



California Construction
Trucking Association

American Alliance
Drug Testing



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Federal Motor Carrier Safety Administration
Docket Management Facility (M-30)
U.S. Department of Transportation
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue SE.
Washington, D.C. 20590-0001

**Re: Docket No. FMCSA-2011-0031
Commercial Driver's License Drug & Alcohol Clearinghouse**

Dear Sir or Madam:

The California Construction Trucking Association ("CCTA") submits these comments in response to the U.S. Department of Transportation, Federal Motor Carrier Safety Administration ("FMCSA" or "Agency") publication of a Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on February 20, 2014 (79 FR 9703), Docket No. FMCSA-2011-0031 proposing to establish the Commercial Driver's License Drug and Alcohol Clearinghouse ("Clearinghouse").

The CCTA is the largest non-profit association of construction trucking firms in the U.S. Founded in 1941 and headquartered in Upland, California, the CCTA advocates on behalf of our majority small-business trucking members for sensible legislation and regulations. As part of providing benefits and services to both members and non-members, we own and operate a subsidiary business - *American Alliance Drug Testing (AADT)*, a leading C/TPA also located in Upland, CA. AADT has been providing controlled substance or drug and alcohol testing services to meet DOT requirements for motor carriers and the "drug free work place" since 1995.

We presently provide services to over 5,500 mainly DOT-FMCSA regulated clients (both inter and intra-state) of which about half are self-employed (owner-operator employer/drivers) and the other half being employers and overlying motor carriers responsible for over 11,000 covered drivers. CCTA/AADT has been proactively engaged and supportive of many regulatory changes over the past 20-years to eliminate the many loopholes identified in DOT related drug and alcohol testing. We have also been involved and supportive of the Clearinghouse concept since 1998.

During that legislative year, we supported California State Assembly Bill 2597 and participated on the *California Drug-Free Commercial Truck and Bus Driver Task Force* which eventually presented the state legislature with a 32 page report in 2000. Much of what is included in this NPRM concerning the Clearinghouse was discussed in depth with the California task force in 1998. We agree with the overall approach in the NPRM and believe the Clearinghouse will, once fine-tuned, likely help correct the problems associated with a commercial driver's license ("CDL") holder testing positive for illegal drug and/or alcohol use, refusing a test with one employer or prospective employers and withholding that information from a second employer or a prospective employer.

According to the NPRM, supporting documents and independent industry estimates, the DOT-FMCSA drug and alcohol testing regulations apply to about 520,000 inter-state motor carriers with 4 million drivers. In addition, there are at least another 270,000 intra-state covered motor carriers with another 2 million drivers which are also required to be in a DOT regulated drug 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 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 commercial motor vehicle ("CMV") drivers, just 2.3 percent (or 3,000 accidents) of all crashes 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 covering 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 in Nov. 1, 2007, before the House Committee on Transportation and Infrastructure, Subcommittee on Highways and Transit he 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 of the positivity rates from the 6 million covered drivers would equate to 156,000 positives, which we believe would have to include refusals, is consistent with on our client/driver positive testing rates of 2.1 percent.

Mr. Hill went onto to say, "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 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 a percent, were discovered under the influence or in possession of drugs or alcohol during roadside inspections and were removed immediately from the highways."

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 generally accepted by industry. We suspect two things; (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 personnel and, (2) We suspect that the mostly interstate roadside inspections may hide that there is a much higher use of drugs and alcohol in localized vocational or intra-state commercial transportation. **All further supporting the need of effective loophole free drug and alcohol testing.**

We believe, that the number of drivers which test positive should reliably decrease as the substance abusers are removed from of the industry, although we remain concerned about the increase in marijuana access and use as more states adopt the legalization of marijuana use for recreational use.

There is a disturbing growth in the number of fatal car /truck crashes involving marijuana use which has tripled in the U.S. according to a recent study. 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 timeframe. 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.

Unfortunately, many (including the CCTA) believe that removing the existing loopholes in drug testing will push many drivers into vehicle classes/weights not subject to DOT drug and alcohol testing (less than 26,000 lbs.). **For these reasons we support including all operators of CMV's and CDL 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 and collectors. Presently the first three noted entities (MROs, C/TPAs and SAPs) in the 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 spirit of the proposed Clearinghouse regulations but are very concerned about the implied redundant “employer responsibility” to report. Virtually everyone in the 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 Clearinghouse, 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/MRO (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 Clearinghouse, the positive reporting by MRO's (and all others) and querying for pre-employment background check annually by employers are important foundations and elements of this regulation.

As proposed the NPRM 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 Clearinghouse positive reporting, it will create an enormous amount of new or at least perceived liability risk that may or may not be insurable under today's existing Professional Liability coverage.

The following are our key points of interest with the NPRM and perceived challenges:

- 1.) **Driver/Employer Identification** – the driver's license especially for commercial drivers is and should be the main form of identification. There is a much higher standard of review for an individual to receive a CDL. The FMCSA and the U.S. Department of Homeland Security (DHS) continue to work cooperatively to implement the provisions of the REAL ID Act of 2005 establishing minimum Federal driver licensing standards that affect both CDL and non-CDL drivers. The REAL ID standards build on the CDL program and include requirements and activities that States are already implementing for CDL drivers. Coordination of these two efforts is maintained to ensure that REAL ID and CDLIS modernization are implemented in a coordinated fashion. The CDL program has been effective at limiting CMV operators to a single CDL but the same degree of certainty cannot be associated with use of a social security number.

- 2.) **Eliminating Collection Site Errors** – many of these (an overly long list) of errors could be eliminated with an electronic Custody and Control Form (eCCF). Without requiring this standard within the Clearinghouse scheme, it will be extremely costly on many levels. We support SAPAAs comments in this area, they were exceptionally thorough.
- 3.) **We support sending/transmitting the eCCF and all other related information from the collector location to the MRO.** The collector is the main point of contact with the driver/employee from the check-in through the testing process, refusals and even witnessing any adulterant activity. It may be prudent to formalize a reporting form with check-boxes and description fields that allows a collector to describe in detail the events leading to a negative outcome (a positive determination by the MRO) in the collection process. The form could then be electronically transferred, with signatures etc. to the MRO for final reporting to the Clearinghouse.
- 4.) **No-collection should be refused by a collector.** All too often, the lack of the “exact” paper CCF or other minor issue leads to turn-aways or refusals to collect, additionally frustrating the entire drug testing program and process. Certified collectors should also be responsible for complete reporting and documentation submittal directly to an MRO involving a refusal to test.
- 5.) **A “positives” 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.
- 6.) **An effective deterrent for driver’s with drug or alcohol problems** from job hopping, and owner-operators from C/TPA hopping until they find one that tests “infrequently.”
- 7.) **A standardized driver release form and information reporting and retrieval process,** that once approved by the driver/owner-operator for a “particular test or reportable situation” not in conflict with 49 CFR 40.351(d) “probation on blanket information releases” shall be sent to all parties electronically within the employer contracted drug testing supply chain. We would hope that C/TPAs and employers would have electronic access for both submitting and retrieving ALL driver information for the Clearinghouse database. Will any contractual agreement between the parties be accepted or will FMCSA provide a minimal contractual standards agreement guide?
- 8.) **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 drugs and/or alcohol.
- 9.) **Clearinghouse registration** – It appears that the owner-operator will be responsible to notify the Clearinghouse that they are being represented by a particular C/TPA. Many owner-operators relay on the C/TPA for services like this. We would hope the C/TPA is allowed to actually report the notification. Could this be done electronically or with a standardized form that could be electronically transmitted? Who and how would be responsible for reporting when the relationship changes? In the event of a Dispute Resolution Process reversal, or an unconfirmed positive during a donor challenge, who will report these changes?
- 10.) **The Clearinghouse must create a clean and clear Dispute Resolution Process (DRP)** – Presently the proposed Clearinghouse regulation describes in §382.717, a DRP for any administrative errors. It is unclear that other positive designations such as refusal or

adulterant activity can be challenged through the DRP. We believe this section of the regulation will require a thorough “all scenarios” analysis and coverage determination. We are concerned that the petition delays (within 90 days) especially those “seeking correction of critical information” could materially affect a drivers/owner-operators career, personal wealth, family, home and business assets. Certainly, if a mistake is made and not corrected quickly, and material damage to the driver occurs, litigation will follow. Without a secondary level outside of the DRP such as mandatory arbitration, employers and MRO/C/TPAs could face the expense and time involved in potential litigation, as well as the specter of unreasonable jury awards.

Further, we strongly believe that FMCSA implement this 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. We cannot imagine the current NPRM will not have significant changes based on the volume of thoughtful comments.

In addition to the SNPRM request, the following are a series of questions, comments and suggestions regarding implementation of the Clearinghouse specific to each section.

§ 382.401- Reporting Positives – How far back, beginning when? It is presently unclear in the NPRM 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. This rule has taken 15 years to evolve and there are relatively few positives, the rule should address this issue directly. This 5-year retroactive reporting process exercise would be beneficial in pre-vetting the new regulations reporting, employer/TPA querying and driver response nuances.

§ 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(1) it states drivers must proceed immediately to the test site once notified of a test. Guidance says “immediate” which can be as much as two hours or a reasonable amount of time to go test is 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, vacation status, out of country, there are 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 and success ratio. We believe that all C/TPAs should be first required to notify all owner-operators via telecommunications, with the understanding that even with this method there are telecommunications, 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 and their contracted MRO. This section of the proposed Clearinghouse 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 has 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 law enforcement, suggesting an investigation. These situations must also be contemplated and addressed within these regulations.

§ 382.211 - Leaves employers vulnerable to litigation. Employers who tender over a random test request 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.

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

- 1.) Will Consortiums/Third Party Administrator (C/TPA) and their MRO be given employers rights to conduct the all query's on behalf of an employer?
- 2.) Will there be a standardized release agreement that all parties from the MRO to the C/TPA and employer can utilize for a particular employee and test?
- 3.) Will owner-operators who are employers and drivers have to query themselves? **We support an exemption for owner-operators who operate under their own authority, although due diligence is a best practice.**
- 4.) Will there be a process that an employer can query the system on multiple drivers at once, such as using an Excel file query? Is the charge for one access or by each driver? There will be many technology challenges and questions which will need to be answered.

§ 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?

Within the OMB “Extent of automated information collection,” it reiterates that the FMCSA estimates that all of the information would be disseminated by logging onto a secure website, with the exception of the notification to drivers, FMCSA would notify each driver via U.S. 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.

Thus, of the seven stated requirements of the rule, all would be electronic except for the second below:

- 1.) Medical Review Officers (MROs) would submit verified positive controlled substances test results and medical refusals to the Clearinghouse.
2. FMCSA would notify (by mail) 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.

3. Substance Abuse Professionals (SAPs) would report the completion date of the return to duty process, and the prescribed follow up testing.
4. Employers or designated service agents (C/TPAs) would report verified alcohol test results at or above .04 alcohol-concentrations for drivers to the Clearinghouse.
5. Employers or C/TPAs acting on the employer's behalf would submit information on refusals to test.
6. All employers would report actual knowledge of drivers who received traffic citations for operating a CMV under the influence of drugs or alcohol.
7. All drug-testing laboratories would submit annual summaries of the results of their controlled substances and alcohol testing programs directly to FMCSA

Under the extent of automated information collection, employers or designated service agents (C/TPAs), MROs would report verified alcohol test results at or above .04 alcohol-concentrations for drivers to the Clearinghouse. We believe the collection site certified breath alcohol technician (BAT) that is performing the test be more knowledgeable to report the positive to the MRO on record. The C/TPA or employer who has no actual knowledge of what happened at the testing event, has little ability to defend the testing procedures and the positive determination? This is also true for drivers who leave the collection site in violation of part 382.

Cost Considerations:

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

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

We suspect that there will be substantial costs associated with IT programming integrating electronic reporting from the company database to the Clearinghouse. We are now experiencing substantial increases in collection site fees, 50 percent increases are not unusual. With the additional costs associated with these regulations and the cost of querying the database, we believe the compliance cost associated with drug/alcohol programs will virtually double.

Respectfully submitted,

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