



United States Department of Transportation  
Federal Motor Carrier Safety Administration  
Docket Number FMCSA-2011-0031  
RIN 2126-AB18

**Comments of the American Bus Association  
on the Notice of Proposed Rulemaking Request for Comments:  
Commercial Driver's License Drug and Alcohol Clearinghouse**

April 22, 2014

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The American Bus Association appreciates this opportunity to comment on the Federal Motor Carrier Safety Administration's (hereinafter "FMCSA" or "Agency") Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding. Specifically the FMCSA published an NPRM on February 20, 2014 in the Federal Register, *79 Fed. Reg. 9703*, in which it proposed to establish the Commercial Driver's License Drug and Alcohol Clearinghouse, a database under the Agency's administration that will contain controlled substances and alcohol test result information for the holders of commercial driver's licenses (CDLs). FMCSA published in the Federal Register on March 6, 2014 a notice correcting the docket number to 2011-0031 at *79 Fed. Reg. 12685*.

The proposed rule would revise 49 CFR Part 382, *Controlled Substances and Alcohol Use and Testing* to establish the Drug and Alcohol Clearinghouse (See, *79 Fed. Reg. 9704*). The proposed rule would require FMCSA regulated motor carrier employers, Medical Review Officers (MROs), Substance Abuse Professionals (SAPs) and consortia/third party administrators (C/TPRAs) supporting U.S. Department of Transportation (USDOT) 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, and other authorized entities. Finally, it would require laboratories that provide FMCSA-regulated motor carrier employers with DOT testing services to report, annual, summary information about their testing activities. See, *79 Fed. Reg. 9703*.

The proposed rule also addresses a recommendation of the National Transportation Safety Board (NTSB) that FMCSA "develop a system that records all positive drug and alcohol test results and refusal determinations resulting from the 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.” *79 Fed. Reg. 9707*. Comments on the *NPRM* are due to be filed with the Docket on or before April 21, 2014.

The American Bus Association (hereinafter “ABA”) is the premier bus and motorcoach industry trade association in North America. The ABA is home to some 3800 member companies and organizations and approximately 850 bus operator companies. ABA motorcoaches or over-the-road bus (OTRB) members represent 65% of all OTRBs on the road. The bus operator members provide all manner of transportation services to the public, including fixed-route scheduled service, charter and tour, dedicated employee transportation, airport shuttle and commuter services. In total, the private over-the-road bus industry provides some 650 million passenger trips annually. In some years the number of passengers we carry exceeds that of the domestic airline industry. In addition, the private bus industry carries more passengers in two weeks than Amtrak carries in a year and to many more destinations. And our industry is growing, some seven percent per year for the last three consecutive years.

The private bus and motorcoach industry is largely a small-business industry. The average ABA bus operator member has eight motorcoaches. Many bus companies are family-owned and as such are less able to capitalize for more equipment. Moreover, each new motorcoach will cost \$500,000 dollars to start with improvements and amenities that could more than double the base cost. Even the largest ABA members engaged in intercity bus service do not approach the size of or command the financial resources of the larger domestic corporations. The above is brought to your attention to highlight the costs of running a bus company, whether scheduled service, charter and tour or commuter operator; the ABA is loath to see increases in these costs where they are not justified or cannot be ameliorated in some fashion.

A significant issue for bus operators in all facets of their business life is cost. In this case, as even the Agency attests, the costs associated with this rulemaking are notable. The Agency estimates about \$187 million in annual benefits from increased crash reduction from the rule, *79 Fed. Reg. 9715*. On the other hand the FMCSA estimated costs of the rulemaking are \$186 million dollars for that same year. Thus the benefits outweigh the costs by only one million dollars. These costs will inure to bus operator employers in a significant degree. Of the \$186 million some 22% of those costs will be paid by the employers of CMV drivers who seek information related to the hiring of those drivers, *79 Fed. Reg. 9717*. In so far as the private bus industry is concerned, this means that the costs will be borne by small business men and women who are the least able to bear them. In addition, it is clear that the costs will fall disproportionately on the industry. The Agency is aware of the significant costs versus the relatively meager benefits of the rulemaking. It notes the benefits of the rulemaking that it “could not precisely quantify” such as improved health, quality-of-life improvements and increased life expectancy for CMV drivers, that the FMCSA “believes are significant,” *79 Fed Reg. 9715*.

The watch word of the private bus industry is “safety.” The safety of our passengers, employees and suppliers is paramount in the minds of ABA members. And ABA members can believe in some degree that any improvement in the hiring and retention of superior drivers can lead to improvements in the non-quantifiable benefits FMCSA touts. However, the non-quantifiable benefits are frankly speculative. The additional costs that the rulemaking will place on the industry are all too real and the new reporting and retention requirements all too burdensome for this small business industry. Finally, it must be said that the sum of the new requirements and costs will fall on those bus operators who seek

to operate their motorcoach businesses in accordance with the regulations. The bus operators who skirt or ignore the rules will continue to operate without reference to the Clearinghouse just as they continue to operate unless forced to end operations via vigorous enforcement.

ABA and its members have supported the establishment of a Drug and Alcohol Clearinghouse. ABA was one of the first organizations to support Congressman Rick Crawford's (1<sup>st</sup> D. Arkansas) bill to establish a Drug and Alcohol Clearinghouse even before the development of the nation's latest transportation reauthorization bill, MAP-21, by which this proposed rule is mandated by Section 32402. ABA agrees with FMCSA that the current background check process 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 not qualified to operate a CMV prior to completing the return to duty process. *See 79 Fed. Reg. 9706-9707.* ABA believes that the proposed Clearinghouse is certainly a step in the right direction towards the goal of having more complete information available so that bus operators may make more informed and consistent CMV drivers' hiring and retention decisions. This will enhance the bus operators' safety records and improve safety for the traveling public. *See 79 Fed. Reg. 9710.* But while we support the Clearinghouse concept, we have some concerns about the FMCSA proposal.

As we will detail below our concerns with the NPRM are centered on the requirements placed on the motor carrier employers in the proposal and the costs of these requirements to the bus operators. In addition, some of the requirements of the proposal are confusing. As an example of the first concern, the proposed rule would add a new provision (*Section 382.601(b) (12)*) which would require employers notify drivers that information about verified results and refusals to submit to tests will be reported to the Clearinghouse. However, the proposal also states that employers must include all of this information in the educational materials they provide to their drivers *79 Fed. Reg. 9709.* While the proposal does not state how this material is to be presented, the issue for ABA members is the cost of developing this material. Again, many, if not most, private bus operators are small, operate on small budgets, and maintain few staff. This requirement will put a burden on carriers least able to afford it. In addition, even the larger bus operators will have a raft of new information that will have to be developed and given to their employees. The costs of this provision are no less onerous for being placed on larger bus operators. ABA requests that consideration be given to lessening this burden by limiting the amount of information the operator is required to provide its drivers.

Therefore, ABA finds that the goal of the proposal is largely consistent with the wishes of the bus industry and the public at large. Specifically, we approve of the proposed section 382.415 (*79 Fed. Reg. 9709*) which would require 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. ABA agrees with the Agency's rationale that this amendment would close a "loophole" in which drivers who work for more than one employer are not required to inform those other employers.

Likewise, ABA can support the goal of ensuring that an employer conduct pre-employment queries prohibiting the employer from hiring drivers without first conducting a search of the Clearinghouse for drug and alcohol violations. *See, Section 382.701, 79 Fed. Reg. 9710.* However, the proposal would require an employer to query the Clearinghouse annually about its current drivers. ABA is concerned that this annual requirement might be unnecessarily burdensome if the driver is a long-term employee with no history of drug or alcohol abuse. ABA suggests that the Agency consider

establishing a process where long-term superior employees have their names queried less often than newer or untried employees.

With respect to the issue of driver consent to an employer's querying the Clearinghouse database, the Agency's proposal, *Section 382.703*, requires an employer to obtain consent from drivers before any querying via written consent. The proposal states that: "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." *79 Fed. Reg. 9710*. One level would grant employers access to the reportable information in the driver's record with written consent of the driver. This level of inquiry would be used to satisfy the pre-employment query requirement. The second level or "limited query" would indicate whether information about the driver exists in the database and for this level, an employer would also have to obtain written consent from the driver.

In complying with this section the FMCSA envisions a process whereby the driver will give a blanket consent to allow employers to conduct a limited query on an annual basis but that no driver will be allowed to give blanket consent for a full query of his or her information in the Clearinghouse. *79 Fed. Reg. 9711*. ABA respectfully contends that such a bifurcated process is unnecessarily complex. The driver should be able to give a blanket consent on an annual basis for a full inquiry. The form would be a part of the driver's file and available for the company and the employee as needed. And there is no reason why the form could not be revoked by the driver whenever the driver deemed it necessary to do so. In addition, the proposal does not provide any reason for a bifurcated consent process. In light of the forgoing ABA asks that this process be modified to allow a blanket consent form to be used in either a full or limited inquiry into the database.

One requirement ABA finds confusing and unnecessary is that proposed in *Section 382.123* which would prohibit employers from identifying drivers by reference to the driver's social security number. The proposal *79 Fed. Reg. 9708* contends that this would "...allow employers to shift from reliance on the use of Social Security numbers...and to identify drivers by better utilizing other types of readily-available and reliable information." While there may be other more "readily available" identifying methods it is clear that most bus operators use the drivers' social security numbers for this purpose. Moreover, the proposal is silent as to why such a step is necessary to the goal of a useable and comprehensive Drug and Alcohol Clearinghouse. ABA therefore submits that the social security number should at least be an option to the employer in carrying out the mandates of the Clearinghouse.

*Section 382.705 (79 Fed. Reg. 9711)* requires an employer to report actual knowledge of traffic citations given to the driver for driving commercial motor vehicles (CMVs) while under the influence of alcohol or drugs (so called DUIs). However, the NPRM does not denote a clear path to the information that must be reported. The certainty here is that the law enforcement officer who wrote the citation has the information but there is no requirement for the officer to report the citation for entry into the Clearinghouse's database. Thus, there is the possibility of a significant gap in the information flow and thus in the goal to establish a workable, comprehensive Clearinghouse for this information. ABA suggests that there is a role here for law enforcement. Perhaps some law enforcement organization (perhaps the Commercial Vehicle Safety Alliance (CVSA)) would be a better vehicle for communicating this data to the Clearinghouse.

Another suggested change is for the FMCSA to allow third-party background screening firms who provide such services to the bus operator employers to be provided access to the Clearinghouse. In

many instances, bus operators, both small and large, contract out employee background checks to these third party firms. These firms are used to aid hiring by bus operators who are too small to undertake the process on their own. On the other hand these firms are used by bigger bus operators who have to make many driver hiring decisions with a relatively small human resources staff to aid the process.

Finally, ABA believes that one additional way to defray the costs of the Drug and Alcohol Clearinghouse is for the FMCSA to allow fees charged for access to the Clearinghouse records to be on a subscription basis rather than per transaction. In this case, an employer could subscribe to the Clearinghouse for a set fee and have access to the Clearinghouse as needed, presumably at less cost than access on a per transaction basis.

ABA believes in the need for a drug and alcohol testing Clearinghouse. We do however as noted above are seriously concerned that the costs to the industry will outweigh the benefits. We respectfully request that the FMCSA take these issues into account before issuing the rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Clyde J. Hart, J.", written in a cursive style.

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