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Mr. Juan Moya  
Office of Enforcement and Program Delivery  
Federal Motor Carrier Safety Administration (FMCSA)  
1200 New Jersey Ave., SE  
Washington, DC 20590-0001  
Re: Commercial Driver's License Drug and Alcohol Clearinghouse  
Docket No. FMCSA-2010-0031

Following are the comments of the Drug & Alcohol Testing Industry Association (DATIA) on the FMCSA Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse) NPRM. DATIA is a 1,500+-member national trade association representing the full spectrum of drug and alcohol testing providers including laboratories, collection sites, C/TPAs, BATs, MROs, SAPs, employers, and testing device manufacturers. DATIA's mission includes working closely with key policy makers in Federal Agencies and in Congress to ensure that the interests of the industry are heard and taken into account when changes in drug and alcohol testing rules are proposed. DATIA works to ensure that these changes foster rather than hinder the industry's growth, and provide for safe and effective drug free workplaces. DATIA further works to educate the industry on current standards of service and regulatory policies and procedures. DATIA's comments on behalf of its constituency are based upon input from DATIA's members, Legislative & Regulatory Committee, and Board of Directors.

DATIA strongly supports the FMCSA's forward movement on this important issue. DATIA has been in support of such a clearinghouse since its inception in 1995. We continuously hear from our members of situations where they provide services for multiple employers, and in turn are privy to positive test results that they aren't able to share with those other employers although they are aware of a potential safety concern with this driver continuing to perform safety sensitive duties for another employer who may not be aware of their infraction.

The NRPM states "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." DATIA and its members couldn't agree more with that statement and see the Clearinghouse as a viable solution to the current problem.

While we are in support of the Clearinghouse, we do have a number of concerns with the proposed regulations. We feel there are issues that need to be addressed to ensure the Clearinghouse operates as efficiently as possible while ensuring accuracy of the information submitted to the database and maintaining strict confidentiality of that information. Below are the key areas where we see changes need to be made. For those sections of the NPRM that we did not comment on, we are in support of those provisions.

### **§382.103 Applicability**

As DATIA will discuss in more detail further within our comments, the regulatory requirements are between the FMCSA mandated employer and the FMCSA. To require each service agent (MRO, Laboratory, SAP) to report their portion of information to the Clearinghouse will likely cause confusion. The employer is the one entity with access to ALL information and is in the best position to provide that information to the Clearinghouse. Why have the MRO provide verified test results to the employer and the Clearinghouse, have the SAP provide information to the employer and the Clearinghouse, have the Laboratory provide reports to the employer and the FMCSA? It seems that throughout the regulation, the employer is the one that is mandated by the FMCSA, however, they have very few requirements to provide information on their current or potential employees to the Clearinghouse. Furthermore, when there are several different entities submitting information on behalf of one employer it will be cumbersome to determine who is responsible for updating information when incorrect information needs to be changed within the Clearinghouse. Having one entity (the employer or their designated agent in the case of employers who utilize Third Party Administrators/Consortia) responsible for submitting information will create a clear determination of responsibility. As in states such as Texas, where information on drug and alcohol testing violations for CDL holders is required to be submitted to the state, many service providers send a report to the employer to be used to identify information that must be reported. Such a system could work well for the Clearinghouse as well.

### **§382.123 Driver Identification**

DATIA opposes the requirement to include the driver's CDL number and state of issuance on the Federal Custody and Control Form (CCF) and the Alcohol Testing form. For starters, the current forms do not provide areas for this information to be documented. As such, there is a very high likelihood that it won't be captured at the time of collection. In addition, identifying a driver by his/her social security number (SSN) is a much better identifying number. Drivers may move to another state where they would obtain a new CDL number and a new state of issuance. This would therefore create a new record for him/her in the Clearinghouse that would not be associated with their Clearinghouse data under the previous CDL number. Social security numbers do not change and remain with a person for life. Therefore we request that the regulation be changed to have drivers in the Clearinghouse identified by their SSN.

Furthermore, the NPRM proposes that the CCF also contain the employer's USDOT number or EIN number and that laboratories use this data for the newly proposed laboratory reports. Currently laboratories do not capture this data and most likely none have a field in their laboratory systems to do so. To modify the laboratory's data systems to capture this data would require a significant effort in both time and money. Also involved in capturing this data will be the number of additional key strokes required per requisition, resulting in additional labor costs.

Additionally, many C/TPAs do not use unique account numbers for each of the companies that they manage, and would make the "generic" or "fill in the blank" CCF obsolete. Requiring the above changes to the CCF will result in laboratories having to print and send new forms to all FMCSA clients. The last

time that this was required, some laboratories had to print and send three to four times as many CCFs as they normally would have sent in the process of resupply, adding even additional costs.

#### **§382.404 Laboratories' Duty to Report Controlled Substances Test Results**

The FMCSA proposes that laboratories must submit annual reports to the FMCSA with aggregate testing data for each employer. This information is already provided to each employer by the laboratory as required by §40.111. To have a separate report that must be provided to the FMCSA will be redundant and cause confusion. For example, a positive result from the laboratory does not always result in a verified positive result after the Medical Review Officer review. The better solution to this would be to require employers to provide information from this report that is already provided to them by the laboratory via §40.111 to the FMCSA as a Management Information Systems (MIS) requirement. Rather than only requiring randomly selected carriers to provide the information, each company with covered drivers should submit their annual MIS report to the FMCSA. This would satisfy the FMCSA's goal of ensuring testing compliance by employers via a slight change to a system that is already in place.

#### **§382.415 Notification to Employers of a Controlled Substance or Alcohol Testing Violation**

DATIA agrees with the requirement to notify other employers who employ an employee who has violated the drug and alcohol testing rules. In the discussion of this requirement, however, it is stated that "each employer must separately follow the return-to-duty provisions of Parts 40 and 382". We find this very redundant and unnecessary. Must the employee go to two different SAPs, get two different evaluations (which may differ considerably), and follow two different follow-up testing programs for one single violation? Since follow up testing information is to be entered into the Clearinghouse within 1 business day, it should be sufficient that other employers need to only monitor the employee's progress.

#### **§382 Subpart G Requirements and Procedures for Implementation of the Commercial Drivers' License Drug and Alcohol Clearinghouse**

While we will discuss specific provisions of this section, DATIA would like to reiterate that drastic security measures must be taken to ensure the confidentiality and protection of the data within the Clearinghouse. Given the sensitivity of the information, any unauthorized access, hacking, or unauthorized use of the information within the Clearinghouse would have serious detrimental effects on those with information within the database – potentially much worse than the loss of a DOT safety-sensitive position. In addition to the controls set up for registration to the Clearinghouse, controls must be set up for the timely revocation of access by those who are no longer authorized for access (i.e. former employer staff or C/TPA staff). In addition, strict controls need to be set up so that employees are prevented from seeing information that they are barred from seeing such as SAP follow-up testing plans. Finally, the discussion of this part states that the FMCSA has full access to the Clearinghouse without having to receive consent. As such, strict guidelines need to be included in the regulatory text as to whom within the FMCSA has such unlimited access. We understand that these are back-end administrative processes that need to be developed, but would be remiss if we didn't reiterate our concerns on this topic.

#### **§382.701 Drug and Alcohol Clearinghouse and §382.703 Driver Consent to Permit Access to Information in the Clearinghouse**

DATIA has two comments on these sections, which are somewhat intertwined. The first concerns §382.701 (c) where it states that the FMCSA will notify an employer if new information is submitted regarding a driver to which the employer performed a search within seven days. DATIA feels that this timeframe is too short. We suggest expanding this timeframe to 30 days.

The second comment is questioning the need for two types of queries – full and limited. The regulations state that the annual query will be a limited query and that if that query shows that the driver has records in the database the employer must get an additional consent to do a full query. This seems like an extra unnecessary step. Prior to hiring, drivers are required to give consent for a full query and the regulations state that this must be kept on file for three years. Furthermore, the regulations state that if a driver refuses to give consent for a query of the Clearinghouse that they cannot be employed in a safety-sensitive position. This begs the question then, as to the purpose of a limited query by an employer. If there is anything in the Clearinghouse regarding an employee, they will either see that information following obtaining a second consent from the employee or remove that employee from safety-sensitive duties should he/she refuse consent. Regardless, the information viewed is strictly confidential, the outcome will be the same, and the only difference is two added steps to be taken by the employer (obtain additional consent and conduct another query). This additional time delay to gain consent for and conduct the second query may allow a non-qualified CDL driver to perform safety-sensitive duties during this time delay thereby creating a potential safety risk. As such, we recommend that all queries by authorized employers (whether it be the pre-employment query or the annual query) be full queries.

#### **§382.705 Reporting to the Clearinghouse**

As DATIA stated earlier in its comments, we support reporting to the Clearinghouse by the employer only (or their designated agent in the case of employers utilizing a C/TPA or in the case of owner-operators). By having multiple agents inputting information the possibility of incomplete or incorrect information only increases. To require each service agent (MRO, Laboratory, SAP) to report their portion of information to the Clearinghouse will likely cause confusion. In addition, service providers will incur extra costs to provide such reporting services that will inevitably be passed onto the employer. The employer is the one entity with access to ALL information and is in the best position to provide that information to the Clearinghouse. Finally, the discussion states that those in violation of not reporting are subject to the civil and criminal penalties set forth in the current §382.507 - Penalties. That section reads “Any employer or driver who violates the requirements of this part shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b). In addition, any employer or driver who violates the requirements of 49 CFR part 40 shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b).” As you can see, that provision only provides for action against the employer or the driver. Under §382.507, the FMCSA does not have authority to apply civil or criminal penalties to anyone other than the employer or the driver. As such, the employer (or their designated agent) should be the only one allowed to submit information to the Clearinghouse.

#### **§382.713 Duration, Cancellation, and Revocation of Access**

In the discussion of this section, the FMCSA states that should access to the Clearinghouse be revoked, and the employer is unable to perform the functions under this rule, FMCSA staff would become involved and process requests on behalf of the employers. This, however, is not apparent in the actual rule text. Obviously if an employer’s access to the Clearinghouse is revoked they will be unable to meet any of the requirements of the NPRM. As such, provisions on how the employer will be able to meet the regulatory requirements in the case of a Clearinghouse registration revocation need to be outlined in detail within the regulatory text.

#### **§382.717 Procedures for Correcting Information in the Database**

The NPRM states that petitions to correct information will take place within 90 days, and expedited requests will take place within 30 days. While DATIA does not have a problem with the 90 days for

minor corrections, we do feel that 30 days is too long for expedited requests. “If resolution of the decision would affect the driver’s ability to perform safety-sensitive functions, he or she would request expedited review. If FMCSA granted expedited review, it would inform the driver of its decision within 30 days of receiving a complete petition.” Given that the need for an expedited review is based on information within the Clearinghouse preventing a person from performing safety-sensitive duties, and potentially leaving him/her out of work for that time, DATIA recommends that expedited reviews be conducted and concluded within a shorter time frame of no more than 14 days.

**§382.719 Availability and Removal of Information**

FMCSA requests comments on whether three or five years from the date of the violation is the appropriate amount of time to make test result information available after a driver has completed the return to duty process. While DATIA prefers a shorter retention time for records, given that §40.307 (d) allows for up to 60 months of follow-up testing we feel it would be appropriate that records remain in the Clearinghouse for five years to accommodate the potential for a driver undergoing 60 months of follow-up testing.

**§382.721 Fees**

This section only states that the FMCSA will require reasonable fees from entities to query the database. Since employers will be required to conduct not only pre-employment queries, but also annual queries on all drivers DATIA encourages the FMCSA to keep fees to less than \$5 per query.

DATIA has one final comment, though not directly affecting this FMCSA NPRM. The issues of job-hopping and omitting previous employer information is not unique to just the FMCSA. In addition, a number of employees are covered by multiple DOT agencies. As such, DATIA is hopeful that after the Clearinghouse works out any initial implementation kinks, the process of submitting information and searching for information on prospective employers is expanded to include all DOT agencies required to follow 49 CFR Part 40 drug and alcohol testing regulations.

DATIA thanks the FMCSA for the opportunity to provide comments on the proposed rulemaking. Please feel free to contact me if you would like to further discuss any of the following comments.

Sincerely,



Laura Shelton  
Executive Director