California Construction Trucking Association

334 N. Euclid Avenue • Upland, CA 91786
Office 909-982-9898 • Fax 909-985-2348
leebrown@CalConTrk.org
www.CalConTrk.org

American Alliance Drug Testing

326 N. Euclid Avenue • Upland, CA 91786
Toll-Free 800-820-9314 • Fax 909-608-2058
leebrown@AADrugTesting.com
www.AADrugTesting.com

AADT Clearinghouse Comments

http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;D=FMCSA-2011-0031

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http://www.regulations.gov/#!documentDetail;D=FMCSA-2011-0031-0001

CCTA Requests a SNPRM – The FMCSA's extension of the comment period reflects the industry concerns and the proposed regulation are not close enough. We support the extension and strongly believe that the DOT implement the rule in a two-step approach consistent with the Supplemental Notice of Proposed Rulemaking (SNPRM) process, similar to the adoption and use of electronic logging devices (ELDs) by all drivers.

A supplemental notice of proposed rulemaking is a notice and request for comment published in the *Federal Register* when an agency has made significant substantive changes to a rule between the Notice of Proposed Rulemaking and the final rule. The SNPRM allows the public to comment on the additional changes. A "significant substantive change" is any new requirement in the rule that goes beyond the scope of the requirements in the NPRM. The agency may enact the other requirements of the final rule while accepting comments on the SNPRM.

About CCTA/AADT: The California Construction Trucking Assoc. (formally the CA Dump Truck Owners Assoc.) is a truck trade association founded in Upland, California in 1941. In 1995, we established the American Alliance Drug Testing (AADT), a leading C/TPA also located in Upland California. AADT was originally established to provide controlled substance or drug and alcohol testing services to CCTA members. By 1998, we expanded our products and service to the entire motor carrier industry in the state offering programs for, trucks, buses and the drug free work place industry. In 2005 we expanded and we are now offering our services national-wide.

Business Involvement with Regulatory Changes: We presently provide services to over 4,600 DOT-FMCSA regulated clients (both inter- and intra-state) which about half are self-employed (owner-operator employer/drivers) and the other half being employers and overlying motor carriers responsible for over 10,000 covered drivers. CCTA/AADT has been proactively engaged and supportive of many regulatory changes over the last 20-years all meant to eliminate the many loopholes identified in DOT related drug and alcohol testing. We have also been involved and supportive of the Clearinghouse (CH) concept since at least 1998.

In that legislative year we supported CA state Assembly Bill 2597 and seat on the *California Drug-Free Commercial Truck and Bus Driver Task Force* which eventually presented the state legislature with a 32 page report. Much of what is taking place today at the federal level concerning the CH was discussed in depth at this task force in 1998. So clearly we agree with the overall approach in the NPRM and believe the CH will, once fine-tuned, likely eliminate the problem of a covered (CDL) holder testing positive for illegal drug and/or alcohol use or refusing a test with one employer or prospective employers and withholding that information from a second employer or a prospective employer.

Scope of DOT D&A Testing: According to the NPRM, supporting documents and independent industry estimates, DOT-FMCSA drug and alcohol testing regulations apply to about 520,000 interstate motor carriers with 4 million drivers. In addition, there are at least another 270,000 intrastate covered motor carriers with another 2 million drivers which are also required to be in a DOT regulated drug and alcohol testing program. In total, these regulations will be effecting around 800,000 motor carrier companies

(inter- and intra-state) and 6 million drivers. It's estimated that 98 percent of all these motor carriers are considered small business entities.

FMCSA's most comprehensive commercial vehicle crash study, the 2006 Large Truck Crash Causation Study (LTCCS), found rather diminutive amounts of illegal drug use or alcohol abuse among the CMV drivers, just 2.3 percent (or 3,000 accidents) for illegal drug use and .8 percent (1,000 accidents) for alcohol use for all large trucks involved in the LTCCS crashes. In that study over 33 months, there were a total estimated 141,000 crashes involving a heavy truck.

According to testimony of John Hill, former Administrator for the FMCSA on Nov. 1, 2007, before the House Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit said, "The last completed annual survey (2006) of industry drug and alcohol testing results revealed that fewer than two percent of CDL drivers are testing positive for controlled substances and that fewer than one percent are testing positive for alcohol, based on random testing (and refusals) performed by motor carriers and C/TPAs." Extrapolating from this claim, a total of about 2.6 percent (1.8 + .8) the positivity rates from the 6 million covered drivers would equate to 156,000 positives, which we believe would have to include refusals. This is consistent with on our own client/driver positive testing rates of 2.1 percent.

Adding, "In addition, when reviewing the effectiveness of drug and alcohol testing programs during Compliance Reviews and new entrant safety audits, FMCSA and numerous State partners conducted over 3 million roadside inspections in 2006. During each of these inspections, drivers were evaluated (but not tested) for signs of drug or alcohol use and, if use was discovered, they were removed from the roadway. Through these inspections 5,466 drivers, or 2 tenths (.2) of one percent, were discovered under the influence or in possession of drugs or alcohol."

Extrapolating the positivity rates from this 8 year old roadside study reveals far less actual positives than the industry results survey, with only about 11,000 positive tests out of 3 million roadside inspections. This is only 1/10 or 10 percent of the industry rate of 2-3 percent reported out by the employer and C/TPA industry and rates generally accepted by industry. We suspect two things why the rates were so low, 1.) Many drivers with substance abuses are functional and in many cases high-functioning addicts and it's very difficult to detect abuse even by trained personal without formal testing and, 2.) We suspect that the mostly interstate roadside inspections may reflect that there is a much higher use of drugs and alcohol in localized vocational or intrastate commercial transportation. **All further supporting the need for effective loophole free drug and alcohol testing.**

The Marijuana Effect: We believe, that the number of drivers which test positive should reliably decrees as the substance abusers are removed from of the industry under the clearinghouse and eliminated loopholes, although we remain concerned about the increase in marijuana access and use as more states adopt the legalization of marijuana for recreational use.

There is a disturbing growth in the number of fatal car crashes many involving trucks where the car driver is using marijuana. According to a recent study, accident statistics have exposed a tripling in the U.S. of marijuana related accidents. Researchers from Columbia University's Mailman School of Public Health gathered data from six states – California, Hawaii, Illinois, New Hampshire, Rhode Island, and West Virginia – that perform toxicology tests on drivers involved in fatal car accidents. This data included over 23,500 drivers that died within one hour of a crash between 1999 and 2010. The study also noted that alcohol contributed to about 40 percent of all traffic fatalities throughout the decade.

The researchers found that drugs played an increasing role in fatal traffic accidents. Drugged driving accounted for more than 28 percent of traffic deaths in 2010, which is 16 percent more than it was in 1999. The researchers also found that marijuana was the main drug involved in the increase. It contributed to 12 percent of fatal crashes, compared to only 4 percent in 1999.

The Clearinghouse Effect: Unfortunately, many including us believe that removing the existing loopholes in drug testing, beginning with the Clearinghouse (CH) will push many drivers into vehicle classes/weights not subject to DOT drug and alcohol testing (less than 26,000 lbs. etc.). **For these reasons we support including all commercial driver classes into DOT drug and alcohol testing programs.**

Additionally, the regulation will affect an estimated 11,000 MROs, 5,000 C/TPAs, 15,000 SAPs and potentially 34 HHS certified labs and over 150,000 collection sites. Presently the first three noted entities in the contracted supply-chain would be responsible to verify and report positive drug and alcohol test

results, test refusals, and information about evaluation and treatment under the return to duty processes. Most MROs, C/TPAs, and SAPs are small business entities.

We completely support the intent and sprit of the proposed CH regulations but we are very concerned about the implied redundant "employer responsibility" to report all positive tests. Virtually everyone in the contracted supply-chain or process is required to report positive tests and behaviors that are considered a positive test. Clearly we do not want to see any positive driver not immediately reported into the CH, but we are concerned that ALL entities within the contracted supply-chain should not be required to report the same positive information. We believe that the regulation should contemplate a hierarchy of responsibilities starting with the MRO (for all drug testing), the BAT and C/TPA or employer (for alcohol) and ending with the employer and C/TPA for owner-operators for refusals. The regulations require the C/TPA to act as the employer for owner-operators.

With the creation of the CH, the positive reporting by MRO's (and all others) and querying for pre-employment background check and annually by employers is an important foundation and elements of this regulation.

As proposed today, the regulation states that, "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." This is consistent with existing regulations but through the CH positive reporting, it will create an enormous amount of new or at least perceived liability or risk that may or may not be insurable under today's existing industry underwriting risk in most Professional Liability coverage.

The real challenges will come with thoughtfully creating:

1.) A reporting process with standardized forms and data, a reasonable reporting time period and a reporting hierarchy structured in a manner that does not overwhelm the intent and economics of the proposed regulations with redundant and overlapping reporting requirements.

2.) A clear, efficient and minimally evasive "refusal to submit to a test" determination process for positives by C/TPAs and employers to the CH.

3.) An effective deterrent for driver's with drug or alcohol problems from job hoping, and owner-operators from C/TPA hopping until they find one that tests "infrequently."

4.) A standardized driver release form, that once approved by the driver for a particular test shall be sent to all parties electronically within the employer contracted drug testing supply chain.

5.) Driver/Employee's need to be compelled to disclose to employers (and C/TPAs for owner-operators) that they have been cited and convicted for driving a commercial vehicle under the influence of drug and alcohol. Which would then be reported to the CH. State DMV agencies could also play an important role in reporting violations to the CH.

6.) The Clearinghouse must create and staff a mandatory arbitration or dispute resolution process for any positive or refusal designation which is challenged by the driver. Without such an option employers and C/TPAs face the expense and time involved in potential litigation, as well as the specter of unreasonable jury awards.

7.) A requirement which states that any driver that leaves a C/TPA within a specified amount of time (a week) of a random notification and a test is not taken, it is automatically reported to the DOT and state enforcement community.

Detailed Questions, Comments and Suggestions – In addition to the SNPRM request, the following are a series of questions, comments and suggestions regarding implementation of the Clearinghouse.

1.) § 382.401 Reporting Positives – How far back, beginning when? It is presently unclear in this proposed rule as to what exact time period positive results and refusals are to be reported to this database. We are suggesting that consistent with the regulations § 382.401(b)(1)(i-vii), the last 5 years of such activity be retroactively reported. The rule has taken 15 years to evolve and there are relatively few positives, the rule should address this issue directly. This 5-yr retroactive

reporting process exercise would be beneficial in pre-vetting the new regulations reporting, employer/TPA querying and driver response nuances.

2.) § 382.211 Refusal to submit to a required alcohol or controlled substances test. The refusal to test status by C/TPA's which have clients that are non-leased owner-operators, typically motor carriers that operator under their own authority(s) referred to as owner-operator motor carriers (at least in California) are considered both a driver and employer and subject as both under the regulations. In 382.305(l) it states drivers must proceed immediately to the test site once notified of a test. Guidance says "immediate" can be as much as two hours or a reasonable amount of time to go test, this are the typical unwritten rule.

There are still many challenges to accomplishing this "immediate testing goal", such as time of day a driver receives the random notice, time of year, weather, driver location away PPB or near collection sites, vacation status, out of country, the sear number of excess real or not is difficult to apply to the letter of the regulation.

There are also many variables and therefore many random notification challenges for C/TPAs that provide testing services to owner-operators. These challenges are unlikely to change but diligence and unwavering questions and documentation are what's required by all TPAs.

The industry has typically offered random notifications by differing degrees of stringency, from direct phone calls, to emails and even the archaic notification by mail is allowable. Each has its own cost, success ratio and potential obfuscation of the drivers testing responsibility. We believe that all C/TPAs should be required to notify/communicate with all owner-operators via telecommunications, with the understanding that even with this methodology there are telecommunications limitations, geographical and collection site limitations which will never meet the "immediate" testing standard. In the rare instances that cellphone service is never or rarely available, mail will have to be an accepted alternative.

Regardless, the establishment or determination that a driver did not "immediately" test and therefore a "refusal" is fraught with a tremendous amount of liabilities, costs and headaches for drivers, (both employed and owner-operators) and C/TPAs. This section of the proposed CH should contemplate and address all these issues in detail.

Finally, there are occasions when a company owner appears to not support random drug and alcohol testing and seemingly always have an excuse why their drivers cannot test when selected. By policy we immediately choose alternative drivers, when that fails we threaten to terminate the client and send a complaint to local law enforcement, suggesting an investigation. These situations must also be contemplated and addressed within these regulations.

In § 382.211 employers are also vulnerable. Employers who tender over a random test to an employee who instantly decides he/she is sick and can't go test or even quits, must be provided some clear protections if they are required to file a refusal to test status on a driver. Employers should be given a set of defined procedures and enforcement infrastructure to help investigate these "gray refusal" situations. The enforcement community must also be allowed (actually required) a process that they can force a driver who quits or leaves a company or a for-hire interview test to – immediately test under enforcement oversight as they have no real employer.

3.) § 382.123(b)(2) – This indicates the employer would provide the information on the driver CDL number and state of issuance. This section does not address what employers with in-house driver training and training schools should use to reference student drivers that do not yet have a CDL. Most commercial drivers are at least 25 years old and will have a class C license and or a leaner's permit and number, and state of issuance be used in these circumstances.

4.) § 382.701(b) – Employers are required to conduct an annual query of the CH on all employees subject to drug and alcohol testing. Questions:

   a. Will Consortiums/Third Party Administrator (C/TPA) be given employers rights to conduct all query's on behalf of an employer?
   b. Will there be a standardized driver release agreement that <u>all</u> parties from the MRO to the C/TPA and employer can utilize for a particular test?
   c. Will owner-operators who are employer/drivers have to query themselves?

d. Will there be a process that an larger employer can query the system on multiple drivers at once, such as using an Excel file query?

There will be many technology challenges and questions which will need to be answered.

5.) § 382.703 - To ease into the program can employers initially run a limited query for pre-employment, and only run the full query if the limited query indicates that information exists on a particular driver?

6.) Within the OMB comments, “Extent of automated information collection,” it reiterates that the FMCSA estimates that all of the information would be disseminated by logging into a secure website, with the exception of the notification to drivers (FMCSA would notify each driver via U.S. USP Mail that information about them has been reported to, revised or removed from the database unless the driver provides an alternative method of notification such as email). We believe mail to not be acceptable as a primary form of contact unless certified mail. There needs to be some affirmative notice sent to the driver where an “event notification” cane be closed as quickly as possible.

Thus, of the seven stated information collection requirements of the rule, all would be electronic except for the second below dealing with drivers. This is a summary:

a. Medical Review Officers (MROs) would submit verified positive controlled substances test results and medical refusals to the CH.
b. FMCSA would notify drivers testing positive that information about them has been reported to the database. The drivers would also have the opportunity to review the information reported and take the steps provided if the information is inaccurate.
c. Substance Abuse Professionals (SAPs) would report the completion date of the return to duty process, and the prescribed follow up testing.
d. Employers or designated service agents (C/TPAs) would report verified alcohol test results at or above .04 for an alcohol test for drivers to the CH.
e. Employers or C/TPAs acting on the employer’s behalf would submit information on refusals to test to the CH.
f. All employers would report actual knowledge of drivers who received traffic citations for operating a CMV under the influence of drugs or alcohol.
g. All drug-testing laboratories would submit annual summaries of the results of their controlled substances and alcohol testing programs directly to FMCSA.

Also, in the above note (d) Employers or designated service agents (C/TPAs) would report verified alcohol test results at or above .04 alcohol-concentrations for drivers to the CH. We believe the collection site certified breath alcohol technician (BAT) that is preforming the test, is more informed and in a better position to report the positive than the C/TPA or employer who has no actual knowledge of what happened at the testing event to defend the test procedures and the positive determination? Collection site administrators already have responsibilities for reporting drivers who leave the collection site in violation of 382.

RIA Estimate of Benefits and Costs – Are the fees referenced in this section, $2.50 for a limited query and $5.00 for the full query, the actual fees that will be in effect upon implementation or a minimum charge? The annual estimated time for a typical small business annual query all employees is estimated to be

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

slightly less than 40 hours/yr. This analysis has many assumptions that in our experience are highly unlikely to happen as calculated.