testing under this part;
  - (v) Frequency, number, and type of required follow-up tests, the duration of the follow-up testing plan; and
  - (vi) Any modifications to the follow-up testing plan.
- (2) Substance abuse professionals must report the information required by

paragraphs (d)(1)(i) – (iii) of this section within 1 business day of the date of the initial substance abuse assessment, and must report the information required by paragraphs (d)(1)(iv) – (vi) of this section within 1 business day of determining that the driver has completed the return-to-duty process.

(e) Reporting truthfully and accurately. Every person or entity with access must report truthfully and accurately to the Clearinghouse and is expressly prohibited from knowingly reporting false or inaccurate information.

**§ 382.707 Notice to drivers and employers of placement, revision, removal, or release of information.**

(a) FMCSA must notify a driver when information concerning that driver has been added to, revised, or removed from the Clearinghouse.

(b) FMCSA must notify a driver when information concerning that driver has been released from the Clearinghouse to an employer and specify the reason for the release.

(c) Drivers will be notified by letter sent by U.S. Mail to the address on record with the State Driver Licensing Agency that issued the driver's commercial driver's license. Exception: A driver may provide the Clearinghouse with an alternative means or address for notification, including electronic mail.

**§ 382.709 Drivers' access to information in the Clearinghouse.**

A driver may review information in the Clearinghouse about himself or herself, except as otherwise restricted by law.

**§ 382.711 Clearinghouse registration.**

(a) Clearinghouse registration required. Each employer and designated service agent to an employer supporting its controlled substances and/or alcohol testing program must register with FMCSA before accessing or reporting information in the Clearinghouse.

(b) Employers. Employer Clearinghouse registration must include:

(1) Name, address, and telephone number;

(2) USDOT number or Internal Revenue Service-issued Employer Identification Number (EIN); and

(3) Name of the person(s) and their position(s) that the employer authorizes to report information to and obtain information from the Clearinghouse and any additional information FMCSA needs to validate the applicant's identity.

(4) Employers must verify the names of the person(s) authorized under paragraph (b)(3) of this section annually.

(5) Identification of the C/TPA used for testing purposes and authorization for the C/TPA to report information to the Clearinghouse for self-employed individuals or owner-operators that are required to use C/TPAs for testing purposes. Employers subject to this requirement must update any changes to this information.

(c) Medical review officers and substance abuse professionals. Each medical review officer or substance abuse professional must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity;

(2) A certification that the applicant's access to the Clearinghouse is conditioned on his or her compliance with the applicable qualification and/or training requirements in 49 CFR part 40; and

(3) Evidence of required professional credentials to verify that the applicant currently meets the applicable qualification and/or training requirements in 49 CFR part 40.

(d) Consortia/third party administrators. Each consortium or third party administrator must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity; and

(2) Name, title, and telephone number of the person(s) authorized to report information to and obtain information from the Clearinghouse.

(3) Each consortium or third party administrator must verify the names of the person(s) authorized under paragraph (d)(2) of this section annually.

**§ 382.713 Duration, cancellation, and revocation of access.**

(a) Term. Clearinghouse registration is valid for 5 years, unless cancelled or revoked.

(b) Cancellation. FMCSA will cancel Clearinghouse registrations that are inactive for 2 years.

(c) Revocation. FMCSA has the right to revoke the Clearinghouse registration of anyone who fails to comply with any of the prescribed rights and restrictions on access to the Clearinghouse, including but not limited to, submission of inaccurate information and misuse or misappropriation of access rights or protected information from the

Clearinghouse and failure to maintain the requisite qualifications, certifications and/or training requirements in part 40 of this title.

**§ 382.715 Authorization to enter information into the Clearinghouse.**

No consortium/third party administrator may enter information into the Clearinghouse on an employer's behalf unless the employer designates the consortium/third party administrator as its service agent.

**§ 382.717 Procedures for correcting information in the database.**

(a) Petition. Any driver or authorized representative of the driver may submit a petition to the FMCSA contesting the accuracy of information within 18 months of the date the information was reported to the Clearinghouse. The petition must include:

(1) The petitioner's name, address, telephone number and commercial driver's license number with State of issuance;

(2) Detailed description of the basis for the allegation that the information is not accurate;

(3) Evidence supporting the allegation that the information is not accurate. Failure to submit evidence is cause for dismissing the petition.

(b) Address. The petition must be submitted to: Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, 1200 New Jersey Avenue SE, Washington, D.C. 20590.

(c) Petitions limited to inaccurately reported information. (1) Under this section, petitioners may challenge only the accuracy of information reporting, not the accuracy or validity of positive test results or refusals.

(2) Exception. Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances if the citation did not result in a conviction. For the purposes of this section, conviction has the same meaning as used in 49 CFR part 383.

(d) Notice of decision. FMCSA will inform the driver in writing within 90 days of receipt of a complete petition whether FMCSA will remove, retain, or correct the information in the database and provide the basis for the decision.

(e) Request for expedited treatment. A driver may request expedited treatment of his or her petition to correct inaccurate information if the inaccuracy is currently preventing him or her from performing safety-sensitive functions. If FMCSA grants expedited treatment, it will inform the driver of its decision in writing within 30 days of receipt of a complete petition. This request may be included in the original petition or as a separate document.

(f) Administrative review. (1) A driver may request FMCSA to conduct an administrative review if he or she believes that a decision made in accordance with paragraphs (d) or (e) of this section was in error.

(2) The driver must submit his/her request in writing to the Associate Administrator for Enforcement and Program Delivery (MC-E), Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE, Washington, DC 20590.

(3) The driver's request must explain the error it believes FMCSA committed and provide information and/or documents to support his or her argument.

(4) FMCSA will complete its administrative review no later than 60 days after receiving the driver's request for review. The Associate Administrator's decision will constitute the final Agency action.

**§ 382.719 Availability and removal of information.**

(a) Information about a driver's drug or alcohol violation will not be available to an employer conducting a query of the Clearinghouse after all of the following conditions relating to the violation are satisfied:

(1) The substance abuse professional reports to the Clearinghouse the information required in § 382.705(d);

(2) The employer or consortium/third party administrator reports to the Clearinghouse that the driver received negative return-to-duty test results;

(3) The driver's current employer or consortium reports that the driver has successfully completed all follow-up tests as prescribed in the substance-abuse-professional report in accordance with §§ 40.307, 40.309, and 40.311 of this title; and

(4) Three years have passed since the date of the violation determination.

Alternate: (4) Five years have passed since the date of the violation determination.

(b) Information about a particular driver's drug or alcohol violation will remain in the Clearinghouse record and be available to employers conducting a query until all requirements in paragraph (a) of this section have been met.

(c) Exception. Within 2 business days of granting a request pursuant to § 382.717(c)(2), FMCSA will remove information from the Clearinghouse about an employer's report of actual knowledge that a driver received a traffic citation for driving

a commercial motor vehicle while under the influence of alcohol or controlled substances.

(d) Nothing in this part shall prevent FMCSA from using information removed under this section for research, auditing or enforcement purposes.

**§ 382.721 Fees.**

FMCSA may collect a reasonable fee from entities required to query the Clearinghouse. Exception: No driver may be required to pay a fee to access his or her own information in the Clearinghouse.

**§ 382.723 Unauthorized access or use prohibited.**

(a) Except as expressly authorized in this subpart, no person or entity may access the Clearinghouse. No person or entity may share, distribute, publish, or otherwise release any information in the Clearinghouse except as specifically authorized by law. No person may report inaccurate or misleading information to the Clearinghouse.

(b) An employer's use of information received from the Clearinghouse is limited to assessing or evaluating whether a prohibition applies to a driver operating a commercial motor vehicle. No employer may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in assessing or evaluating whether a prohibition applies to a driver operating a commercial motor vehicle.

(c) Violations of this section are subject to civil and criminal penalties in accordance with applicable law, including those set forth at § 382.507.

(d) Nothing in this part shall prohibit FMCSA from accessing information about individual drivers in the Clearinghouse for research or enforcement purposes.

**§ 382.725 Access by State licensing authorities.**

(a) The chief commercial driver's licensing official of a State may request and receive a driver's record from the Clearinghouse if the driver has applied for a commercial driver's license from that State.

(b) By applying for a commercial driver's license, a driver is deemed to have consented to the release of information from the Clearinghouse in accordance with this section.

(c) The chief driver's licensing official's use of information received from the Clearinghouse is limited to assessing or evaluating an individual's qualifications to operate a commercial motor vehicle. No chief driver's licensing official may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in assessing or evaluating an individual's qualifications to operate a commercial motor vehicle.

(d) A chief commercial driver's licensing official that does not take appropriate safeguards to protect the privacy and confidentiality of information obtained under this section is subject to revocation of his or her right of access under this section.

**§ 382.727 Penalties.**

An employer, employee, medical review officer, or service agent who violates any provision of this subpart shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b)(2)(C).

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Anne S. Ferro,  
Administrator

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