



# Federal Register

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## **Part III**

# **Department of Transportation**

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**Federal Motor Carrier Safety  
Administration**

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**49 CFR Parts 380, 390, and 391  
Safety Performance History of New  
Drivers and Minimum Training  
Requirements for Longer Combination  
Vehicle (LCV) Operators and LCV Driver-  
Instructor Requirements; Final Rule**

**DEPARTMENT OF TRANSPORTATION****Federal Motor Carrier Safety Administration****49 CFR Parts 390 and 391**

[Docket No. FMCSA-97-2277]

RIN 2126-AA17

**Safety Performance History of New Drivers****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Final rule.

**SUMMARY:** The Federal Motor Carrier Safety Administration amends the Federal Motor Carrier Safety Regulations (FMCSRs) to specify: The minimum driver safety performance history data that new or prospective employers are required to seek for applicants under consideration for employment as a commercial motor vehicle (CMV) driver; where, and from whom, that information must be sought; and that previous employers must provide the minimum driver safety performance history information. This action will enable prospective motor carrier employers to make more sound hiring decisions of drivers to improve CMV safety on our nation's highways.

**EFFECTIVE DATE:** April 29, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Goettee, (202) 366-4097, Office of Policy, Plans and Regulation, FMCSA, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:****Outline**

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**Background**

Current § 391.23 of Title 49 of the Code of Federal Regulations (CFR), "Investigations and Inquiries," sets forth each motor carrier's responsibilities to inquire into the driving record and investigate the employment history of each prospective new driver. The investigations are to obtain the driver's

employment history from the driver's previous employers<sup>1</sup> during the preceding three years. The inquiries are to obtain the driver's driving records from each State in which the driver held a motor vehicle operator's license or permit during the preceding three years.

These investigations and inquiries must be completed within 30 days of hiring the new employee, or the employer must have documentation of a good faith effort to complete them. Currently, there is no specification in the FMCSRs for what minimum information must be investigated, nor is there a requirement for previous employers to provide that information to prospective motor carrier employers when requested. Consequently, many former employers decline to respond to employment investigations, while others—for fear of litigation—merely verify that the driver worked for the carrier and provide the driver's dates of employment.

The Hazardous Materials Transportation Authorization Act of 1994 was signed into law on August 26, 1994 (Pub. L. 103-311, 108 Stat. 1677) (HazMat Act), partly codified at 49 U.S.C. 5101 through 5127. Section 114 of the HazMat Act directed the Secretary of Transportation (Secretary) to amend § 391.23 to specify the minimum safety information to be investigated from previous employers as part of performing the required safety background investigations on driver applicants. Section 114 of the HazMat Act requires a motor carrier at minimum to investigate a driver's accident record and alcohol and controlled substances history from all employers the driver worked for within the previous three years. All previous employers are required to respond to the investigating employer within thirty days of receiving the investigation request.

The agency published a Notice of Proposed Rulemaking (NPRM) for implementing driver safety performance history regulations in the **Federal Register** on March 14, 1996 (61 FR 10548) and a Supplemental Notice of Proposed Rulemaking (SNPRM) on July 17, 2003 (68 FR 42339).

**Summary of the NPRM**

In response to the requirement at section 114 of the HazMat Act of 1994, the agency (then the Federal Highway Administration (FHWA), FMCSA's predecessor agency) issued an NPRM on March 14, 1996. It proposed changes to 49 CFR part 391 (Qualification of

Drivers), with proposed conforming amendments to parts 382 (Controlled Substances and Alcohol Use and Testing), 383 (Commercial Driver's License Standards; Requirements and Penalties), and 390 (Federal Motor Carrier Safety Regulations; General). The agency proposed under § 391.23 that motor carriers investigate the following minimum safety information for the previous 3-year period from all employers who employed the driver during that time: (1) Hours-of-service violations that resulted in an out-of-service order; (2) accidents as defined under § 390.5; (3) failure to undertake or complete a rehabilitation program recommended by a substances abuse professional (SAP) under § 382.605; and (4) any "misuse" of alcohol or use of a controlled substance by the driver after he/she had completed a § 382.605 SAP referral.

The existing § 391.23(b) requirement to make an inquiry for a driver's driving record(s) from the State(s) was retained. In addition, to harmonize the proposed § 391.23(e) with then current alcohol and controlled substances regulations under § 382.413, the agency proposed the conforming amendment that the motor carrier must obtain the driver's written authorization to investigate the required alcohol and controlled substances information. Current and former employers will be required to respond to an investigating employer within 30 days of receiving an investigation request. The investigating motor carrier would have to afford the driver a reasonable opportunity to review and comment on any information obtained during the employment investigation, and would have to inform the driver of his/her right to review the investigation information received at the time of application for employment. Conforming changes were also proposed to §§ 383.35(f) and 391.21(d) to reinforce the driver notification requirement.

Further, the agency proposed under § 390.15 to change the required retention period for the accident register maintained by motor carriers from one year to three years, and to begin requiring motor carriers to provide information from the accident register in response to all prospective employer investigations pursuant to § 391.23. These provisions would facilitate the required investigation of accident information by prospective employers by expanding a source of accident data that was already being collected and maintained by motor carriers for other purposes.

When the NPRM was published in 1996, FMCSA's alcohol and controlled

<sup>1</sup> As noted below, FMCSA's definition for the term "previous employer" includes a current employer of the driver applicant.

substances regulations (codified at 49 CFR part 382) required employers to investigate: (1) Alcohol tests with a result of 0.04 or greater alcohol concentration, (2) verified positive controlled substances test results, and (3) refusals to be tested. Section 382.413(a)(2) then allowed a previous employer to pass along alcohol and controlled substances test information received from other previous employers (as long as the information covered actions occurring within the previous two-year period). Under then § 382.413(b), if an employer found that it was not feasible to obtain the alcohol and controlled substances information prior to the first time a driver performed a safety-sensitive function for the employer, that employer could only continue to use the driver in a safety sensitive function for up to 14 calendar days. After that time period, the employer could not use the driver in a safety-sensitive function unless the requisite information was obtained, or the employer documented having made a good faith effort to obtain it.

In its 1996 NPRM, the agency also proposed numerous conforming amendments to expand the type of alcohol and controlled substances information that should be sought under § 382.413(a). Employers would be required to investigate whether, in the past 3 years, a driver had: (1) Violated the prohibitions in subpart B of part 382 or the alcohol or controlled substances rules of another DOT agency, and (2) failed to undertake or complete a SAP's rehabilitation referral pursuant to § 382.605 or pursuant to the alcohol or controlled substances regulations of another DOT agency.

Beyond incorporating the HazMat Act requirements into part 382, the violations enumerated in § 382.413 would also have been included in the alcohol and controlled substances regulations of "all DOT agencies." The FHWA believed that some drivers might apply for positions that require driving a CMV after having violated the alcohol or drug use prohibitions of another DOT agency. Therefore, the agency included a requirement for an employer to investigate information from all past employers for which a driver had worked in a position covered by the alcohol and/or drug prohibitions and testing requirements of another DOT agency. That could ensure that persons applying for positions that involved operating a CMV would have all of their relevant records of violations investigated. It would also have ensured that a SAP evaluated persons who test positive, and that violators completed a recommended rehabilitation program

before returning to perform safety-sensitive functions.

The proposed revision to § 382.413(a)(2) making it a requirement to pass along alcohol and controlled substances information received from other previous employers, when responding to a prospective employer's investigation required by then § 382.413(a)(1), was previously incorporated into the FMCSRs by a technical amendment published in the **Federal Register** on March 8, 1996 (61 FR 9546). However, because it was later determined that change to § 382.413(a)(2) constituted a substantive change, which should have been subject to public notice and comment before becoming a final rule, the agency included it in the March 14, 1996 NPRM. It was also subsequently included in the notice and comment that led to revision of part 40 in 2000.

In a related conforming amendment proposed to then § 382.405, disclosure of the information pursuant to then § 382.413(a) would have required the driver's written authorization, and responding employers would have been required to reply within 30 days of receiving the investigation request. Under § 382.413(b), the agency proposed extending the time period a new employer would be allowed to use a driver in a safety-sensitive function without having received the requisite alcohol and controlled substances information from 14 days to 30 days. After 30 days, the employer would have been prohibited from continuing to use the driver to perform safety sensitive functions without having received, or documented a good faith effort to obtain, the driver's alcohol and controlled substances history.

#### Summary of the SNPRM

Comments received on the NPRM were summarized in the SNPRM. One significant issue was concern on the part of motor carriers that they would be subjected to considerable costs through litigation if they furnished background information and it was used to deny employment to drivers. In section 4014 of the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178, 112 Stat. 107, 409, (June 9, 1998)), Congress created a limitation on liability to protect motor carriers, their agents and insurers from being found liable because they supplied and used driver safety performance history records in the hiring decision process, but also established restrictions intended to protect the rights of drivers and their privacy from misuse of such investigative information.

Another significant concern was that the proposal would impose significant new recordkeeping and reporting burdens on previous motor carriers, especially small entities. Commenters, including the Small Business Administration (SBA), requested that the agency include considerably more discussion of possible burdens to foster more informed comments from the public.

FMCSA responded to the requirements of section 4014 of TEA-21, now codified at 49 U.S.C. 508, and the requests to provide more discussion of the possible burdens on previous employers. The agency published an SNPRM on July 17, 2003 (68 FR 42339). The FMCSA revised the proposals through the SNPRM to include the new employer liability limitation and driver protections mandated by section 4014 of TEA-21. It also refined the safety performance history data list of items prospective employers must request for new applicants in response to comments to the NPRM, and related changes to agency alcohol and controlled substances regulations made by rulemakings since the 1996 NPRM. In addition, an enhanced regulatory flexibility analysis, Paperwork Reduction Act analysis, and a detailed regulatory evaluation required by the new designation as a significant rulemaking, were added addressing comments to the docket from the SBA and others.

The SNPRM specified minimum safety performance history data that a motor carrier must investigate from previous employers under the proposed § 391.23(d) and (e). It differed from the NPRM by: (1) Refining the list of what information is to be investigated from previous employers, (2) establishing employer liability limitation for providing and using the driver safety performance history information, (3) clarifying drivers' rights to review, correct, or rebut information provided, (4) providing enhanced Regulatory Flexibility Act and Paperwork Reduction Act analyses, (5) providing a detailed Regulatory Evaluation, and (6) dropping conforming amendments to part 382 because they were previously addressed under separate rulemakings. The SNPRM provided 45 days for public comment, which closed on September 2, 2003.

#### Discussion of Comments to the SNPRM

As of October 1, 2003, the FMCSA had received 38 written comments on the SNPRM. Commenters include motor carriers, corporations, associations, individuals, an insurance company, a

union, and a public interest organization.

### *General Support and Opposition*

Fifteen commenters including motor carriers, associations, public interest groups, and a union generally support the SNPRM and state that the proposed rule is a long overdue step in the right direction.

Many of those same commenters, and others, criticize various proposals in the SNPRM. For example, American Trucking Associations, Inc. (ATA) writes—

Generally, there is consensus [among their membership] that the proposal to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to require previous employers to respond to employment and safety history inquiries will be beneficial and will enhance the ability of motor carriers to obtain specific, objective information on important aspects of prior safety performance of driver applicants beyond what is now generally furnished. \* \* \* Despite our general support, the intended safety gains will not be realized unless several fundamental changes are made in the proposed rule.

The opposition to the proposals set forth in the SNPRM generally center around the process for obtaining driver safety performance history information, the limited liability of employers, the burden placed on motor carriers to provide and obtain the employee information, and FMCSA's cost/benefit analysis. For example, Con-Way Transportation Services (Con-Way) comments that the rule would "delay the hiring of drivers, increase paperwork and [administrative burdens] with little or no benefit" and "[t]he cost assumptions made by the FMCSA are insufficient." In addition, one individual writes that the burden should not be on the motor carriers to enforce alcohol and controlled substances rules, but rather on the State to suspend a driver's license.

Owner Operator Independent Drivers Association, Inc. (OOIDA) also states that "The requirements for motor carriers to investigate the safety background of truck drivers as part of the hiring process has always been a good idea in theory but a dubious practice under the FMCSA rules." OOIDA continues, "Beyond a carrier's duty to determine whether a driver is qualified under the rules to drive a truck, the existing rule does not require a carrier to take any particular action or make any particular decisions based on the driver information it receives."

OOIDA also expresses a unique concern to this proposed rule. OOIDA comments that—

It is important for the FMCSA to create rules that are fair on their face and comport with the legal rights and responsibilities of the parties under the law. But FMCSA should also keep in mind that professional drivers have little or no bargaining power with motor carriers. Carriers set the driver's agenda through every step of the hiring process and during the length of their relationship. Drivers who do not accede to a carrier's demands, no matter what they are, usually face one result, termination. Drivers who try to assert their rights, including the kind of rights proposed in this rule, are told to be quiet if they want to keep their job.

*FMCSA Response:* The FMCSA appreciates the thoughtful comments and many specific suggestions received from commenters on both the NPRM and SNPRM. As discussed under the following topics, the FMCSA has carefully considered these comments and has incorporated many of the suggestions into the final rule.

### *Timetable To Obtain Safety Performance History for New Drivers*

Several commenters discuss the timetable for prospective employers to obtain safety performance histories for driver applicants outlined in the proposed rule. Those commenting from the perspective of being a prospective hiring motor carrier commonly suggested reducing the allotted time. Those commenting from the perspective of being a previous employer providing driver safety performance history information, commonly suggested increasing the allotted time.

Several commenters are opposed to the overall length of time the proposed rule, in their view, would permit for obtaining, providing, and refuting employee history information. Under the proposed rule, past employers would have 30 days to respond to prospective employers' investigation requests. There are up to two additional days for providing copies of the investigations to a driver wanting to review his or her record, and possibly another 30 days for the rebuttal process. Truckload Carriers Association (TCA) states that "assuming that FMCSA intends for the prospective employer to delay its hiring decision pending the running of the appeal time, it would be possible under the proposed rule for carrier hiring decisions to be forced to be delayed for as long as sixty (60) days."

The length of time, write other commenters, forces motor carriers to hire drivers conditionally. As Con-way writes, "most carriers, would not want to hire someone until the investigation is complete. Hiring a driver and then terminating his employment after receiving information from previous

employers is not an acceptable practice." Another general concern with the time allowed to obtain a driver's safety performance history is that such a delay in the hiring decision process will compel drivers to look for jobs outside the industry.

Con-Way recommends an alternative timetable. Con-Way suggests a 5/5/2/5 business day structure where: (1) The prospective employer has five business days to request the driver safety performance history investigation data, (2) the previous employer has five business days to respond to the request for information, (3) the applicant must send corrections to the previous employer within two business days, and (4) the previous employer must respond to the request for corrections within five business days.

*FMCSA Response:* Because this is a rather complex process with numerous possibilities, each component of the time line is discussed below in detail as a separate topic. FMCSA has carefully considered these comments and has incorporated many of the suggestions into the final rule, while balancing the need for large truck and bus safety on our nation's highways.

### *30-Day Investigation Period (§ 390.15 and § 391.23 (g))*

Seven commenters answered from the perspective of a hiring motor carrier and recommend reducing the time period allowed for previous employers to respond to requests for new driver safety performance history information. One of those commenters proposes that the response time period be ten days. Most of those seven commenters suggest reducing the time period allowed for the investigation from 30 days to five days.

Commenters cite various reasons for recommending the reduction in response time. For example, the TCA explains from the perspective of the truckload sector, "the trucking industry has been experiencing a driver shortage for years and this shortage is not expected to end any time soon. Because of the shortage, carriers have a critical need to be able to screen prospective drivers in the shortest time possible." Commenters express concern that the length of time would force some drivers to look for employment outside the motor carrier industry. In addition, Consumer Energy remarks, a lesser amount of time "should be ample time to gather information that would already be assembled in order to not delay a potential employer's hiring decision." Finally, commenters express concern that the length of time will force conditional hiring of drivers while the process is completed. As TCA explains,

A major safety drawback of the 30-day time frame proposed is that many carriers will find themselves being forced to hire drivers on a conditional basis instead of waiting as long as thirty days to receive and review the required information beforehand, only to later find out that one or more of the drivers they hired should not have been hired because of the safety risk they pose. Clearly, such an outcome unnecessarily puts the public at risk and could easily be prevented if the 30-days were reduced to five.

The International Brotherhood of Teamsters (IBT) offers no objection to reducing the time period as long as employers can provide accurate information in compliance with the regulations in that time frame.

Two commenters answered from the perspective of a previous employer providing information. One recommends increasing the time period for a previous employer to respond. This commenter suggests increasing the time period to 60 days in order to reduce the burden on small businesses. Another commenter proposes a 15-day hardship extension if the prospective employer agrees.

*FMCSA Response:* The length of time allowed for previous employers to respond to an investigation is specified in the HazMat Act as within 30 days. Although FMCSA could specify a shorter response time, the agency is cognizant that the majority of motor carriers that will now be required to provide this information for the first time are small businesses. FMCSA believes that the implied 30 days in the existing regulation for provision of this data continues to be the most considerate for the majority of impacted entities. The regulation at § 391.23 (b) and (c) has for many years said “\* \* \* must be made within 30 days of the date the driver’s employment begins.” The text proposed in the SNPRM for § 391.23(c) was slightly revised to conform to the language set forth in 49 CFR 40.25(d) as “\* \* \* must be completed within 30 days of the date the driver’s employment begins.”

FMCSA notes that it has always been up to the motor carrier whether to immediately employ an applicant and have that person operate a commercial motor vehicle for that motor carrier during the 30-days allowed for the motor carrier to obtain the required inquiry and investigation information. This final rule still leaves that decision to the motor carrier and its insurer.

#### Two-Day Response to Driver (§ 391.23(i)(2))

The SNPRM proposed that the prospective employer be required to provide the driver with his or her previous employer-provided records

within two days of the driver’s written request, or within two days of having received the information if the driver request is presented before the investigation information arrives. Five commenters recommend increasing the time that a prospective employer has to respond to a driver’s request for copies of the information received from previous employers. Recommendations were for five, seven, or ten days. Commenters cite the proposed 2-day requirement as an unreasonable burden especially during concentrated hiring periods, stating that the time to retrieve records, especially if records are kept off site, and limited staff resources are reasons to increase the time period. Most commenters mention that an increase in this time period should not unduly disrupt prospective employer hiring operations.

One commenter agrees with FMCSA’s proposal of two business days for the prospective employer to provide a copy of the investigative data to the driver.

*FMCSA Response:* FMCSA asked whether a longer time period should be allowed, and suggested 5, 7 and 10 days. Comments to the docket, especially in regard to small business concerns, appear to generally favor lengthening the time allowed for a prospective motor carrier to provide previous employer information to a driver who requests a copy of that investigation information. Therefore in the final rule FMCSA has increased the proposed 2 days for that function to 5 days. The agency believes this will provide carriers a greater degree of flexibility without detrimentally impacting driver rights.

#### 30-Day Driver Correction and Rebuttal Period (§ 391.23(j)(3))

Almost no commenters directly addressed this issue. Two commenters recommend reducing the time the previous employer has to send the corrected or rebutted information to the prospective employer from 30 days to 20 days. Another recommends 5 days. The commenters suggest this change in order to significantly reduce the time both the applicant and the prospective employer are awaiting a decision on the applicant’s employment.

OIDA is concerned that drivers have no leverage to get previous employers to correct driver safety performance history, and a disgruntled previous employer might deliberately delay responding as long as allowed, thus leaving the driver unemployed for that period of time. Both TCA and National School Transportation Association (NSTA) are concerned about the total time that could elapse before a hiring decision could be made.

*FMCSA Response:* The few commenters who addressed this question are in favor of shortening the time period allowed for the driver and a previous employer to resolve differences, or include a rebuttal from the driver in the previous employer’s information. There was no opposition to shortening the time allowed from any of the commenters to the docket in response to this question in the SNPRM. After reviewing these comments, FMCSA believes a shorter response period is warranted.

Therefore, the final rule is revised to reduce the proposed 30 days for a previous employer to respond to a request for correction to 15 days. This still allows the previous employer the time and opportunity to review the driver’s record to determine if the previous employer agrees the correction is warranted.

The final rule further clarifies that if the driver chooses to submit a rebuttal, the previous employer has 5 days to forward the rebuttal to the prospective motor carrier employer and to append a copy of the rebuttal to any other information in the driver’s safety performance history record. The agency believes that drivers will have somewhat of a disincentive to submit a rebuttal first, if a correction is possible. This is because a rebuttal presents a conflicting story to a prospective motor carrier employer, whereas a correction represents agreement between the parties involved. Upon receiving a rebuttal, the previous employer must forward a copy of it to the prospective motor carrier employer and append it to the driver’s safety performance history record.

There are two scenarios that could occur when the driver applicant receives a copy of the previous employers’ safety performance history information. Under the first scenario, the driver could first request a correction. The previous employer could agree to the correction and forward the corrected information to the prospective motor carrier employer within 15 days. However, if the previous employer disagrees with the driver that a correction is warranted, the previous employer could decline to correct and notify the driver within 15 days of its decision not to do so. The driver could then submit a rebuttal, and the previous employer would have five (5) days to forward the rebuttal to the prospective motor carrier employer, and include the rebuttal in the driver’s safety performance history record.

Under the second scenario, the driver could simply submit a rebuttal as a first step, with no request for correction of

the data. The previous employer would then have five days to forward a copy of the rebuttal to the prospective motor carrier employer.

Thus, the 30 day time period is reduced to a minimum of 5 days and a maximum of 20 days. FMCSA believes this responds to commenters concerns, while not detrimentally impacting the drivers or employers involved.

#### Review Time

Under the proposed rule at § 391.23(i)(2), a driver may submit a written request to the prospective employer to review his or her safety performance histories received by that motor carrier. OOIDA suggests that, rather than the driver needing to request his or her previous employer information to review, the prospective employer should automatically give the driver a copy of any background information it receives. OOIDA supports the driver's right to access his or her record, and believes this recommendation will lead to quicker corrections, streamline the investigation process, and eliminate unnecessary burden on the driver to submit a request.

American Truck Dealers Division of the National Automobile Dealers Association (ATD) states that as proposed, employers would have two days to provide an employee access to information upon request, and prior employers would have 30 days to respond to a driver's concerns. They point out that the rule does not appear to set a time limit for the driver's review itself. ATD recommends that we allow drivers 3 days after receipt of requested information to request corrections.

*FMCSA Response:* In response to OOIDA's point, FMCSA believes it is important to minimize the cost of regulations. However, it is also necessary that a reasonable opportunity be provided drivers to review, correct and rebut previous employer safety performance history information. Thus, any driver must be able to request that prospective motor carrier employers provide information received from previous employers. To minimize the potential for such requests to be frivolous actions taken by some drivers, FMCSA requires this request to be in writing. FMCSA believes that it would be overly burdensome for prospective employers to provide information not requested or frivolously requested by the driver.

FMCSA can not address ATD's recommendation in this final rule on setting a limit on how long a driver has to respond to a previous employer seeking correction or rebuttal, since this

is not addressed in the SNPRM. Moreover, the agency believes this is likely to be self-regulating, since it is in the driver's interest to request correction or rebuttal as quickly as possible.

#### *Prospective Employer Responsibilities*

3-Year Requirement (§ 390.15(a); § 391.23(d))

Under the proposed rule, motor carriers must contact all the previous DOT regulated employers of the applicant driver from the last three years. Seven commenters address this requirement. Several commenters mention the ineffectiveness and paperwork burden of this requirement. Two commenters state that with the high level of driver turnover involved in their sector of the industry [truckload], requesting information from prior employers in the last three years could involve numerous inquiries. Also, the potential for gaps in employment history poses problems in complying with this requirement. Another commenter mentions the paperwork burden on small businesses and that this requirement forces motor carriers to keep employment records longer than the six months now required for hours-of-service record of duty status logs.

A few commenters discuss more specifically the requirement that three years of employment history must be investigated. One commenter recommends that all DOT modes be consistent in the time period required for the background investigations. For example, the length of background investigations is specified as 2-years in part 40, and 3-years in part 391. Another commenter submits that no requirement in the rules should create longer retention periods than those currently applicable. For example, records relating to the collection process for alcohol and controlled substances testing programs must be retained for two years (§ 382.401(b)(2)), whereas records of negative and cancelled controlled substances test results must be maintained for a minimum of one year (§ 382.401(b)(3)). Finally, commenters suggest that only the immediate former employer needs to be contacted or that a valid commercial driver's license should be sufficient evidence of a prospective employee's driving record.

OOIDA expresses concern that if "FMCSA requires former carriers to turn over all safety employment history in the carrier's possession, then in many instances it will be requiring more than three years of records to be transmitted." OOIDA continues by saying that "FMCSA does not give

guidance in the SNPRM as to whether the previous carrier should be required to delete any information older than three years from its own records or from the records it received from other carriers." OOIDA is concerned that older information would be less reliable and less accurate.

AT&T observed that driving is a minor part of at least some of their jobs. They asked whether the inquiries and investigations must be made for every job applicant or only for candidates who are actually being extended a job offer, and when must they be made?

*FMCSA Response:* The requirement to investigate all former employers of the past 3 years is specified in the HazMat Act. FMCSA therefore has no latitude, and must specify in the final rule that the background investigation cover the prior three years. The problem with possible gaps in employment history based on this process is well known. It includes former employers that have gone out of business, as well as those not listed by the driver applicant when applying for a job. The alcohol and controlled substances regulations at 49 CFR 40.25(c) and 40.333(a)(2) attempt to mitigate such possible gaps in previous employer information by requiring an employer to retain for 3 years any § 40.25(b) specified information that any previous employer furnished and to pass the most recent 2-years of it along to prospective employers performing an investigation of the driver applicant.

The retention period specified for data in the driver qualification file in § 391.51(d) has been 3-years since at least 1971. The data retention period specified for hours-of-service records of duty status logs in § 395.8(k) has been 6-months since 1982. No changes to these retention periods were proposed in the SNPRM, and therefore none are being made in this final rule.

Parts 40 and 382 currently specify making investigations to previous employers for a minimum of 2-years regarding alcohol and controlled substances data. However, the HazMat Act requires all safety performance history investigations, including those for alcohol and controlled substances information, to be made to all employers of the driver for the previous three years, which is what was proposed in the SNPRM. A motor carrier that is in compliance with the new 3-year investigation requirement in § 391.23 will automatically be in compliance with the 2-year background investigation requirements of parts 40 and 382.

The 2-year requirement for data retention found at § 382.401(b)(2) refers to information about the processes used

by the employer to collect the alcohol and controlled substances information, not the actual results that are considered driver safety performance history information. The correct reference for data retention about positive driver test results would be § 382.401(b)(1), and it specifies 5 years as the minimum retention time. The one year requirement for data retention found at § 382.401(b)(3) refers to negative test results and canceled tests.

However, FMCSA believes the thrust of the comments is focused on the background time period that must be investigated. They are correct that § 40.25(b) specifies investigating employers from the previous 2-years. Since the HazMat Act specifies this investigation must be for 3-years, motor carriers will now be required to investigate one additional year of alcohol and controlled substances background driver safety performance history information than entities regulated by other DOT modes.

In order to clarify when the 3-year time period begins, text for the final rule is modified for § 391.23(e) to define that the three years to be investigated and reported on begins from the date of the employment application. This is the point of reference used in parts 40 and 382, and such text already exists in the proposed text at § 391.23(d) for accident data. In regard to OOIDA's concern about more than 3-years of background data being provided by previous employers, FMCSA believes most employers where allowed will choose not to retain or provide data older than the 3-year minimum requirement as a means of reducing their costs.

The requirements in parts 40 and 382 encourage the prospective employer to complete the investigations before allowing the driver to perform safety sensitive functions for that employer. However, just as in part 391, they do not require the employer to complete the investigations until 30 days from the date the driver's employment begins. Thus, an employer would be free to screen and test the driver in any way the employer chooses prior to performing the investigations required by this rulemaking, including hiring the driver. However, after 30 days from beginning employment, the employee may not be used to operate a CMV unless the responses to the investigation requests are received and placed in the appropriate file, or documentation of a good faith effort to obtain such data is placed in that file.

In regard to the question by AT&T, FMCSA is aware there are different screening processes used by different employers covered by the FMCSRs. As

pointed out by AT&T, some employers physically see and screen the driver before deciding to perform the background inquiries and investigations required by § 391.23 under this final rulemaking. Some begin the § 391.23 inquiry and investigation process immediately for all records available based on phone applications for each applicant before seeing them.

Companies absolutely may perform substantial screening of potential employees on their own company job criteria that forms the major portion of the job responsibilities. The requirement contained in this final rule merely requires the company to complete the inquiries and investigations required by § 391.23 on all drivers that will operate a CMV within 30 days of that employee being hired. Such drivers have invested considerably in acquiring skills sufficient to qualify to work for companies. A similar pattern applies to a number of employers covered by the FMCSRs, but whose primary business requires the employee to have skills in addition to being a driver, plumber, electrician, etc. All such employees have much more at stake to preserve their professions, and may be less likely to have used alcohol or controlled substances or been involved in numerous accidents. It would be good business sense for such companies to only perform inquiries and investigations required by § 391.23 after they have determined the applicant passes all their other company screening requirements.

#### *Accident Information (§ 391.23(d)(2))*

The HazMat Act requires prospective motor carrier employers to investigate accident data for the prior three years, and for previous motor carrier employers to provide all accident data for that driver for the previous three years from the date of the application. As pointed out in the SNPRM, some process is needed to enable a smooth transition from the current regulation's one year retention requirement to the three year retention period required by the HazMat Act.

The SNPRM proposed a phased process whereby beginning on the effective date of the final rule, motor carriers would be required to retain all accident information then retained in their accident registers, plus all new accident information, for three years. This adds a requirement of two additional years of retention to the current one year retention requirement. Thus, the retained accident data will grow from the current one year of retained data to three years over time.

No comments were received on that phased approach to data retention. Therefore, the proposal as presented in the SNPRM is included in the final rule.

TCA states that the proposed § 391.23(d)(2) would require past employers to report and prospective employers to review the specific data related to a driver's accident record, as specified at § 390.15, for the preceding three years, and include it in the driver's investigation history file. TCA believes that, while such accident information may be relevant to FMCSA and clearly should be maintained by carriers, such information is not at all relevant to a hiring decision and should therefore not be required.

OOIDA is concerned about the definition of "accidents." OOIDA states, "It is the experience of OOIDA members that the term "accident" is sometimes used loosely in the trucking industry. \* \* \* This casual use of the word 'accident' leaves drivers' safety histories vulnerable to interpretations that are inaccurate and could unreasonably damage their job prospects." OOIDA suggests referring to the definition of "accident" as defined in § 390.5 to help avoid this problem.

Other commenters express concern about the accident data itself. Current § 390.15(b)(1) lists six items that must appear on the accident register. ATA believes that two items from the accident register, driver's name and date of accident, along with two data elements that are not in the accident register, (1) any traffic citation(s) related to each accident and (2), if available, whether each accident was determined to be "preventable" or "non-preventable.", are necessary to make an informed hiring decision.

In contrast, J.B. Hunt expresses considerable concern about the amount of effort that would be required to deal with driver protests about carrier attribution of "preventability." It says "We deal with requests daily to change our attribution of preventability of accidents on driver's records. The burden to maintain all of the rebuttals and explanations on why every accident should be non-preventable would, in and of itself, be extremely burdensome."

*FMCSA Response:* The HazMat Act requires previous employers to report 3-years of accident information to prospective employers. The NPRM, SNPRM and this final rule all use the existing definition of accident as contained at 49 CFR 390.5. The only changes proposed in the SNPRM and finalized in this rule to § 390.15 are for accident data retention to allow a phase-in period from the current one year to the required three years of accident data

retention and provision. If employers choose to share information about minor accidents not included in the definition at § 390.5, there is no prohibition on them doing so. However, for purposes of making the minimum requirement clear, the phrase “as defined by § 390.5 of this chapter” is added to § 391.23(d)(2) in the final rule.

Regarding ATA’s comments to change the data items/elements recorded in the existing accident register and reported in response to requests for information, FMCSA believes this would represent a substantial change in the existing definition of accident data, and is outside the scope of this rulemaking. Comments to the docket, very explicitly by J.B.Hunt, point out that attribution of “preventable” and “non-preventable” contributes to drivers contesting the carrier’s accident information. Thus, FMCSA has decided not to make revision to the definition of accident as part of this final rule.

#### Standardized Forms and Instructions (§ 391.23(f))

The SNPRM proposed a conforming amendment in § 391.23(f) that the prospective employer provide the previous employer with the driver’s written authorization to obtain his or her safety performance history information, often via a release form. Online Employment Verification Services (OEVS) states that the problem of releasing alcohol and controlled substances information is magnified because prospective employers do not know the proper verbiage to include on the driver authorization release. According to OEVS, at least 10% of the requests do not meet the requirements of DOT for driver authorization. In addition, up to 75% are vague or difficult to interpret as to whether they comply, resulting in slower turn around time for the prospective employer to receive the requested information. OEVS suggests that DOT provide standard verbiage for requestors to include in the driver authorization form they use. This would allow 3rd party providers, such as OEVS and previous employers, to process such requests without hesitation, eliminating the time and cost required to scrutinize and analyze whether the correct details are contained within the document, thus increasing the percentage of successful requests and shortening the response times.

Also, commenters suggest that the FMCSA provide outreach and standard instructions along with standardized forms. For example, Petroleum Marketers Association of America (PMAA) “believes that the way FMCSA

issued its new hours-of-service regulation is an appropriate model of how to publicize any new regulations on conducting safety background checks. The brochures, pocket cards, etc., explaining the hours-of-service rule were very beneficial to PMAA members.”

*FMCSA Response:* The defining procedures for what must be investigated and what must be reported for alcohol and controlled substances are spelled out in parts 40 and 382. This rule merely adds conforming amendments for that requirement to part 391. The specification of what must be included in the driver’s authorization for the previous employer to release the alcohol and controlled substances data is found at § 40.321(b). In order to clarify what authorization information must be provided, a reference to § 40.321(b) is added in this final rule at § 391.23(f). FMCSA notes that entities like OEVS are free to provide their clients with a form meeting the requirements of § 40.321(b).

#### *Record of Compliance*

The proposed rule would require employers, both prospective and previous, to maintain certain employee records. Petroleum Transportation & Storage Association (PTSA) urges the FMCSA to drop the 1-year record retention requirement for non-hired drivers. PTSA believes that this provision would make prospective employers a depository of information that is completely unrelated to their responsibility for maintaining and providing employee records under the FMCSRs. In addition, PTSA argues that there is no need for a prospective employer to keep such records, since the very same information is already on file with the driver’s previous employer, and that the potential liability involved with the management of non-hire driver information is far too great when weighed against any discernable regulatory benefit that may result. Finally, PTSA stresses the burden for small businesses of maintaining records. Reusable Industrial Packaging Association (RIPA) agrees with PTSA’s arguments and also does not believe it serves any purpose to require employers, who decide against hiring a driver applicant, to maintain for a year any information received from previous employers.

Two commenters specifically discuss the documentation requirement at § 391.53(b)(2) for the prospective employer to show that a “good faith” effort was made to contact previous employers. National Ready Mixed Concrete Association (NRMCA) explains

that good faith “is a vague term, open to many interpretations.” It asks for specific examples of “good faith” efforts to help eliminate any question about being in compliance. The other commenter states that the “current system of “good faith” checks is absolutely abysmal” and that any system of contacting former employers should be administered by a pseudo-governmental agency or contractor.

*FMCSA Response:* FMCSA proposed the one year retention of background investigation information for all drivers as part of its desire to establish an enhanced capability for enforcement of these requirements. However, we are persuaded that eliminating this requirement would do no harm. If the driver is not hired, it is not relevant to safety concerns whether the prospective employer performed the investigations and inquiries required by § 391.23. Further, if the driver applies and is hired by another motor carrier, that employer is required to have performed the required investigations and inquiries and to have placed the information received in the appropriate file, or documented a good faith effort to have done so. Any additional data that may have been gained regarding previous employers who are failing to provide the required information can be gained via the complaint process, as recommended in §§ 391.23(g)(3) and 391.23(j)(4).

With regard to NRMCA’s request for examples of good faith efforts, FMCSA notes that this term has been used in the FMCSRs for a number of years. The agency believes that the most appropriate guidance it can give in the context of this rule is that employers document in the driver investigation history file their efforts to comply with the requirements to obtain the background investigation information. This could also include documentation of having reported previous employers to FMCSA using the procedures at § 386.12 that failed to provide the required safety performance history information.

Further, FMCSA believes the environment for verifying the “good faith” requirement will be substantially changed by this rule. There is no current requirement for previous employers to respond to investigations. Establishment of this requirement by this final rule requires previous employers to furnish the information and keep records of having done so. This will make it possible to corroborate whether a motor carrier has contacted a previous employer. Thus, the substantial change in the reporting and recordkeeping requirements of previous employers will in turn create the ability to verify



whether there was a good faith effort made by prospective motor carriers to obtain this data.

In regard to assigning the responsibility for administering driver safety background checks to a separate entity, the HazMat Act specifically requires the prospective employer, or perhaps their agent, to make the investigations to the previous employers, or their agent.

#### *Previous Employer Responsibilities*

##### Requirement To Respond

Several commenters express concern that the proposed rule does not impose a requirement on the previous employer to respond to the prospective employer's request. Most commenters on this issue state that there is no burden of compliance placed on the previous employer. Coach USA explains that in their experience, "many previous employers fail to respond because they are not required to keep a record as such and do not fear enforcement." In contrast, DAC Services recommends that—

The record keeping requirements should be consistent between Parts 40.25 and 391.23. If the FMCSA has found part 40.25(g) useful, it might prove useful under the requirements of 391.23. On the other hand, if 40.25(g) has not been beneficial, it should not be required under 391.23 and the 40.25(g) requirement should be revisited, as it requires considerable record keeping efforts on the part of motor carriers.

Although the proposed rule provides previous employers with liability "limitation" regarding their response to investigations, Coach USA points out that it does not allow for any means to enforce non-compliance by previous employers that choose to ignore such requests. Coach USA believes that this rule will be ineffective unless it includes an unequivocal requirement to respond for previous employers and to maintain corresponding records.

Two commenters are specifically concerned that the rule does not place liability with former employers that do not respond to a prospective employer's request for information within 30 days. In addition to issuing the rule, one commenter suggests that FMCSA educate employers, provide standard forms (possibly via the internet), and otherwise eliminate every possible reason for not supplying a valid response.

Five commenters sought clarification of the rule's enforcement mechanism. For example, Consumer Energy states, "The SNPRM suggests taking enforcement action, but does not provide details of the action, when an

employer does not provide the required information in the allotted time." Advocates for Highway and Auto Safety (AHAS)

\* \* \* strongly supports this rulemaking action, but we are concerned that the agency does not plan any targeted oversight actions to ensure that prospective employers are requesting safety performance information on applicant drivers or that current or previous employers are complying with requests for the appropriate information.

AHAS states that the agency needs to emphasize, with specific action items, how it intends to publicize and educate the motor carrier community about its new responsibilities under this proposed regulation, exactly what oversight actions it will carry out to ensure very high rates of compliance, and specifically what enforcement actions will be brought against non-complying motor carriers.

Dart Transit Company (Dart) comments that the enforcement procedures, if a carrier does not respond, are unclear. Dart asks, "What penalty or penalties will be imposed and how will enforcement be achieved and by whom?" OOIDA agrees that "if FMCSA expects carriers to comply with these rules, it needs to consider adopting some kind of enforcement mechanism, including monetary penalties." In addition, Dart believes some direction should be adopted in terms of the inquiring carrier. For example, Dart asks, "What is an inquiring carrier obligated to do if a response is not received?" OOIDA also remarks that whereas a driver who does not authorize release of his or her alcohol and controlled substances data cannot be hired, there are no penalties or consequences for carriers that fail to abide by this proposed rule. Finally, these commenters identify enforcement as an important issue and obstacle to the success of this rule.

Also, two commenters state that there is no requirement for previous employers to document or even maintain a log of to whom information about a previous employee was furnished. The commenters believe that, without this requirement, many previous employers may fail to respond because they are not required to keep a record as such and do not fear enforcement.

However, one commenter, concerned with the additional administrative burden, disagrees with the other commenters. It prefers that the FMCSA allow the industry some flexibility in responding to inquiries about the performance of past employees without mandating completion and retention of additional forms, especially if the driver

retires, leaves the industry, or otherwise does not seek further employment.

*FMCSA Response:* The conforming requirement in this rule for providing the required information to the prospective motor carrier employer and keeping a record of having done so, especially for alcohol and controlled substances, is based on the provisions found at § 40.25(g). That provision states that a previous employer must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided. Thus, this previous employer recordkeeping provision is already contained in the proposed driver safety performance history requirements. Nonetheless, as clarification to avoid any possible confusion in the future, the language contained at § 40.25(g) is also added to the conforming language in the final rule at § 391.23(g)(1).

As with all violations of our regulations, FMCSA may cite and take enforcement action against carriers that do not comply with our regulatory requirements. Carriers who fail to maintain the records required by this rule may be cited and are subject to the fines and penalties prescribed in Appendix B paragraph (a)(1) to Part 386, Penalty Schedule; Violations and Maximum Monetary Penalties; Recordkeeping, which says "a person or entity that fails to prepare or maintain a record required by parts 385 and 390–399 of this subchapter, or prepares or maintains a required record that is incomplete, inaccurate, or false, is subject to a maximum civil penalty of \$550 for each day the violation continues, up to \$5,500."

FMCSA is aware a number of previous employers covered by requirements in parts 40 and 382 are currently failing to provide the information specified at § 40.25(b) and required by § 40.25(h). Carriers that fail to provide the information required by §§ 391.23(g)(1) and 391.23(j) are subject to the fines and penalties prescribed in Appendix B paragraph (a)(3) to Part 386, Penalty Schedule; Violations and Maximum Monetary Penalties; Non-recordkeeping violations, which says "a person or entity who violates parts 385 or 390–399 \* \* \* is subject to a civil penalty not to exceed \$11,000 for each violation."

FMCSA has a formal process in place for drivers and carriers that wish to file a complaint against a person or entity that fails to comply with the FMCSRs. FMCSA intends for drivers and prospective motor carriers to inform the agency using the existing complaint process specified at § 386.12, entitled

"Complaint." This includes previous motor carriers that either fail to correct their records or include the driver's rebuttal, or who fail to provide the required information to prospective motor carriers. To make this clear, the FMCSA has added language to the final rule in §§ 391.23(g) and 391.23(j) pointing out that drivers and prospective employers should report information about such failures to comply with these requirements. Complaints about failures to comply will be investigated and carriers failing to comply will be cited, and in addition may be subject to civil penalties for other violations found during a carrier compliance review.

The agency believes inclusion in this rule of the requirement to record and provide the alcohol and controlled substances data, as well as accident data, may additionally create a legal liability for previous employers who fail to provide this data. Previous employers who fail to provide the required driver safety performance history information may ultimately be found liable if the requesting motor carrier hires an unsafe driver without receiving the requested history and the driver is involved in an accident.

Additionally, FMCSA believes the motor carriers who will choose to pay little attention to safety performance history information received and hire drivers with substantial adverse safety performance histories, likely are the same ones already doing this with driving behavior traffic conviction information received on the MVR from the licensing State or such predecessor States. FMCSA is in the process of analyzing a capability to enable SafeStat to better identify motor carriers who are systematically hiring drivers with poor driving records, and target them for a carrier compliance review. This is expected to also help with identifying motor carriers who continue to hire drivers with poor safety performance history. A copy of a current updated report on that analysis is included in the docket as document 85.

To ensure the effectiveness of this rule, FMCSA will undertake a number of activities, including: (1) Preparing guidance materials for enforcement of these new requirements; (2) monitoring the level of complaints received for non-compliance; (3) removing the previously issued interpretation Question and Answer 1 under § 391.23; (4) encouraging use of the FMCSA safety violation and commercial complaint hotline (1-800-DOT-SAFT) and Web site ([www.1-888-dot-saft.com](http://www.1-888-dot-saft.com)) for filing complaints; and (5) assembling a team to develop recommendations for

continued improvements to the program.

With regard to the commenter concerned about recordkeeping regarding drivers that retire, leave the industry, or otherwise do not seek further employment as a driver after leaving a previous employer, there would be no requirement placed on any employer to report additional information.

#### Use of Third Party Providers

Two commenters ask FMCSA to add appropriate language to the final rule to specifically allow third-party providers to obtain driver safety performance history information for motor carriers. These commenters believe that third-party providers perform valuable services for motor carriers, especially during the driver-applicant screening and hiring process. The commenters state that, as written, the rule seems to imply that a motor carrier may use a third-party to perform the required investigations. The commenters believe that the rule should explicitly allow third parties to obtain information for prospective employers.

*FMCSA Response:* The language in the proposed rule does not address how the prospective motor carrier may obtain information from previous employers. FMCSA does not believe it is appropriate for it to specifically endorse commercial companies.

The agency has existing guidance in the form of Question and Answer 2 under § 391.23, indicating that a motor carrier may use a third party provider to obtain information to meet the inquiry requirements of § 391.23. Question 2 under § 391.23 says: "May motor carriers use third parties to ask State agencies for copies of the driving record of driver-applicants?" The answer is: "Yes. Driver information services or companies acting as the motor carrier's agent may be used to contact State agencies. However, the motor carrier is responsible for ensuring the information obtained is accurate." There is similar guidance under § 391.25. FMCSA is aware that many motor carriers use third parties to obtain this information for them rather than directly dealing with many different State driver-licensing agencies.

The preamble to the SNPRM pointed out that if such a third-party party is the agent of the motor carrier, it would be covered by the limited liability implemented by this rule. If the third party is not the agent of the motor carrier, then it is not covered by these regulations, but is still operating under the provisions of the Fair Credit

Reporting Act (FCRA) (15 U.S.C. 1681 *et seq.*) for performing this function.

The provision by Congress of granting limited liability to agents of the motor carriers in carrying out the requirements of the HazMat Act is an opportunity for motor carriers and their agents to take advantage of such services, but it is not a requirement. The discussion about whether previous employers may charge fees for providing the required data, talks in terms of FMCSA encouraging a competitive, open, free, efficient, market economy approach to management of the fee issue.

#### Driver Information To Be Reported (§ 391.23(d)(1) and (2))

Several commenters urge FMCSA to clarify and to add details on what needs to be included in the information investigated about a driver's safety performance history, and what must be provided. For example, Qwest Communications International, Inc. (Qwest) recommends that additional language be added to § 391.23(d)(1) describing the general information about a driver's employment record that should be investigated. Qwest proposes that the general information further identify employment and job responsibilities.

OOIDA agrees and asks FMCSA to revise the description of employee background information in two ways. First, the rule should limit the investigation to information directly related to a driver's qualifications under Federal or State law. Second, the rule should require that the information reported in safety background investigations be made with sufficient detail so that an accurate safety assessment of the driver can be made. OOIDA is concerned that the broad language of proposed § 391.23(d)(1) could invite the dissemination of a wide range of non-safety information. In that section FMCSA would require that a prospective employer investigate "General information about a driver's employment record." OOIDA believes that this requirement invites any and all information to be transmitted as part of a driver's safety background. OOIDA asks that FMCSA be much more specific, by listing the "facts" that make up the general background history that FMCSA proposes be transmitted, such as date of hire, safety information, and final date of employment.

*FMCSA Response:* FMCSA agrees that the wording contained in § 391.23(d)(1) of the SNPRM for information the prospective employer is to request of the previous employer is general in nature. What was intended for this category is for the prospective motor carrier to

provide the driver identifying data, such as name, date-of-birth, and social security number for the driver on whom it is requesting safety performance history information, and for the previous employer to provide information about that same driver, such as starting and ending employment dates and job responsibilities. However, the agency is not specifying that information in the regulatory text of this final rule, so that employers have some degree of flexibility in providing such basic information. FMCSA does not believe that this type of information will detrimentally impact drivers. All of the information requested in § 391.23 is in the context of driver safety performance history.

#### How To Respond Absent Any Data (§ 391.23(g))

Section 391.21(g) requires all previous employers to respond to each request for a driver's record as outlined in the rule. Safe Fleet, Inc. comments that the proposed rule does not require a response unless the previous employer has derogatory information to report; however, the new employer must have a response within 30 days from every previous employer. Safe Fleet believes the previous employers should be required to respond in every case.

*FMCSA Response:* All previous employing motor carriers must respond to each investigation within 30 days as specified in the HazMat Act. Responses are required even in the absence of data on accidents, or alcohol and controlled substances abuse. Accordingly, FMCSA has made this more explicit in § 391.23(g) of the final rule by adding words clarifying that a response is required even when there is no accident or alcohol or controlled substances data, by stating that no such data is on file.

#### Designated Contact Persons

Qwest requests that FMCSA include a provision indicating that employers must designate a person to receive requests for information from prospective employers and former employees, and clarify when the proposed time frames for required actions start. Qwest states that it is a large, national company, which routinely receives correspondence that is incorrectly or inadequately addressed, thus delaying delivery to the responsible party by up to several days. Qwest believes that compliance with time frames for required actions in the rule should be based on start times that begin when the designated responsible person within the organization receives the request for action, rather than when

the request may be received by the organization.

*FMCSA Response:* Each employer is free to provide their contact information in any way they desire to facilitate this process, such as on its Website, or perhaps designating an agent.

FMCSA has added requirements in the final rule language at § 391.23(d) for each prospective employer to include information on a point of contact when requesting this investigative background information, and for the previous employer to provide similar contact information on its response for use by a driver who may wish to contact that previous employer.

FMCSA intends for the previous employer's 30-day response period to begin when the prospective motor carrier submits the investigation request to the previous employer or its agent.

#### Applicability to Current Employer

Three commenters state that the term "previous employer" does not include the current employer. If an individual is currently employed and is seeking a new position, his or her current employer should be required to provide the accident history. FMCSA has clearly stated that previous employers must respond to requests for information under the new regulations. Unaddressed however, is the issue of whether a company currently employing a driver must respond to a request from a company that may be recruiting its driver. Two commenters want the FMCSA to clarify whether a carrier that currently employs a driver must respond to a request for information from a prospective employer. A third commenter recommends that FMCSA require both previous and current employers to respond to new or prospective employer inquiries.

*FMCSA Response:* The HazMat Act defines previous employer as any employer that employed the driver in the preceding 3 years. From the prospective employer's point of view, a current employer is a previous employer. In accordance with the HazMat Act definition, FMCSA has added a definition for previous employer to § 390.5 in the final rule to clarify that it includes a current employer.

#### Appending Rebuttal (§ 391.23(j)(3))

Under proposed § 391.23(j)(3), if a driver refutes information from a previous employer, that rebuttal must be appended to, and provided with, the driver safety performance history information to each subsequent prospective employer that requests it. Commenters state that requiring

previous employers to maintain rebuttals adds a significant and unnecessary burden to previous employers. For example, Coach USA requests that proposed § 391.23(j)(3) be amended to exclude the last sentence, which requires the previous employer to append the driver's rebuttal to its file information and to provide the complete file in any future requests. Coach USA believes that this specific requirement will place an undue burden on previous employers, and prejudice any response they may give to prospective investigating employers. Coach USA considers the fact that the rule allows for an applicant's rebuttal as sufficient to ensure that previous employers provide accurate information, should they choose to respond.

J.B. Hunt states that it has a concern with

\* \* \* the provision for requiring motor carriers to maintain and provide to prospective employers the rebuttals of former drivers when the information provided by the motor carrier is correct, complete, and factual. J.B. Hunt terminates many drivers whose only purpose in life after termination is to make anyone associated with the carrier miserable. These drivers would likely submit rebuttals of several hundred pages, just to increase the carrier's costs.

J.B. Hunt further says "It should not be the previous motor carrier's responsibility to provide the rebuttal to prospective employers."

Two commenters suggest that, in order to keep the process manageable and to be consistent with the Fair Credit Reporting Act, the rebuttal should be limited to not more than 100 words.

*FMCSA Response:* The HazMat Act specifies that the safety performance history data be requested from the previous employer. The TEA-21 limitation on liability requires the driver to have an opportunity to correct the data or rebut it. If the driver determines a rebuttal is needed, it is necessary for that rebuttal to be provided each time, along with the data to which the driver does not agree. Since the data is coming from the previous employer or its agent, it is necessary for the driver rebuttal information to also come from the previous employer or its agent. Without this mechanism in place, future prospective employers would not receive the driver's rebuttal as part of the information furnished.

FMCSA has not specified a limit for the length of the driver rebuttal. The agency believes it is important for drivers to have the opportunity to adequately respond to what they believe is inaccurate information. Further, the agency has no evidence demonstrating

that this would be widely abused by drivers.

#### *Applicants—Driver Rights*

Applicants Rights (§ 391.23 (i), (j), (k) and (h))

Under the proposed rule, the prospective employer must inform the driver in writing of his or her review, correction and rebuttal rights in the hiring process. DAC Services recommends that the rule explicitly state that this written notification may be given to the driver subsequent to initiating the hiring application and initial screening processes to obtain driver safety performance history data, other than alcohol and controlled substances. This clarification would allow motor carriers to accept driver applications for employment over the phone or via the Internet without written notification of due process slowing or hindering such methods of quickly obtaining information.

Similarly, PTSA wants clarification of the rule that requires prospective employers to notify driver applicants of their rights regarding previous employers' records before an application is submitted. The rule only specifies that the prospective employer must "inform" the driver of the procedures for the use and collection of safety performance records. PTSA asks, "Does the FMCSA intend that this notification, like the notice of due process rights under 49 CFR 391.23(i), be in writing?"

PTSA also wants guidance on the requirement that the previous employer "take all precautions reasonably necessary to ensure the accuracy of the records." PTSA requests that this language (and similar language contained in §§ 391.23(h) and (k)(2)) be clarified to specify the type of precautions the FMCSA has in mind.

*FMCSA Response:* FMCSA has added a clarifying statement to the final rule language for § 391.23(i) that says the required notification in writing of driver rights may occur anytime prior to a hiring decision being made, but it must be made in writing to all applicants, including those not hired. The SNPRM pointed out that if a motor carrier is in compliance with § 391.21(b) this could be done as part of the employment application the driver signs.

The intent is to make it clear that provisions of the Fair Credit Reporting Act can apply as part of the job application process. The FCRA allows notification of the driver by telephone (or other electronic communication) that the prospective employer will obtain the inquiry and investigation information

required by § 391.23 based on that application communication. FMCSA also notes that if the driver makes the application over the Internet, the required notification in writing about the driver's due process rights to review, correct and rebut could be provided by the prospective employer as part of the application process as well.

The request by PTSA for guidance regarding how previous employers can be in compliance with the requirement to "take all precautions reasonably necessary to ensure the accuracy of the records" cannot be addressed by FMCSA. To qualify for limited liability protection set forth in the HazMat Act, Congress intends for the previous employer to furnish accurate safety performance history information. As part of that limited liability concept, Congress also established the requirement for drivers to be able to review, correct and rebut the information furnished. The test of whether an employer has taken reasonable precautions to ensure accuracy would be addressed within the context of a driver taking a previous employer to court trying to prove the information furnished is false. With this as the test, employers should have sufficient records to substantiate that any information they reported is accurate to the best of their knowledge.

#### *Employee Access and Rebuttal*

The proposed rule allows the driver to submit a written rebuttal to the previous employer when agreement cannot be reached on whether information provided to the prospective employer is erroneous. According to commenters, while the SNPRM is clear on the responsibilities of the driver and the previous employer with regard to the rebuttal, the proposal is silent on the prospective employer's responsibility when faced with conflicting information. PTSA requests "that this provision be clarified so that prospective employers fully understand their responsibilities (if in fact there are any) when faced with conflicting information relating to driver safety performance history."

Two commenters disagree with the requirement of allowing a prospective driver an opportunity to refute investigative information, citing a large burden on small businesses and slowing the hiring process with no significant benefit. Several commenters think that the driver should only be allowed to access the information if employment is denied. For example, Qwest—

\* \* \* proposes that access to this information be provided only if employment is denied by the prospective employer based

solely on the investigative information. This will allow drivers who have been denied employment an opportunity to rebut potentially inaccurate information. It will also decrease the administrative burden on employers.

Further, ATA states that an applicant's right to review information provided by previous employers should only address those persons who are rejected for employment because of the information received. Hired drivers have the ability to review and access their personnel files, making a regulation for such drivers unnecessary. TCA agrees and states,

The costs that such an across-the-board requirement would impose on carriers would be significant and, in the absence of a dispute over the accuracy of the information, seems entirely unnecessary and unjustified. FMCSA's final rule should only extend the right of a driver to receive the information from the prospective employer in the event that the driver is denied employment based, in whole or in part, on the information provided by a past employer.

The IBT, however, agrees with the provision that the driver should be allowed, upon request, to see his or her records obtained from previous employers. In addition, the IBT questions the other commenters' assertion that the cost of providing records to drivers would be burdensome. The IBT claims "that allowing drivers to view the information provided whether they are denied employment or not may be more efficient and result in saved costs as it will allow drivers to correct or rebut information sooner, without having to wait until they are denied jobs based on the information."

Finally, OOIDA believes that the rebuttal process leaves the driver in a distinct disadvantage because a driver can only correct his or her record during the hiring process while the carrier can make changes to the driver's record at any time. OOIDA suggests that a driver have a right of rebuttal or correction any time a carrier makes a change to the driver's record.

*FMCSA Response:* Congress, in the HazMat Act, requires that the previous employer provide driver safety performance history information to the prospective motor carrier employer. TEA-21 requires that all drivers have the right to a rebuttal, and that the previous employers' information may be made available to the prospective motor carrier's insurance provider. TEA-21 also requires that provisions implementing these requirements be added to § 391.23 dealing with investigations and inquiries required as part of the hiring process.

There are no requirements in the HazMat Act, TEA-21, or existing regulations regarding what a prospective employer is required to do with previous employer information. They are similarly silent regarding what to do with driver rebuttals that presumably will conflict with the previous employer information.

TEA-21, however, provides the insurer of the motor carrier requesting the data with the same limited liability as the prospective motor carrier requesting the data. FMCSA believes that by also granting insurers limited liability to gain access to the information (the final rule excludes the alcohol and controlled substances information), Congress intended for business decisions between the prospective motor carrier and the insurance provider to function as a mechanism by which this data will be evaluated. FMCSA believes there is motivation for the carrier and insurer to make good sound judgments of the relative risk of prospective drivers. Those judgments will now be based on better documentation about the driver's past safety performance history.

FMCSA believes the final rule must allow all drivers the right to submit a rebuttal, as specified in TEA-21. The request by OOIDA to allow the driver a rebuttal right at any time a motor carrier makes an entry to the driver's record is not required by the HazMat Act or TEA-21, and would be intrusive on the operating practices of motor carriers.

#### Appeal Process (§ 391.23(i) and (j))

Commenters express concern that the appeal process would inhibit prospective employers from hiring a driver. For example, TCA opposes FMCSA's proposed appeal process. A driver's dispute over information provided by a past employer, would require the prospective employer to delay making its hiring decision until the dispute has been resolved or the driver provides his or her rebuttal. TCA believes the impact that such a mandatory requirement would have on carriers [in the truckload sector of the industry] would be extremely impractical from an operational standpoint and also unduly burdensome and costly. TCA states, on the other hand, " \* \* \* FMCSA's decision not to mandate such a delay in hiring decisions would have a minimal impact on drivers, since the dispute resolution process should enable the driver to cure the inaccuracy in a reasonably timely fashion and thereby limit any denial of work based on the disputed information \* \* \*"

The IBT, however, disagrees with TCA's position. The IBT does not think it would be proper for the FMCSA to issue a regulation explicitly permitting a prospective employer to make a decision not to hire a driver before the process is complete.

*FMCSA Response:* There is no requirement for the motor carrier to delay putting the driver to work pending the appeal process. The proposal in the SNPRM was that the investigations " \* \* \* must be completed within 30 days of the date the driver's employment begins." FMCSA has modified § 391.23(c) in the final rule to make it clearer that the employer is allowed to put the driver to work for up to 30 days without having completed the required safety performance history background investigation.

FMCSA desires to keep the new requirement for safety performance history § 391.23 as close as possible to current requirements so that the provisions of this rule are consistent with existing requirements. The requirement is that the inquiries and investigations must be performed and information received within 30 days or the motor carrier must not allow the driver to continue operating a CMV. In order to keep that requirement as it is, the additional new times added by this rule for completing the driver appeal process are defined as being outside of the 30 days allowed for obtaining the initial safety background information. For example, a motor carrier hires a driver and on the 29th day from the start of employment, the hiring motor carrier receives a response from a previous employer that contains accident data. If the driver requests a copy of that report from the prospective (hiring) employer, and then decides to request correction or to rebut it, the hiring motor carrier is not required by these regulations to prevent the driver from operating a CMV for the new (prospective) employer while the driver is exercising his or her rights to review, correct or rebut the information provided.

#### Access to Data

##### Insurer Access to Data (§§ 391.23 (h) and 391.53(a)(1))

The Daily Underwriters of America thinks that the regulation should be expanded to include insurers of commercial autos. It argues that "Allowing the insurance company access to the same information would enhance the decision making process and offer another professional opinion on the safety risk presented by each driver."

The TCA and ATA are opposed to allowing insurers of motor carriers access to safety performance history information. TCA argues that the provision will effectively give insurers the implicit right to direct the hiring decisions of motor carriers and may expose carriers to liability for adverse hiring decisions.

ATA points out that part 40 allows the release of alcohol and controlled substance information to anyone named on the driver's release authorization. ATA states that " \* \* \* § 391.53(a)(1), as proposed, would be inconsistent with § 40.25."

*FMCSA Response:* In regard to the Daily Underwriters of America request to expand this rule to include commercial autos, the FMCSA notes it only has authority to regulate commercial motor vehicles as defined in § 390.5. Unless the autos are carrying placardable amounts of hazardous materials (thus requiring a commercial driver license (CDL) to operate them) they are not CMVs. Additionally, in part 391 FMCSA only has authority over motor carriers operating in interstate commerce. Thus, unless the commercial autos are being operated by a motor carrier in interstate commerce carrying placardable amounts of hazardous materials, FMCSA has no jurisdiction over such autos even if used commercially, such as in sales fleets.

In regard to TCA and ATA not wanting to release accident data to their insurers, FMCSA notes that Congress specified in TEA-21 that the motor carrier's insurer could have access to the safety performance history. This is one of the mechanisms by which the safety performance history data is made part of the hiring decision process.

In regard to ATA's question about whether the proposed § 391.53(a)(1) is inconsistent with § 40.25, FMCSA believes the reference should more accurately be to § 40.321. FMCSA further notes that the regulations in § 391.23 apply to what a motor carrier can do. Section 391.53(a)(1) says the prospective motor carrier cannot give the alcohol and controlled substances information to its insurer. Departmental policy in part 40 seeks to protect the privacy rights of drivers, and does not want alcohol and controlled substances information released for purposes other than intended, namely to keep drivers with positive tests from operating CMVs until they have completed the process of return-to-duty status. There is no need for insurers to have access to this data, because prospective employers are prohibited from allowing such drivers to operate CMVs.

However, as ATA points out, if a driver wishes to give authorization for their alcohol and controlled substance data to be released by the previous employer to the insurer of the prospective motor carrier, they are free to do so. However, there is no regulatory requirement for them to do so.

#### Access to and Use of Driver Investigation History File (§ 391.53(a))

The SNPRM contained a provision that restricts access to the Driver Investigation History file to the hiring decision process and to those persons involved. Con-Way and the ATA oppose this provision. Both commenters cite the burden of maintaining two files—a Driver Investigation History file, which can only be accessed by those involved in the hiring process, and a second Driver Qualification file with the rest of an employee's information. Both commenters recommend that the provision be amended to permit storage of all of an employee's information in one file. ATA also argues that management personnel of a motor carrier should have the right to review the information in a driver's file for any valid reason whether or not they were involved in the hiring process.

RIPA seeks guidance with regard to the agency's interpretation of the term "controlled access" as it is used in § 391.53. In this section, the proposed rule states that the Driver Investigation History file "must be maintained in a secure location with controlled access."

*FMCSA Response:* FMCSA does not believe it has any latitude to permit the investigation records required by the rule to be mingled with the inquiry records, nor to allow the investigation information to be used for any other purpose, even for FMCSA required reviews, such as the annual review required by § 391.25.

TEA-21, as codified at 49 U.S.C. 508(b)(1)(B), requires the prospective motor carrier to " \* \* \* protect the records from disclosure to any person not directly involved in deciding whether to hire that individual." In addition, 49 U.S.C. 508(b)(1)(C) requires that "the motor carrier has used those records only to assess the safety performance of the individual who is the subject of those records in deciding whether to hire that individual."

In addition to the Congressional requirement at 49 U.S.C. 508(b)(1)(C), as it relates to Con-Way's and ATA's concern about the burden of maintaining an extra file, FMCSA notes that this file is customarily maintained separately for alcohol and controlled substance results. The proposal at § 391.53 was developed based on this

common practice of motor carriers maintaining such files separately in order to be able to withstand driver court challenges when asked how they can prove they met the requirements of part 40 for secure and controlled access. Thus, FMCSA proposed that the Driver Investigation History file could be combined with the already separately maintained alcohol and controlled substances response file in order to minimize any additional costs imposed on motor carriers.

The terms secure and controlled-access are adopted as a conforming amendment from part 40, which has used these terms for some time.

#### National Database or Access to FMCSA Data Files

Instead of requesting driver information from previous employers, nine commenters advocate a national or centralized database to include information, such as driver accidents, alcohol and controlled substances test results, safety related medical conditions, citations, and out of service inspections. The arguments presented for such a database include better tracking of drivers, less expensive and easier access to the information, and less burden on the motor carriers. For example, Consumer Energy explains that a database system could eliminate the paperwork burden, limit the possibility of a driver's falsification of employment, failure to provide documentation of previous employers, and speed up the hiring process. Consumer Energy recommends modeling a database after the Nuclear Regulatory Commission's Personnel Access Data System (PADS).

J.B Hunt concurs that a database would lessen the burden to motor carriers from the thousands of requests for information gathered in the hiring process. This commenter suggests adopting a national program similar to the California Pull-Notice Program where motor carriers register new drivers in a database of safety performance indicators, such as accidents, alcohol and controlled substances test failures, and traffic convictions. The administrator of the database notifies employing motor carriers when a driver's record changes, and drivers would have access to their records to make rebuttals. The American Bus Association agrees that such a database "would solve the problem that occurs when a driver applicant 'forgets' to list a previous employer to avoid scrutiny."

TCA, ATA, and DAC Services all urge FMCSA to allow motor carriers access to driver information in the Motor Carrier

Management Information System (MCMIS) database. These commenters argue that by giving access to this data, motor carriers would gain access to more information about a driver than under this rule. ATA urges FMCSA

to immediately take the necessary action to allow prospective motor carriers to access the MCMIS database, on a real-time basis, for the purpose of obtaining driver-applicants accident data, as well as other important roadside inspection safety compliance and performance data.

Similarly, the Commercial Vehicle Safety Alliance (CVSA) states that roadside safety inspection reports include information that would allow prospective employers the opportunity to analyze the driving habits of prospective employees by reviewing their FMCSR violation histories and that of the vehicles they operated. Access to this information might be accomplished by providing access to driver specific information via SAFER [Safety And Fitness Electronic Records] and/or other databases. Access to this driver information would provide motor carriers a more comprehensive rendering on which to base their hiring decisions. While the CVSA strongly recommends motor carrier access to driver specific roadside safety inspection information, it also recognizes the fiscal implication at both the Federal and State levels. For this reason the CVSA requests that FMCSA be cognizant and sensitive to the limited resources available in regard to proposed upgrades to information systems.

The IBT strongly opposes making individual driver records publicly available via MCMIS. IBT is concerned about maintaining the confidentiality of the information and believes the rule as proposed implements the necessary precautions to protect the confidentiality of this information by making it only available to individuals involved in the hiring process.

*FMCSA Response:* The FMCSA recognizes the interests demonstrated by the suggestions to provide the safety performance history for new drivers using national databases rather than investigations to previous employers. For the benefit of those interested, FMCSA provides this summary of related activities in each of the suggested areas.

FMCSA has been building the MCMIS database of motor carrier information for many years. However, the agency is also aware that there are accompanying cost and individual privacy issues. As the commenters indicate, the MCMIS contains information on accidents and out-of-service orders, and is used by

FMCSA for various purposes, including prioritizing motor carriers to receive carrier compliance reviews. In any event, access to that MCMIS database or the development of another database was not proposed in the SNPRM, and is outside the scope of this rulemaking.

Regarding an alcohol and controlled substances database, section 226 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Pub. L. 106–159, 13 Stat. 1748 (December 9, 1999)) requires a report to Congress on the feasibility and merits of an alcohol and controlled substance database capability. Work on that report is progressing. When the report is released to the public after being sent to Congress, it will be placed in docket FMCSA–2001–9664. The long title of the report is “A Report to Congress On the Feasibility and Merits of Reporting Verified Positive Federal Controlled Substance Test Results to the States and Requiring FMCSA–Regulated Employers to Query the State Databases Before Hiring a Commercial Driver’s License (CDL) Holder.”

Regarding medical certification information as part of the CDL process, section 215 of MCSIA requires a rulemaking to provide medical certification information as part of the CDL licensing process. Work on that rulemaking effort is progressing as well.

There were studies related to the possible value of a national database of citations. However, there is no proposal or funding to proceed with such an effort. It appears far more cost effective to instead focus on using the data about traffic convictions available from the Commercial Driver License Information System (CDLIS), and also available to motor carriers from the Motor Vehicle Record (MVR) obtained from the licensing State, and already required by § 391.23(b). For CDL drivers, the FMCSA is working with the States to improve the quality of this data in accordance with section 221 of MCSIA.

#### *Rejection Rate and Cost/Benefits*

Several commenters addressed FMCSA’s rejection rate in its SNPRM cost/benefit analysis. Two commenters take issue with the FMCSA use of a 4 percent rejection rate of applicants in the SNPRM regulatory evaluation. These commenters state that the actual rate is much higher and that therefore the FMCSA underestimated the cost of the proposed rule. Con-Way states that the rejection rate is closer to 80 percent, and that therefore the cost would be \$1.52 billion, not \$76 million as stated in the SNPRM. Con-Way states,

\* \* \* there is no doubt that the proposal will result in lots of paper and administration. Not only employers but also

potential applicants would be impacted, as applicants may not be hired as quickly, creating more hardship and loss of income for job seekers.

Con-Way further states that the analysis assumes, with no data to support the assumptions, that there may be a 0 percent, 10 percent, 25 percent or 50 percent reduction in accidents (what is identified as “deterrence effect”). In the opinion of Con-Way, the fact that there is a wide range in accident reductions included in the sensitivity analysis implies there is little data to support a more definitive statement of benefits. Con-Way concludes that the benefit analysis is inadequate, flawed, and based on little data and many assumptions.

The ATA contacted several motor carriers of varying sizes, presumably among their membership, to get a better estimate of the rejection rate of CMV driver applicants. ATA submitted the results of its inquiries to the docket. ATA states that the information indicates the actual driver employment rejection rate may be considerably higher than the four per cent used by FMCSA in its cost/benefit analysis. The table contained in ATA’s document 83 in this docket gives the results of the ATA inquiries. It also gives a weighted mean rejection rate of 80.1 percent. ATA suggests that FMCSA needs to further investigate its rejection rate assumption and reexamine its cost/benefit analysis based on the new information.

Three commenters assert that associated and administrative costs will significantly exceed FMCSA’s estimates and will cause significant economic burden on the industry. For example, AT&T estimates that its efforts to comply with these regulatory changes would result in very costly modifications to an established, well-functioning system, which would take considerable time. In AT&T’s opinion, the FMCSA did not prove that the benefit of the SNPRM’s proposal would outweigh these costs.

*FMCSA Response:* FMCSA stated in the preamble to the SNPRM, with a reference to the supporting study in the docket, that it was aware of the CDL Effectiveness focus groups study involving motor carrier safety directors who stated that there is a substantial rejection rate of CMV driver applicants. A copy of the relevant portions of that publication is included in the docket as document 41. The preamble also stated that because of limited information, that observation was not included in the regulatory evaluation. Additionally, the SNPRM requested that more information about rejection rates be provided in comments to the docket.

Based on the additional information received, FMCSA has revised both the paperwork burden estimates and the regulatory evaluation, using a higher rejection rate, and thus yielding higher burden and cost. These are discussed in detail in the “Paperwork Reduction Act” and “Regulatory Evaluation: Summary of Benefits and Costs” sections later in this preamble.

#### *Fees (Previous Employers or Third Parties Charge)*

Of those commenters that addressed this issue, some do not want previous employers to be allowed to charge a fee to offset their costs of providing safety background information about their previous employees. Safe Fleet asserts that all motor carriers are both previous and new employers, so all should share the burden and help out one another with this cost. Two commenters suggest that, if previous employers can require a payment for the required safety performance history information, it should be a standard amount determined by the FMCSA. ATA specifically urges FMCSA to make a decision on whether charging a fee for safety performance history information is allowed or prohibited.

*FMCSA Response:* There are two distinct requirements under § 391.23, namely for “Investigations” and “Inquiries.” Under “Inquiries” motor carriers are required to obtain the driving record from all States where the driver held a license or permit in the last three years. All States commercially sell this information as the Motor Vehicle Record (MVR) to authorized users. Payment of the fee set by each State is a condition of the MVR being released by the State. These fees are set by State government agencies for access to public records. FMCSA has no part in setting these fees.

Under the “Investigations” requirements of the § 391.23 “Investigations and inquiries,” prospective motor carriers continue to be required to request investigatory information from previous employers, and the minimum data elements are now defined by this rulemaking. In addition, previous employers are now required by this rule to provide the specified minimum information.

Further, as pointed out in the SNPRM, it is an established practice for some motor carriers to require a driver to have driving experience before they will hire the driver. (See document 41 in this docket.) This means some carriers are hiring the inexperienced new entrant drivers, who systematically leave their employ to go to work for carriers

requiring some type of driving experience.

Those carriers hiring inexperienced new entrant drivers will systematically be subject to the costs of providing the safety performance history data, but will not equally get the advantages of this data from other previous employers. The Regulatory Evaluation section presents two possible scenarios, each indicating that some motor carriers hire drivers with no driving experience. Under scenario 1, the percent of drivers hired from outside the industry would be over 25 percent new entrants. Under Scenario 2, the percent of the drivers hired from outside the industry would be over 34 percent new entrants.

FMCSA points out that our regulations do not prevent previous employers from charging a fee for this information. If such fees are charged to offset carriers' cost of providing the required safety performance data, FMCSA encourages development of a market that establishes reasonable, predictable fees. Although FMCSA agrees any fees should be reasonable and predictable, somewhat like the State fees for the MVRs, FMCSA does not believe it has the authority to set fees for release of former driver safety performance history information to prospective employers.

However, FMCSA believes it has the authority to require previous employers to release the minimum data, for alcohol and controlled substances specified in part 382 and for accidents as defined in § 390.5, to the investigating prospective motor carrier within the time period required at § 391.23(g)(1), even if the previous employer has to initially absorb the costs for maintaining and providing this information, *i.e.*, extend credit. Previous employers may not condition release of this required investigative safety performance history information on first receiving payment of a fee by the prospective motor carrier. A copy of a corresponding FMCSA interpretation to this effect in the context of alcohol and controlled substance information was placed in the docket as document 55. This does not apply to accident data not defined by FMCSA and retained either pursuant to § 390.15(b)(2) or because the motor carrier chooses to maintain more detailed minor accident information for their own purposes.

FMCSA does not believe it has a regulatory role in establishing reasonable, predictable fees for the safety performance history information previous employers are required to provide once this rule is implemented. What such fees may be, and how they are collected, should be determined in

a free, open, efficient, competitive marketplace.

#### *Miscellaneous*

##### Relation of Hours of Service to Safety Performance

The ATA believes that the regulatory evaluation discussion in the SNPRM did not provide the evidence showing the claimed positive relationship between hours of service violations resulting in out-of-service orders and future safety performance. ATA urges FMCSA to place appropriate proof of this claimed relationship in the public docket.

AHAS strongly disagrees with FMCSA's decision to accept the SBA request to delete the requirement for previous employers to disclose records evidencing previous driver hours of service (HOS) violations resulting in out-of-service orders. AHAS is not persuaded that the agency's rationale for excising this aspect of the proposed rule has any merit. AHAS challenges that a "failure to require employers to provide such information on driver HOS violations to any prospective new employer of that driver arguably abets ongoing HOS violations by refusing to stop their concealment from subsequent employers."

*FMCSA Response:* With regard to ATA's comment, the information referred to in the SNPRM was developed in a study for FMCSA. A preliminary report on this study was presented at the 2002 annual Transportation Research Board meeting in Washington, DC. A copy of a current report on that analysis is included in the docket as document 85.

More accurately, the SNPRM discussion refers to a positive and significant relationship between a measure developed by that study of traffic convictions and driver out-of-service (OOS) orders, which are largely from hours of service violations or record of duty (logbook/timecard) violations. Drivers receiving more traffic convictions for moving violations, particularly those defined as CDL serious or disqualifying convictions, are identified by the required Commercial Driver License Information System (CDLIS) recordkeeping functions.

Depending on the traffic law conviction received and the number of such convictions, the driver may be identified by the State driver licensing agency as a safety risk requiring driver improvement actions, such as suspension or revocation, in accordance with the CDL program regulations. It is an underlying premise of the CDL program that drivers with such conviction patterns are considered

higher risk for being involved in accidents, and should be removed from driving CMVs, either temporarily or permanently.

The study found a significant, positive, linear correlation between the proposed carrier-driver conviction measure with OOS orders and carrier power unit crash rate. This implies that if the driver OOS information were available to prospective employers, it could also be useful in predicting future safety problems, including accidents. The relationship of driver OOS orders and future crash involvement is being further researched.

In regard to the AHAS comments, as stated in the SNPRM, FMCSA continues to believe " \* \* \* requiring this information collection and establishing a motor carrier recording requirement would be particularly burdensome to small entities \* \* \*" " \* \* \* because this information is only systematically reported to FMCSA as part of the Motor Carrier Safety Assistance Program (MCSAP) enforcement activities of the States." FMCSA provides the following additional details why this would be burdensome on small entities, as well as not meet the three-year reporting requirement of the HazMat Act.

Motor carriers are not currently required by the FMCSRs to maintain a three-year record for hours of service violations resulting in an out-of-service order. Requiring motor carriers to maintain and provide three-years of such information would necessitate creating a new recordkeeping requirement for motor carriers to obtain and maintain this data, and creation of such a process could be problematic.

The following things are currently required. Drivers are required by § 395.13(d)(3) to notify their employer of having received a driver out-of-service order for an hours-of-service violation. Motor carriers are then required by § 395.8(k)(1) to retain such data as a supporting document for 6-months. Under § 396.9(d)(3), motor carriers are required to retain a copy of inspection reports they receive from the driver, some of which could include information about a driver out-of-service order, for 1-year.

Because of the known problem with drivers not providing all such information to their motor carrier, FMCSA created a capability for motor carriers to obtain a carrier profile from FMCSA for a fee. If there is information on that profile about a driver-out-of-service order the motor carrier did not receive from the driver, the motor carrier may either contact the State MCSAP agency that issued the report, or request a facsimile copy of that



information from the FMCSA for their records for a fee.

There is no requirement for the motor carrier to regularly obtain a carrier profile in order to search for possible missing driver OOS orders. However, if the carrier requests a profile from FMCSA, we require the carrier to pay a fee to the agency for both the profile and any missing facsimile data. This means there is no reliable, institutionalized process for motor carriers to be notified of all such orders received by their drivers. Even if the information were obtained, the longest the motor carrier is required to keep reports on file is 12 months for inspections.

The more reliable reporting process in place is the States' MCSAP agency reporting this data to FMCSA, using SAFETYNET<sup>2</sup> to place it in MCMIS. There is no requirement for the States to provide this information to motor carriers.

#### Broader Applicability (Non Safety Sensitive Functions)

The proposed rule requires that prospective employers investigate alcohol and controlled substance testing information for prospective drivers previously employed in safety-sensitive positions. Qwest supports this requirement. However, Qwest believes the language in § 391.23(e) should be modified to state that all prospective driver alcohol and controlled substance testing information should be investigated, not just drivers that will perform safety-sensitive functions for the prospective employer.

*FMCSA Response:* The requirements of part 382 only apply to persons covered by part 383 (CDL) requirements. Section 391.23(e) adds conforming amendments for the requirements of part 382 to those of part 391 as required by the HazMat Act. It is possible an applicant for a driving job that does not require a CDL may have previously driven vehicles requiring a CDL and failed an alcohol or controlled substance required test.

The specification at § 391.23(e) applies to all drivers who held a safety sensitive job in the previous 3 years. For motor carriers, this is a CDL driver. If they are driving a CMV, whether they will perform a safety sensitive job for the prospective employer does not matter. The prospective employer is required for such drivers to request the

alcohol and controlled substances information. The requirement at 49 CFR 390.3(d) states an employer may specify more stringent requirements as a condition of employment. However, if during the previous three-year period the driver did not hold a safety sensitive job subject to the requirements of part 40 or part 382, there is no requirement for the previous employer to have applied the testing requirements required for safety sensitive jobs. FMCSA does not have the authority to require drivers not performing safety sensitive functions to be subject to the requirements of parts 40 and 382.

#### Liability Limitation (§ 391.23 (l))

All commenters support the provision that limits liability when previous employers are furnishing driver records. Two commenters raise questions about whether immunity will apply to State courts and whether this provision will prevent a driver who was not hired from suing. Three commenters have specific recommendations regarding the language of the provisions. First, Conway proposes that protections should apply unless a person knowingly and intentionally furnishes false information. Second, ATA urges the FMCSA to delete from § 391.23(l)(2) the second phrase “\* \* \* or who are not in compliance with the procedures specified for these investigations \* \* \*” by placing a period after the word “information” and striking the balance of the sentence in order to strengthen the employer protections. However, the IBT disagrees with ATA and claims that this suggestion would immunize employers from liability even if they do not comply with the regulations. Finally, Qwest recommends protections for good faith compliance.

However, OOIDA believes that motor carriers' fear of liability is exaggerated. OOIDA states

The proposed rule emphasizes carriers' supposed fear of their exposure to legal liability for following the rules. OOIDA finds this fear suspect and vastly overstated. OOIDA does not understand why any carrier would express any fear of liability unless they know or believe that the information they are using is false, or that they are engaged in the improper use of such information. Furthermore, OOIDA is unaware of any litigation brought against a carrier for the creation of false information in a driver's safety performance history or the misuse of such information. FMCSA presents no factual record to back up this fear. From OOIDA members' experience, drivers' careers are much more likely to be damaged by carrier misuse of background information than carriers are at risk for litigation under the rules.

In addition, OOIDA expresses concern that motor carriers knowingly passing along false information received from another carrier would be shielded from legal liability.

*FMCSA Response:* The only basis provided under the statute and this regulation for a driver to have standing in court is to allege the previous employer knowingly provided false information. If the driver proves false information was provided by the previous employer, the liability limitation does not apply and the court can determine and assess a penalty on the previous employer. The preemption language in TEA-21 at section 4014(c) (see document 39 in this docket) explicitly refers to State and local law and regulations that create liability associated with providing or using safety performance history investigative information.

FMCSA concurs with the IBT comment to the docket that the HazMat Act does not provide discretion for partial or good faith compliance with the procedures established by this final rule. Motor carriers must comply with the regulations.

#### Implementation

The previous topics and their discussions indicate many commenters are concerned about a number of practical difficulties that must be dealt with to effectively implement this rule. Additionally the Small Business Administration (SBA) submission to the docket in response to the NPRM, document 26, expresses concern that the implementation needs of the large number of small businesses should be given more explicit attention. Two issues SBA explicitly addressed were the phasing in of accident data retention and providing compliance assistance.

*FMCSA Response:* The issue of phasing in accident data retention is addressed separately, and FMCSA is doing that. However, it only addresses that specific aspect of implementation that is impossible to accomplish until enough time has passed to allow accumulation of three years of data.

An additional issue is allowing a reasonable enough time for all parties to effectively implement the newly required processes for data retention, investigating, reporting, using data obtained as part of the hiring decision process, and managing the driver rights processes. FMCSA determined that six months after the effective date of this rule is a reasonable balance between motor carrier implementation and safety requirements for all impacted parties to implement the process capabilities required to operate in compliance with

<sup>2</sup> SAFETYNET is a database management system that allows entry, access, analysis, and reporting of data from driver/vehicle inspections, crashes, compliance reviews, assignments, and complaints. It is operated at State safety agencies and Federal Divisions and includes links to SAFER and MCMIS. It is an Oracle based client-server system.

this rule. This will also allow the industry together with FMCSA to develop and make available various non-mandatory guidance materials.

### Rulemaking Analyses and Notices

#### *Privacy Act*

Anyone is able to search the electronic form of 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 DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

#### *Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures*

The FMCSA determined this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of Department of Transportation regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, February 26, 1979), because the subject of requirements for background checks of prospective driver safety performance history information generated considerable public and congressional interest. FMCSA estimates the economic impact of this rule will not exceed the annual \$100 million threshold for economic significance. The Office of Management and Budget (OMB) reviewed the final rule, Paperwork Reduction Act submission, the regulatory evaluation, and the regulatory flexibility analysis associated with this action.

Under a following section of this rule entitled "Regulatory Evaluation: Summary of Benefits and Costs," the agency estimates the first-year costs to implement this rule will amount to approximately \$15 million. Total discounted costs over the 10-year analysis period (2004-2013) will be \$113 million, using a discount rate of seven percent. All these costs are associated with the statutorily mandated requirements of section 114 of the Hazmat Act and section 4014 of TEA-21. First-year benefits associated with this rule are estimated at \$7 million. Total discounted direct benefits over the 10-year analysis period (2004-2013) are estimated at \$107 million. Total discounted net benefits from implementing this rule are estimated at -\$6 million (without consideration of a deterrence effect) or as high as \$47

million (with consideration of a deterrence effect).

A key assumption used in the above analysis involved the percentage of newly available accidents for which prospective employers would be able to determine, or infer, that the truck driver was at fault and therefore deny the driver employment as a result. In the analysis performed for the SNPRM, now called scenario 1, it was estimated that 30% of the drivers are at fault, and from those a total of 10% of driver applicants would be denied employment. In this final rule it is estimated from preliminary data from the Large Truck Crash Causation Study that 38.64% of the drivers are at fault, and from those in scenario 1 a total of 12.88% of driver applicants would be denied employment. Both the 10% in the SNPRM and the 12.88% in this rule are derived as one-third of the vehicle accidents involving a large truck where the truck driver is estimated to be at fault.

For purposes of sensitivity analysis perspective, FMCSA also presents a scenario 2 in the regulatory analysis where we assume the full 38.64 percent of drivers at fault would be denied employment by prospective employers because the employer would be able to determine, or infer, from the data that the CMV driver was at fault in the accident, and would choose to deny employment to all. This new, more aggressive assumption is presented in an effort to provide readers with the range of possible impacts, in light of the inherent uncertainty regarding how much new accident data will become available to prospective employers and exactly how they will use this data to make hiring decisions. However, the more aggressive scenario 2 estimates are only presented for sensitivity analysis perspective. FMCSA continues to cite the original (now scenario 1) as the primary analysis performed for this rule.

Under the scenario 2 assumption that prospective employers will be able to accurately determine, or infer, fault in all the accident data involving drivers applying for positions, and that all the drivers who were at fault would be denied employment as CMV drivers for on average six-months, the costs would remain the same, \$113 million. But, the first year benefits could be as high as \$24 million, and the total discounted 10-year benefits could be as high as \$406 million. This means the total discounted net benefits under this aggressive scenario 2 could be as high as \$294 million over the 10-year analysis period (2004-2013).

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement and Fairness Act (SBREFA), requires Federal agencies to analyze the impact of rulemakings on small entities, unless the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In response to SBA's request for more information on the economic impact of this final rule upon small entities, and the determination that this is considered a significant rulemaking proposal, the agency prepared a final regulatory evaluation and the following Regulatory Flexibility Analysis.

(1) *A description of the reasons why action by the agency is being considered.* Motor carriers must hire a large number of drivers each year to operate large commercial motor vehicles on the nation's roads and highways. These drivers are responsible for safe, secure and reliable operation of these vehicles. Public concern regarding the safety of commercial motor vehicles and their operators has heightened awareness of the almost non-existent investigative driver safety performance history information made available to prospective motor carrier employers to assist in making hiring decisions. If prospective employers have access to more information about a driver's safety performance history, it will enable employers to make more informed decisions regarding the relative safety risk of applicants to operate CMVs.

With enactment of section 114 of the HazMat Act, Congress directed revision of the FMCSRs to specify the minimum driver safety performance information a prospective employer must investigate from previous employers, and further directed that previous employers now must provide the specified information. Additionally, the HazMat Act sets a 30-day time limit for previous employers to respond to the investigations, and provides the driver with " \* \* a reasonable opportunity to review and comment on the information" provided by previous employers to the prospective employer.

In response to industry concerns about the legal liability which could arise from providing information about driver safety performance history, Congress determined that the societal importance of this information is sufficient to grant limited liability to motor carriers by preempting State and local laws and regulations creating liability. This is carried out in section 4014 of TEA-21. The liability limitation applies to prospective and previous

employers, their agents, and their insurance providers from defamation suits when investigating, using or providing accurate information about safety performance histories of their drivers. The right of drivers to review such employer investigative records, and to have them corrected or include a rebuttal from the driver, is made statutory. The Secretary is directed to develop procedures for implementing these new requirements as part of the changes to § 391.23 previously mandated by section 114 of the HazMat Act.

(2) *A succinct statement of the objectives of, and legal basis for, the rule.* The legal bases for this final rule are the Congressional directives contained in section 114 of the HazMat Act and section 4014 of TEA-21. Congressional direction is to ensure prospective motor carriers have access to increased information about the safety performance history of driver applicants, including access to specified investigative information from the driver's previous employers for the preceding three years.

Regulations at §§ 391.23(a)(2) and (c) currently require prospective employers to investigate a driver's employment record from previous employers. The regulations do not specify what information prospective employers must investigate, nor do they require previous employers to respond to investigations received from prospective employers. Comments to the docket for this rulemaking, such as those from Dart and Fleetline, Food Distributors International, Interstate Truckload Carriers Conference, American Movers Conference, United Motor Coach Association, and the National Private Truck Council state that many previous employers are either not responding, or not providing any information other than verification of employment and dates.

Further, comments to docket FMCSA-2001-9664 state that many previous employing motor carriers either do not respond to investigations for alcohol and controlled substances information, or do so belatedly, making the data of questionable value in the hiring decisions. Docket 9664 contains the **Federal Register** notice and numerous comments regarding the requirement of section 226 of the MCSIA for a Report to Congress on the possibility of requiring employers to report positive results or refusals to be tested for controlled substances. A copy of section 226 of MCSIA is included in the docket for this rulemaking as document 40.

The objective of this final rulemaking is to improve the quantity and quality

of investigations made to previous employers, especially the quantity, quality and timeliness of driver safety performance information provided to prospective employers. This should foster more informed hiring decisions about the safety risks of potential new driver employees, while affording drivers the opportunity to review, correct or rebut the accuracy of information provided by previous employers.

This final rule specifies minimum information that must be investigated, and specifies processes to facilitate this information exchange, so as to minimize the reporting burden, including establishing the limit on potential liability of employers, their agents, and insurance providers from lawsuits.

(3) *A description of, and where feasible, an estimate of the number of small entities to which the rule will apply.* This rule will apply to all motor carrier employers regulated by the FMCSRs whose driver employees apply to work for another motor carrier operating CMVs in interstate commerce. This includes small motor carriers, many of which are in numerous industries covered by the FMCSRs because they operate their own private commercial motor vehicles. Examples include drivers who operate CMVs in industrial categories, such as: bakeries, petroleum refiners, retailers, farmers, bus and truck mechanics, cement masons and concrete finishers, driver/sales workers, electricians, heating, air conditioning and refrigeration mechanics and installers, highway maintenance workers, operating engineers and other construction equipment operators, painters, construction and maintenance workers, plumbers, pipefitters and steamfitters, refuse and recyclable material collectors, roofers, sheet metal workers, telecommunications equipment installers and repairers, welders, cutters, solderers, and brazers.

The SBA regulations at 13 CFR 121 specify Federal agencies should analyze the impact of proposed and final rules on small businesses using the SBA Small Business Size Standards. Where SBA's standards do not appropriately reflect the effects of a specific regulatory proposal, agencies may develop more relevant size determinants for rulemaking.

The regulatory evaluation below estimates the number of driver hiring decisions affected by this final rule at approximately 403,000 annually. This estimate is a function of three components, including: (1) Annual driver turnover within the industry, (2) annual employment growth within the

industry, and (3) an increase in the number of drivers required to fill vacancies left by those denied employment when this background information becomes available to prospective employers.

It is difficult to determine exactly how many existing motor carriers will be affected by this final rule, since it is not known year-to-year how many employers on average hire drivers. However, it is known from the MCMIS that there are more than 500,000 active motor carriers currently operating in interstate commerce in the United States. This includes both for-hire and private motor carriers, but deducts a number of carriers believed not to be currently operating, yet still having files in MCMIS. Data from the 1997 Economic Census (U.S. Census Bureau), Standard Industrial Classification (SIC) Code 4213, "Trucking, Except Local," indicates that over 90 percent of trucking firms in that SIC code had less than \$10 million in annual sales in 1997 (less than \$10 million in annual revenues represents the threshold for defining small motor carriers in this analysis).

Because the FMCSA does not have annual sales data on private carriers, we assume the revenue and operational characteristics of the private trucking firms are generally similar to those of the for-hire motor carriers. Using the 90-percent estimate from for-hire motor carriers to identify the small business portion of the existing industry, FMCSA estimates that 450,000 out of the approximately 500,000 total existing motor carriers could be defined as small businesses. Also, we estimated that a net 403,000 hiring decisions will be affected by this final rule annually. These 403,000 net annual hirings within the industry represent 13 percent of the total three million drivers currently estimated in the regulatory evaluation to be employed within the trucking industry. To be conservative, we assumed that 13 percent of existing motor carriers will be filling the 13 percent of driver positions each year. Using 13 percent of existing motor carriers translates to 67,000 out of the 500,000 existing motor carriers that would be prospective motor carriers hiring drivers each year.

We conservatively assumed that these 67,000 hiring employers will bear the full cost of the data retention and reporting processes for the 403,000 drivers to be hired each year. This includes the file searches, duplication, and reporting costs incurred by previous employers for providing the information.

Conversely, if instead we had assumed previous employers would also bear a portion of these costs, and we assumed one previous employer for each driver over the past three years, then we would have had to divide compliance costs by twice the 67,000 hiring carriers, *i.e.*, 134,000 carriers. However, to ensure we do not underestimate the impact to small employers, we have used the 67,000 estimate of hiring employers.

Total discounted compliance costs of this final rule are estimated at \$113

million over the 10-year analysis period (2004–2013), resulting in an average discounted annual cost of \$11.3 million. If we divide these average annual costs by the 67,000 hiring companies estimated to be hiring drivers within a given year, the result is a total compliance cost of roughly \$169 per motor carrier in the first year of this rule’s implementation.

Data from the 1997 Economic Census, SIC 4213 (derived from NAICS Categories 484121, 484122, 484210, and 484230) divides trucking firms into 11

revenue categories, beginning with those firms generating less than \$100,000 in annual gross revenues and ending with those generating \$100 million or more. As stated, “small” trucking firms are defined here as those that generate less than \$10 million in annual revenues. The 1997 Economic Census divides these firms into eight specific revenue categories. The annual revenue categories, the number of firms in each, and the average annual revenues of firms in each category are listed below in Table 1.

TABLE 1.—AVERAGE ANNUAL REVENUES OF SMALL TRUCKING FIRMS (SIC 4213, “TRUCKING, EXCEPT LOCAL”) BY REVENUE CATEGORY

Revenue category (\$1,000s)	Number of firms/% of total small firms	Average annual revenues (\$1,000s)	Compliance costs (\$169), as % of annual revenues	Average pre-tax profit margins, by revenue size (in percent)
<\$100 .....	1,487 (5)	\$67	0.25	9.5
\$100–\$249.9 .....	8,715 (30)	160	0.11	9.5
\$250–\$499.9 .....	5,687 (19)	356	0.05	9.5
\$500–\$999.9 .....	4,890 (17)	710	0.02	9.5
\$1,000–\$2,499.9 .....	4,819 (16)	1,580	0.01	2.8
\$2,500–\$4,999.9 .....	2,414 (8)	3,490	<0.01	2.9
\$5,000–\$9,999.9 .....	1,407 (5)	7,000	<0.01	3.5
Total .....	29,419 (100)			

Source: 1997 Economic Census, Sales Size of Firms, NAICS Categories 484121, 484122, 484210, and 484230 aggregated to SIC 4213.

We applied the average annual regulatory compliance costs (\$11.3 million) to the number of existing motor carriers in the industry we anticipated will be hiring drivers in a given year (67,000). As seen in the above table, the compliance costs of this final rule per existing motor carrier (\$169) represent 0.25 percent (or a little less than 3/10 of one percent) of gross annual revenues of the smallest firms (*i.e.*, those with annual gross revenues less than \$100,000). For the second smallest revenue category compliance costs represent 0.11 percent of gross revenues in the first year.

Data obtained from Robert Morris Associates (RMA) in 1999 on pre-tax profit margins of trucking firms in SIC Code 4213 are contained in the right-hand column of the above table. For all firms with less than \$1 million in annual revenues, the RMA listed average pre-tax profit margins of 9.5 percent. Since the 1997 Economic Census data had additional revenue categories, FMCSA applied the same profit margins (9.5%) to all firms with annual revenues of less than \$1 million.

The data reveal that total discounted 10-year costs to existing motor carriers will reduce, although not eliminate average pre-tax profits for carriers in any of the carrier revenue categories. The

smallest revenue category in this table (<\$100,000 annual revenues), which represents 5 percent of the firms in the Economic Census table, will experience an average reduction in pre-tax profit margins of 2.6 percent (0.25/9.5 = 2.6%). For the second smallest revenue category (\$100–249.9), which represents 30 percent of the small carriers in this motor carrier category, pre-tax profit margins are reduced by about 1.2 percent (0.11/9.5 = 1.2%). For the third smallest revenue category, the annual compliance costs associated with this final rule are expected to reduce these carriers’ average pre-tax profit margins by 0.5 percent (0.05/9.5 = 0.5%).

Several things about this data should be noted. The above figures for compliance costs and profit margins by revenue category represent averages of the estimated impact of this rule to small motor carriers. Impacts to particular subgroups of small motor carriers, such as those with annual profits that fall within the lowest quartile of carriers in each revenue category, may be more significant than those at the median. For example, FMCSA is aware that a number of motor carriers go out of business every year. At least some percentage of those likely are for financial reasons.

Recognizing that the RMA data used here is only for firms that applied for commercial bank loans (presumably the more profitable firms in their revenue category in order to qualify for loans) and represents only one to five percent, generally speaking, of those motor carriers identified in the 1997 Economic Census, FMCSA did not feel confident in breaking out the RMA profit margin data into individual quartiles. As such, we have reported the anticipated impacts using an average compliance cost per carrier and average profit margins for carriers in each revenue category.

(4) *A description of the proposed reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirements and the type of professional skills necessary for preparation of the report.*

*Reporting.* No new reporting to the Federal government or a State is required. New reporting is required by all DOT regulated employers of the previous three years for alcohol and controlled substances, and all motor carriers for accident information, to prospective motor carrier employers. In response to prospective employees who assert their right to disagree with the

investigative driver safety performance data reported by that previous employer, previous employers are also required either to correct the data per the driver's assertion, or include the driver's rebuttal with their data.

In the case of alcohol and controlled substances, all previous employers or their agents subject to DOT alcohol and controlled substances regulations are required by 49 CFR 40.25(h) to report specified minimum employer investigative safety performance history data for their previous employees to prospective employers upon receiving an investigation.

Data to be provided will include at least the following:

1. Information verifying the driver worked for that employer and the dates of employment.
2. The driver's three-year alcohol and controlled substances history, an increase of one year from the two-year history now required, which will make it the same as the already required three-year retention of previous employer data, and two years less than the five-year retention of positive results or refusals to test.
3. Information indicating whether the driver failed to undertake or complete a rehabilitation referral prescribed by a substance abuse professional within the previous three years, but only if that information is recorded with the responding previous employer. Previous employers will not be required to seek alcohol and controlled substance data they are not already required to retain by part 382.
4. Information indicating whether the driver illegally used alcohol and controlled substances after having completed a rehabilitation referral, but only if recorded with the responding previous employer. Previous employers will not be required to seek alcohol and controlled substances data they are not already required to retain by part 382.
5. Information, only from previous employing motor carriers, indicating whether the driver was involved in any accidents as defined in § 390.15.

Previous employers or their agents for three years after a driver leaves their employ will be required to respond within 30 days to investigations from prospective motor carriers about an applicant and provide at least the minimum information specified in this final rulemaking. This final rule will enhance the ability of FMCSA and its agents to take enforcement action if a previous employer does not record and provide the information required within the specified time.

Motor carriers are already required to respond to alcohol and controlled

substances requests under part 382.

However, requests for that data can be the last information requested in the screening process. This is because of the requirement for a signed authorization from the driver applicant to release any such data, and in subsectors such as truckload, this generally occurs only for that portion of drivers still under consideration for employment, based on initial screening.

All motor carriers, and all DOT regulated entities for alcohol and controlled substances, for the previous three years, will now be required by conforming language in § 391.23 to provide the specified minimum investigative safety performance history data. That data, minus the alcohol and controlled substances data, will be requested routinely for many driver applicants from all previous employers as part of the initial employment screening process that does not require signed authorization. For those drivers still under consideration for employment, the same previous employers could receive a subsequent second request for the alcohol and controlled substances information.

The 1997 CDL Effectiveness study contained a report of focus group meetings of motor carrier safety directors. (CDL Focus Group Study, November 1996, copy of the Safety Director comments are included in docket as document 41.) It documents that a number of motor carriers require drivers to have obtained previous experience driving a CMV before that motor carrier will hire the driver. This means that employers operating more as employers of entry-level drivers, will be required to systematically provide investigative information, but will not get much benefit of receiving such investigative data from other previous employers. FMCSA estimates this to be 24 percent of the drivers under scenario 1, and 30 percent of the drivers under scenario 2.

**Recordkeeping.** It is a largely accepted motor carrier practice that alcohol and controlled substance information is kept separately from the driver qualification file. This is a practical arrangement that enables employers to defend that the data is adequately secured and access to it is controlled, in compliance with the recordkeeping requirements of parts 40 and 382.

Employers are currently required by § 391.23(c) to keep prior employer furnished investigative information in the driver qualification file. Section 4014 of TEA-21, codified at 49 U.S.C. 508, restricts usage of previous employer investigative data to just the hiring decision. Therefore, this rule

changes the specification of where previous employer investigative information is kept to now be with the alcohol and controlled substance data in the already established controlled access, secure file. Because such a file already exists, there should be no significant impact on recordkeeping requirements of prospective employers.

**Professional skills.** Motor carriers are already required to provide two-years of prior alcohol and controlled substances data. That function requires designation of a person who has the controlled access to that data. The additional task of reporting accident data could be another responsibility of the person already required to report the alcohol and controlled substances data.

(5) *An identification, to the extent practicable, of all Federal rules which may duplicate, overlap, or conflict with the rule.* The Fair Credit Reporting Act specifies procedures that must be followed by consumer reporting agencies when providing consumer reports. Motor carriers and their agents are consumer reporting agencies when providing information on drivers' safety records to prospective motor carrier employers, as required by this rule. The FCRA specifically authorizes the provision of information "for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee" [15 U.S.C. 1681a(h)]. The purpose of this rule is therefore consistent with the FCRA. Furthermore, the rule is drafted following the model of the FCRA. FMCSA believes there is no duplication, overlap, or conflict with the FCRA or with any other Federal statute or rule."

(6) *A description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.* The FHWA published an NPRM on March 14, 1996 (61 FR 10548) following the detailed prescriptive specifications contained in section 114 of the HazMat Act. It proposed processes for investigations to previous employers, the required provision of that data, and use of that data in the hiring decision process. The FMCSA published a SNPRM on July 17, 2003 (68 FR 42339) incorporating additional prescriptive requirements contained in section 4014 of TEA-21, and to concerns expressed by various commenters, including the SBA to the NPRM. This final rule responds to concerns expressed in response to the SNPRM. FMCSA continues to believe that the agency does not have the latitude to propose alternatives other than discussed in this rule, because of

the prescriptiveness of the HazMat Act and TEA-21.

*Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a final rule likely to result in a Federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of \$100 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. FMCSA has determined that the changes in this rulemaking will not have an impact of \$100 million or more in any one year.

*Executive Order 12988 (Civil Justice Reform)*

This action 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)*

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing "economically significant" rules that also have an environmental health or safety risk that an agency has reason to believe may disproportionately affect children must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a "covered regulatory action" an evaluation of its environmental health or safety effects on children. The agency has determined that this rule is not a "covered regulatory action" as defined under Executive Order 13045.

This rule is not economically significant under Executive Order 12866 because the FMCSA has determined that the changes in this rulemaking would not have an impact of \$100 million or more in any one year. This rule also does not concern an environmental health risk or safety risk that would disproportionately affect children.

*Executive Order 12630 (Taking of Private Property)*

This rule will 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)*

As stated in other parts of this final rule, Congress first mandated details about checking driver safety performance history in section 114 of the HazMat Act. It directed the Secretary to amend the FMCSRs to specify the minimum driver safety performance history information that a motor carrier must investigate from the motor carrier employers and other DOT regulated employers for the preceding three years, and to require those previous employers to provide that data to the requesting motor carrier within 30 days.

Comments to the docket in response to the 1996 NPRM expressed great concern that the agency's proposals in the 1996 NPRM could subject them to considerable litigation and expense by drivers denied employment based on the proposed safety performance history data. Congress responded to those concerns by implementing section 4014 of TEA-21,<sup>3</sup> by granting limited liability to employers and agents furnishing and using this information by preempting State and local laws and regulations creating such liability. TEA-21 also directed FMCSA to include provisions implementing this limited liability, and driver protection rights, in a revision to the previously issued 1996 NPRM. The intent of the Act is to " \* \* \* provide protection for driver privacy and to establish procedures for review, correction, and rebuttal of the safety performance records of a commercial motor vehicle driver."

In the SNPRM, the FMCSA proposed a process similar to what is specified under the FCRA for protecting a driver's rights when investigating previous employer background information. The SNPRM also proposed processes for recordkeeping to make it possible for FMCSA to verify that previous and prospective employers are conforming to the agency's proposed processes protecting driver rights.

<sup>3</sup> Section 4014 of the 1998 TEA-21 explicitly says "No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using safety performance records in accordance with regulations issued by the Secretary to carry out this section." This Federal preemption of State or local jurisdictions' liability rights is codified at 49 U.S.C. 508, and is intended to facilitate the transfer of this vital investigative driver safety information between DOT regulated employers. The liability limitation does *not* apply if it is proven the previous employer knowingly provided incorrect information.

Because the preemption requirement set forth in the SNPRM was established by TEA-21, this was the first time this preemption provision was set forth as a proposed regulatory change. Consequently, the SNPRM sought public comments on possible compliance costs or preemption implications from elected State and local government officials or their representatives on whether there may be any major concerns about the proposed preemption of State and local law and regulations for these Federally protected interests. FMCSA did not receive any comments on this issue.

Accordingly, FMCSA determined that implementation of this rule change, in conformance with the specification contained at 49 U.S.C. 508(c), will not add substantial additional compliance costs nor preemption burdens to States or local subdivisions. We also determined that these changes will have no effect on the State or local subdivisions' ability to discharge traditional governmental functions. FMCSA has analyzed this action in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and determined that there are not sufficient federalism implications on States that would limit the policy discretion of the States.

*Executive Order 12372 (Intergovernmental Review)*

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

*Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires Federal agencies to obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. FMCSA has determined that the changes in this final rule will impact and/or reference three currently-approved information collections (IC), as follows: (1) Driver Qualification Files, OMB Control No. 2126-0004 (formerly 2125-0065), approved at 941,856 burden hours through December 31, 2005; (2) Accident Recordkeeping Requirements, OMB Control No. 2126-0009 (formerly 2125-0526), approved at 37,800 burden hours through September 30, 2005; and (3) Controlled Substances and Alcohol Use and Testing, OMB Control No. 2126-0012 (formerly 2125-0543),

approved at 573,490 burden hours through August 31, 2004.

There is no effect on the IC burdens covered by Controlled Substances and Alcohol Use and Testing, OMB Control No. 2126-0012. The IC burdens for investigating and reporting requirements are addressed in the IC Driver Qualification Files, OMB Control No. 2126-0004.

The effect of this final rule on the IC burdens of Accident Recordkeeping Requirements, OMB Control No. 2126-0009 is limited to the additional costs for maintaining the accident records for two additional years. FMCSA estimates maintaining data for two additional years will result in an additional 252,000 records. The cost for keeping these records is estimated at \$0.15 per record per year, derived from Association of Records Management Activities (ARMA) costs.

FMCSA's estimate of 252,000 additional records is derived as follows. The FMCSA estimates there are approximately 155,000 accidents (as defined in § 390.5 of the FMCSRs) annually involving trucks plus an additional 17,000 accidents involving buses (source: General Estimate System, p. 28). The issue is to estimate how many of these are subject to FMCSA regulations that require the motor carrier to retain accident information in the accident register, pursuant to § 390.15(b)(1).

FMCSA estimates that approximately 80 percent of these accidents involve trucks and buses operated by interstate motor carriers. Additionally, most buses involved in crashes are school or transit buses and are not subject to this recordkeeping requirement. FMCSA estimates about 85 percent of those interstate bus accidents are not subject to accident register retention requirements.

Thus, the number of accidents required by § 390.15(b)(1) to be recorded on accident registers is estimated at:  $(0.80 \times 155,000) = 124,000$  interstate truck accidents that must be in accident register.  
 $(0.80 \times 0.15 \times 17,000) = 2,040$  interstate bus accidents and regulated by FMCSA.

Total accidents that must be placed in motor carriers' accident registers = 126,000 (rounded to the nearest thousand).

Thus, the cost for maintaining this accident information an additional two years is calculated as \$37,800 (126,000 accidents per year  $\times$  2 years  $\times$  \$0.15 per record = \$37,800.)

There are significant adjustments and changes caused by this final rule

concerning IC burdens of driver safety performance history records covered by Driver Qualification Files, OMB Control No. 2126-0004. These files are now stored according to § 391.23, called the Driver Qualification file, and § 391.53, called the Driver Investigation History file. The latter contains information that must be secured and controlled regarding who can see the information and when.

For purposes of this information collection, the agency is using 6,458,430 as the estimate of the number of interstate and intrastate drivers that could be impacted by this proposal. Several existing FMCSA information collections employ this number (OMB Control No. 2126-0001—Drivers Records of Duty Status; OMB Control No. 2126-0004—Driver Qualification Files; and OMB Control No. 2126-0006—Medical Qualification Files). The agency believes this high-end estimate captures all drivers who may be affected by the new information collection burdens being proposed here. The agency continues to explore methods of more precisely determining the number of drivers that could be affected by FMCSA regulations.

#### Number of Drivers Screened

Previous information collections have estimated there are burden hours associated with 839,596 driver job openings each year. That represents a national average turnover rate of 13 percent for the 6,458,430 truck driver positions. However, it is also well known that some sectors of the truck driving industry are characterized by a high driver turnover rate, e.g., truckload.

Comments to the docket for the 1996 NPRM describe various driver-screening processes used by trucking companies to fill these driver positions. In the 2003 SNPRM, FMCSA specifically requested comments addressing on average how many applicants are screened per job opening, or what percentage of applicants are denied employment using current screening practices. Comments to the docket for the SNPRM supported the premise put forward in the preamble that on average more than one applicant is screened for each job. However, there was no clear agreement on what is a representative average number of applicants per job in the many different sub-sectors and industries covered by the FMCSRs.

ATA made inquiries to some of its members and submitted to the docket that the weighted mean of their sample is 80.1 percent of driver applicants are denied employment. However, TCA and others in the truckload sector point out that in their portion of the industry they

perceive the labor market to be tight, i.e., a shortage of qualified drivers. CTS Con-Way Transportation Services points out that, "If employers need drivers and they are in short supply, [the motor carriers] will hire who is available." These comments imply there could be less than an 80.1 percent denial rate in their subsector of the trucking industry.

Comments to the docket for the NPRM and the SNPRM make it clear that different employers covered by the FMCSRs use different screening processes. Some employers physically see and screen the driver on criteria other than driving (because driving is an ancillary duty) before deciding to perform the inquiries and investigations required by § 391.23. On the other hand, some motor carriers such as in the truckload subsector begin the inquiry and investigation process immediately for all driver applicants based on phone or other electronic applications for each applicant. (See document 36 in this docket; record of meeting with DAC Services, Inc.)

AT&T points out they currently perform a substantial screening of potential employees on the company job criteria that forms the major portion of job responsibilities for their company. It is only for the select subset of applicants, after being successfully identified as someone the company would hire based on the skills they possess, that the inquiries and investigations required by § 391.23 are performed. This is because driving a CMV is a minor portion of their job responsibilities and would only prevent the applicant from performing that function, not qualify them to perform that function. Thus, the only drivers that companies such as AT&T want to screen according to the requirements of § 391.23, are drivers who have invested considerably in acquiring skills sufficient to qualify to work for a company in that trade, performing duties that also require them to drive a CMV covered by the FMCSRs.

A similar pattern applies to a number of employers covered by the FMCSRs, but whose primary business requires the employee to have skills in addition to being a driver. All such employees have much more at stake to preserve their professions, and have much more to lose if they illegally use alcohol or controlled substances or are involved in numerous accidents. The net result is that drivers who pass the technical skills screening to be considered for hiring by such firms also covered by the FMCSRs, very likely have considerably less than an 80.1 percent denial rate based on subsequent screening to

qualify as a truck driver for their ancillary job responsibilities.

Examples of skills or trades where many CMV drivers are subject to the FMCSRs include the following industrial classifications: bakeries, petroleum refiners, retailers, farmers, bus and truck mechanics, cement masons and concrete finishers, driver/sales workers, electricians, heating air conditioning and refrigeration mechanics and installers, highway maintenance workers, operating engineers and other construction equipment operators, painters, construction and maintenance workers, plumbers, pipefitters and steamfitters, refuse and recyclable material collectors, roofers, sheet metal workers, telecommunications equipment installers and repairers, welders, cutters, solderers and brazers.

There is agreement between the agency, as expressed in the preamble text of the SNPRM, and commenters to the docket in response to this question in the SNPRM. Namely, the national average is more than one applicant screened pursuant to these regulations for each job opening. But, there is no clear agreement on how many. While the estimate of 5 applicants per hire presented by ATA may be representative of their membership, it appears very excessive for numerous other industries also covered by the FMCSRs. As a result, FMCSA is using the estimate that on a national average across all industries covered by the FMCSRs, there are 3 applicants screened pursuant to these regulations for each job, *i.e.*, two denials and one hire. Clearly, the discussion indicates the number will be higher in some subsectors and industries, and lower in others.

#### Experienced Versus Inexperienced

There is an additional aspect of this screening. Namely, what percentage of drivers screened will be experienced drivers with previous employer safety performance history information that can be investigated? What percentage are inexperienced or new entrant drivers with no previous employers to investigate? These numbers are derived from the estimates given in the 1997 Gallup study for the ATA Foundation.

Based on this final rule establishing a new requirement for previous employers to report driver safety performance history information, drivers will no longer be able to hide their safety performance history information by jumping from one motor carrier to another. Thus, drivers with poor safety records will be denied employment with a new motor carrier

employer, and their safety record will accumulate enough to cause the current employer to remove them as part of the § 391.25 required annual review. As a result, prospective motor carriers will have a much stronger basis for knowing whether an applicant with previous driving experience is a safety risk.

#### Adjustments and Changes to Estimated Burden

Adjusting the estimate of number of applicants screened per job opening from one to three requires a substantial adjustment in the existing estimated burden for performing the already existing regulatory requirements for inquiries and investigations. In addition, it also requires a substantial revision to the estimates presented in the SNPRM for changes in new burdens created by this final rule.

The adjustments for the existing regulatory IC burden are entirely in the First Element of the existing information collection requirements. These are explained in detail below under the First Element of the IC.

Both small and large changes (increases in burdens) are created in the same First Element, and large changes or increases are created in the new Third Element. These are explained in detail below under the First and Third Elements of this IC.

A summary of all adjustments and changes is presented at the end of this section along with the existing approved burdens.

#### Structure of Elements

The currently-approved Driver Qualification Files information collection can be broken down into two elements: (1) § 391.23, addressing the burdens of prospective and previous employers and driver applicants during the hiring process, and (2) § 391.25, addressing the burdens related to carriers and drivers who are currently employed (*e.g.*, annual review). This rule requires revisions to the first and leaves the second unchanged. In addition, FMCSA is creating a new third element—to address new burdens imposed by the rule on the previous and prospective employers of drivers. The resulting three elements of this information collection will be: (1) The hiring process (prospective employers and driver applicants), (2) the annual review (current employers and drivers), and (3) the responsibilities of previous employers related to the hiring process.

*First Element of IC.* The changes to the first item—the hiring process—address the specific types and timeframes of driver safety performance

history that must be requested (includes accident data).

The burdens required for the existing driver application process must be adjusted substantially. This is because FMCSA now assumes there are three applicants per job opening, not one. On a national average, the prospective motor carrier denies two out of three applicants employment as a driver as part of the existing screening processes. Plus, for experienced drivers on average there is more than one previous employer that must be investigated.

The number of inquiries for driver records that prospective employers must make increases from the SNPRM estimate of 839,596 to 2,641,788 applicants. Using the Gallup estimate of just under 80 percent of driver hires will come from existing drivers, we initially assume approximately 80 percent of the 839,596 job openings, or 666,677, would be filled by experienced drivers. For experienced drivers with safety performance history information we estimated there is a ratio of 3 drivers screened for each job opening, meaning there will be 2,000,031 experienced driver applicants ( $666,677 \times 3 = 2,000,031$ ).

The number of new entrant driver applications is calculated as the initial approximately twenty percent of jobs,  $172,919 \times 3$  applicants, or 518,757. To this is added the number of new entrant applications to fill the 41,000 jobs that were not filled by experienced drivers because of the new safety performance history data. This is  $41,000 \times 3 = 123,000$ . Thus, the total number of applications by new entrants is  $518,757 + 123,000 = 641,757$ . And, the total number of applications by all drivers is  $2,000,031 + 641,757 = 2,641,788$ .

The total burden hours for drivers making applications for a job increases from 41,981 to 132,090 hours. The burden estimate for the application process remains at 2 additional minutes for the driver to furnish the motor carrier unique information and 1 minute for the motor carrier to review that unique information. Based on the estimation of 2,641,788 applications, the burden is 132,090 hours ( $2,641,788$  applications  $\times 3$  minutes/60 minutes/hour = 132,090 hours rounded to the nearest hour).

In order to distinguish the adjustments from the changes to the burden, we separated analysis of the positions for which high risk drivers will be denied employment because of the new safety performance history information.

*Adjustment.* The adjustment to the burden for this element is caused by the adjustment in the assumed number of



drivers that must be screened for each job opening. Experienced driver applications are calculated as 2,000,031 (666,677 × 3 applicants per job). Inexperienced driver applications make up the difference, calculated as 518,757 [(839,596 – 666,677) × 3]. This totals 2,518,788 applicants (2,000,031 + 518,757 = 2,518,788). The adjusted burden hours for this element thus are 125,940 hours (2,518,788 applications × 3 minutes/60 minutes/hour = 125,940 rounded).

*Change.* The change to the burden for this element is caused by the high risk experienced drivers who will be denied employment. We estimated that at 41,000 positions. These will be filled by new entrant drivers. The change in burden is calculated as 6,150 hours (41,000 positions × 3 applicants/positions × 3 minutes/60 min/hr = 6,150 hours).

The 41,000 denials are calculated on the following logic. Denials because of new accident data is calculated as (0.148 annual accidents per driver × 3 years × 0.1288 percent of drivers denied employment based on at-fault accident data × 666,677 experienced job openings for drivers coming from DOT- and FMCSA-regulated previous employers required to provide history = 38,125 drivers denied employment based on new accident data.)

Denials because of an additional year of alcohol and controlled substances positive tests or refusals to test are calculated as: 0.001 percent of the experienced drivers (666,677) do not pass because they test positive and 0.015 of them fail because they refuse to test. This equals to a total of 10,666.84 experienced drivers who do not pass or refuse to test for alcohol and controlled substances. FMCSA estimates that 25 percent of these 10,666.84 experienced drivers (or 2,667 drivers) would be denied employment because of the additional year of alcohol and controlled substances positive tests or refusals to test [(0.0001 × 666,677 = 66.668) + (0.015 × 666,677 = 10,000.16) = 0.25 × 10,666.84 = 2,667 rounded].

Rounded to the nearest thousand, this represents 41,000 additional job openings that will be involved in the hiring process. For purposes of not over estimating the benefits associated with this rule, FMCSA assumes the applicants for these 41,000 job openings will be new entrants from outside the existing industry without any safety performance history information on file.

The burden for obtaining the driver records and analyzing them under the current regulations increases from 69,966 to 209,899 hours, an adjustment of 139,933 hours. The burden estimates

for obtaining the driving record remains at 4 minutes, and for reviewing at 1 minute. Based on the adjusted estimation of 2,518,788 inquiries, the burden is 209,899 hours (2,518,788 inquiries × 5 minutes/60 minutes/hour = 209,899 hours).

The additional 41,000 job openings because of the denials (based on the driver safety performance history information) require the motor carrier to obtain and review the MVR for each of the 123,000 applicants. This is a change of an additional 10,250 hours (41,000 jobs × 3 applicants × 5 minutes to obtain and review/60 minutes/hour = 10,250 hours).

For purposes of this information collection, the agency estimates that, on average, at a 13 percent annual turnover rate, each applicant will have had 1.39 employers in the past 3 years. If all applicants were investigated, the number of investigation requests for safety performance history information would be greater than 3,501,115 (1.39 previous employers × 839,596 job openings × 3 applicants = 3,501,115).

However, the Gallup study for the ATA Foundation estimated in 1997 that only approximately 80% of the jobs will be filled with experienced drivers, *i.e.*, those who worked for previous employers regulated by DOT or FMCSA. Upon implementation of this final rule, that percentage of jobs to be filled with experienced drivers decreases to about 75%. This is because of the experienced drivers who will be denied employment because of this final rule. Therefore, the number of employers who will be investigated for experienced drivers is calculated at 2,780,043 (1.39 previous employers × 666,677 experienced job openings × 3 applicants = 2,780,043).

The burden for investigation of previous employers under the current regulations increases from 139,933 to 463,341 hours, an adjustment of 323,408 hours. The burden estimate for investigating previous employers remains at 10 minutes per investigation. Based on the assumption of 2,000,031 applicants, the burden is 463,341 hours (1.39 previous employers × 2,000,031 applicants × 10 minutes/60 minutes/hour = 463,341 hours).

There is no additional burden for investigating previous employers of new entrant applicants for these jobs because we assumed these applicants come from jobs that are outside the FMCSA or any other DOT agency's regulatory authority. Thus, there are no regulated previous employers to be investigated nor any that are required to provide safety performance history information.

For most drivers, there will be no accident or alcohol and controlled

substances data to report. For those drivers, the amount of time the prospective employer must spend reviewing the data obtained will be only seconds. However, for those drivers who have any such data reported to the prospective employer, substantial time may be spent reviewing and evaluating that data to determine if that driver is a reasonable risk to hire. The majority of this review time thus will be spent on the small number of drivers for whom accident and/or alcohol or controlled substance information is reported. In order to turn this into a usable metric, FMCSA assumes that on average prospective employers will spend 10 minutes evaluating the additional safety performance history data made available to them. FMCSA believes this is likely a high estimate, and therefore does not understate the total burden that will be placed on motor carriers. This leads to a burden change of an estimated additional 463,341 burden hours (2,780,043 investigations × 10 minutes/60 minutes/hour = 463,341 hours).

This rule requires prospective motor carriers to notify driver applicants that they have the right to be provided a copy of the safety performance history data provided to the prospective motor carrier by previous employers for the driver applicant to review. If the driver applicant wants to receive a copy, the driver must request the copy in writing. If the driver wants the previous employer to correct the data, the driver applicant must request the previous employer to correct the data, or to include a rebuttal furnished by the driver. The majority of these notifications would be made via a statement on the job application; therefore, we are not assigning an additional information collection burden for this notification. FMCSA requested comments in the SNPRM on whether there might be any significant burden in sectors of the industry using telephone job application processes. No comments specific to this question were received. One commenter said it would be a major imposition for them to create new employment forms to include such a notification. Other comments asked FMCSA to provide a template statement so they could easily incorporate such a notification. In general, it appears most carriers feel this could be easily accommodated within their employment applications. Thus, there is 0 burden hours assumed for this function.

In many cases, drivers have an idea of what type of safety performance history they have on file with their previous employers. Thus, although FMCSA does not have any actual data, it seems

unlikely every driver will go through the trouble to submit a request in writing to obtain the information provided to the prospective employer. FMCSA assumes that one-half of the experienced driver applicants investigated who are not hired would request to receive the previous employer information provided to the prospective employer. We assume  $666,677 \times 3 = 2,000,031$  experienced applicants of which  $(666,677 - 41,000 =) 625,677$  are hired. This means  $(2,000,031 - 625,677 =) 1,374,354$  experienced driver applicants are not hired. One half of these, or 687,177 drivers, will request copies of the safety performance histories furnished by previous DOT- or FMCSA-regulated employers.

Therefore, the change in the additional burden estimate for prospective employers to provide a copy of the previous employer information to the drivers who choose to request it is 57,265 burden hours [687,177 drivers  $\times$  5 minutes for prospective employers to provide the data to each of those drivers, divided by 60 minutes = 57,265 hours].

Therefore, the total burden to notify of rights and to provide requested copies of histories is 57,265 hours  $(0 + 57,265 = 57,265$  hours).

Thus, the total annual burden associated with the first element is 1,336,186 hours (125,940 hours + 6,150 hours + 209,899 hours + 10,250 hours + 463,341 hours + 463,341 hours + 57,265 hours = 1,336,186 hours).

*Second Element of IC.* The second element of the Driver Qualification Files—annual review—would be unaffected. It remains at 187,294 burden hours for obtaining the list or certification of annual violations; 468,236 burden hours for the motor carrier to obtain and review the MVR; and 37,674 burden hours for additional or duplicate recordkeeping associated with using multi-employer drivers.

Thus, the total annual burden associated with the second element remains at 693,204 hours (187,294 hours + 468,236 hours + 37,674 hours = 693,204 hours).

*Third Element of IC.* The third element of this information collection—related to the hiring process—addresses the substantial new burdens created due to the changes made by this final rule. In the past, previous employers were not required to provide safety performance history on their former employees. However, this rule requires all previous employers to provide driver safety performance history data for the 3 year period preceding the date of the

request. The annual change in IC burden for previous employers reporting this information is estimated to be 231,670 burden hours [2,780,043 investigations  $\times$  5 minutes, divided by 60 minutes = 231,670 hours].

This rule also establishes a new right for former drivers to request correction or rebut employment data supplied by previous employers to prospective employers. Prospective employers are required to provide the driver applicant with copies of the information it receives from the previous employer. In turn the previous employer is required to: (1) Provide the past employee/driver the opportunity to request correction; (2) review such a request, if submitted; (3) correct records, if persuaded by the driver's request; (4) append the driver's rebuttal to the record, if not persuaded to revise their records by the rebuttal; and (5) keep a copy of the rebuttal with the file; and (6) send (a) the revised record or the rebuttal to the prospective employer, and (b) the employment history with the appended rebuttal when requested in the future by any subsequent prospective employer.

If a driver wishes to pursue getting a previous employer to correct their previous driver safety performance history data, or to prepare a quality rebuttal for that employer to include with the safety performance history data, the driver will have to commit a considerable amount of time and effort. FMCSA estimates that as 2 hours. As a result, FMCSA believes only a small percentage of such drivers denied employment will decide it is worth the effort. The agency estimates that 10 percent of the drivers requesting to see previous employer information would choose to expend the effort to protest their driver safety performance history provided by former employers. Thus, 68,178  $(687,177 \times 0.10)$  drivers would actually request corrections or submit rebuttals. The FMCSA further estimates that on average it would take the previous employer 2 hours to address and respond to such request for correction or rebuttal. Therefore, the change in burden estimate for this activity is 272,712 hours [ $(68,178 \times 2$  hours per protesting driver = 136,356 hours) +  $(68,178$  hours  $\times$  2 hours per previous employer = 136,356 hours) = 272,712 hours].

The total change in annual burden caused by this rule associated with this third IC item is 504,382 hours [231,670 hours (burden associated with previous employers providing safety performance history) + 272,712 hours (burden

associated with rebuttals/protests) = 504,712 hours].

#### Summary

Accordingly, Table 2 estimates that the total burden adjustment for the Driver Qualification Files information collection associated with the revised number of driver applicants per job opening is 547,300 hours [799,180 hours is the total adjusted burden for these three activities: 125,940 hours (application) + 209,899 hours (request MVR and review) + 463,341 hours (request/investigate previous employers information) – the currently approved burden of 251,880 hours for the same activities: 41,981 hours (application) + 69,966 hours (request MVR and review) + 139,933 hours (request/investigate previous employers information) = an adjustment of 547,300 hours].

The amount of current burden for the annual review remains the same at 693,204 hours [187,294 hours (list or certify violations) + 468,236 hours (annual review of the driving record) + 37,674 hours (multi-employer drivers) = 693,204 hours].

The total change or new IC burden hours caused by this rule is estimated as 1,041,388 hours [463,341 hours (review/evaluate data received) + 57,265 hours (notification and driver rights to review data received) + 6,150 hours (for the additional 41,000 jobs—41,000  $\times$  3 applicants—that will need to go through the application hiring process) + 10,250 hours (for the additional 41,000 jobs—41,000  $\times$  3 applicants—that need to have their MVRs obtained and reviewed by prospective employers) + 231,670 hours (previous employers providing 3 years of safety performance history) + 272,712 hours (duties of previous employers and drivers associated with drivers who rebut and protest employment history) = 1,041,388 hours].

A more detailed summary of the adjusted burden and changes from new IC burden requirements is provided in the Paperwork Reporting Act Supporting Statement.

You may submit comments on the *information collection burden* addressed by this final rule to the OMB. The OMB must receive your comments by April 29, 2004. You must mail or hand deliver your comments to: Attention: Desk Officer for the Department of Transportation, Docket Library, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Activities	Currently approved burdens	Continuing burden hours	Adjusted burden hours	Changed burden hours
Application .....	41,981	.....	125,940	
Additional 41,000 drivers application .....		.....		6,150
Request MVR and review .....	69,966	.....	209,899	
Request 41,00 Additional MVRs and review .....		.....		10,250
Request/investigate previous employers information .....	139,933	.....	463,341	
Review previous employer information received .....		.....		463,341
Notify driver of rights and provide info from previous employer to drivers requesting copy to review .....		.....		57,265
List or certification of violations .....	187,294	187,294		
Annually obtain and review driving record .....	468,236	468,236		
Multi-employer drivers .....	37,674	37,674		
Providing 3 years of safety performance history .....				231,670
Driver rebuttals .....				272,712
Sub-Totals .....		693,204	799,180	1,041,388
Grand Totals .....	945,084	.....	.....	2,533,772

### National Environmental Policy Act

The agency analyzed this final rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under our environmental procedures Order 5610.1 (published in the March 1, 2004 **Federal Register** at 69 FR 9680 with an effective date of March 30, 2004), that this action is categorically excluded (CE) under Appendix 2, paragraph 6.d of the Order from further environmental documentation. That CE relates to establishing regulations and actions taken pursuant to these regulations that concern the training, qualifying, licensing, certifying, and managing of personnel. In addition, the agency believes that the action includes no extraordinary circumstances that would have any effect on the quality of the environment. Thus, the action does not require an environmental assessment or an environmental impact statement.

We have also analyzed this rule under the Clean Air Act, as amended (CAA) section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's General Conformity requirement since it involves policy development and civil enforcement activities, such as, investigations, inspections, examinations, and the training of law enforcement personnel. See 40 CFR 93.153(c)(2). It will not result in any emissions increase nor will it have any potential to result in emissions that are above the general conformity rule's *de minimis* emission threshold levels. Moreover, it is reasonably foreseeable that the rule change will not increase total CMV mileage, change the routing of CMVs, how CMVs operate, or the

CMV fleet-mix of motor carriers. This action merely continues requiring each motor carrier to inquire into the driving record and investigate the previous safety performance history of each prospective new driver, and establishes a requirement, including driver rights, for previous DOT and FMCSA regulated employers to provide this safety performance history to improve CMV safety on our nation's highways.

#### Executive Order 13211 (Energy Supply, Distribution, or Use)

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because it is not economically significant and not likely to have a significant adverse effect on the supply, distribution, or use of energy. Additionally, the Administrator of the Office of Information and Regulatory Affairs has not designated this rule as a significant energy action. For these reasons, a Statement of Energy Effects under Executive Order 13211 is not required.

#### Regulatory Evaluation: Summary of Benefits and Costs

##### I. Background and Summary

The primary new costs created by this final rule involve previous employers providing and prospective motor carriers reviewing driver safety performance history data for use in hiring decisions, and dealing with driver rights to request correction or rebut the data. The specific types of new driver safety performance data include providing driver accident, alcohol/controlled substance positive test results

or refusals to be tested, and any rehabilitation program data the previous employer may have.

Specific new costs to previous employers include reporting this specified investigative data to all prospective motor carrier employers of drivers for three years after a driver leaves their employ, and dealing with any of their previous drivers that request correction or inclusion of a rebuttal to the safety performance history data the previous employer reports. Current regulations require motor carriers to collect and retain accident data for one year on their drivers. This rule requires retaining accident data for an additional two years on each of its drivers.

Before this there was no requirement for previous motor carriers to report accident information to prospective motor carrier employers. This rule requires such reporting. Additionally, previous employers are required to report an additional year of positive alcohol/controlled substances tests (and refusals to test) and any rehabilitation program data they may have to prospective motor carriers, i.e., three-years in lieu of the two years of data currently required by existing regulations.

Previous employers are already required by parts 40 and 382 to report on driver positive tests or refusals to be tested regarding alcohol and controlled substances use, as well as whether any such driver completed the return to duty requirements (if the previous employer has that information) within the preceding two years. This rule adds a conforming requirement to the § 391.23 investigation provision that previous employers must report the alcohol and controlled substances information as part of the safety

performance information, plus increases the reporting period for this data from two to three years. (Previous employers are already required to retain this data for at least three years.)

Specific costs to prospective employers include reviewing all responses and any driver accident and alcohol/controlled substances data received from previous employers and using that data in hiring decisions. Current regulations require prospective employers to inquire to obtain driver Motor Vehicle Record(s) (MVRs) from appropriate States and to investigate previous motor carriers for the preceding three years.

As explained in the SNPRM, this final rule relies on the interpretation that previous employers cannot make receiving a fee for providing this information a precondition of releasing the minimum driver safety performance history information within the specified maximum response period. Notwithstanding that previous employers can set a fee and ultimately enforce collection of that fee by going to court, many employers are unlikely to enforce collection because they are small entities with limited resources. Thus, they could wind up not receiving reimbursement for their cost of providing the safety performance history information. On the other hand, in some segments, at least some of these costs could be relatively equally shared, *i.e.*, many employers will get value from investigations to other employers as well as costs from providing the information to others.

This final rule reasserts the position presented in the SNPRM, namely, these costs are not always equally shared. (See document 41 in the docket for this rule.) Some firms hire new entrant drivers who systematically leave those employers to work for firms that require several years of experience before they will hire a driver. This analysis estimates that as 24 percent in scenario 1, and 30 percent in scenario 2. These distributional effects are relevant to SBA concerns about small businesses, and are addressed in other sections of this final rule, particularly the Regulatory Flexibility Act analysis and the Paperwork Reduction Act analysis. However, who incurs these costs is not directly important to the estimation of total costs of this rule addressed in this section, since they represent transfer costs among employers.

The discussion that follows is a summary of the costs and benefits associated with this rule. For a complete discussion of the data used, assumptions made, and calculations performed for this analysis, the reader is

referred to the docket, where a copy of the full regulatory evaluation report for this final rule is found as document 86.

The summary of costs associated with this rule is presented as Table 3.

TABLE 3.—SUMMARY OF COSTS, 2004–2013, IN MILLIONS OF DOLLARS

First Year Costs .....	\$15
Total Discounted Costs, 10-Year Period .....	113

These figures represent FMCSA’s estimate of the costs associated with implementation of this rule. Where uncertainties exist regarding these cost estimates, they are noted in the discussions.

Changes From SNPRM

These regulatory evaluation estimates incorporate information provided to the docket in response to questions in the SNPRM. They contain both substantial adjustments and changes from the numbers presented in the SNPRM analysis.

The number of drivers screened for each job opening is a good example of where a major adjustment in burden resulted from submissions to the docket in response to questions asked in the SNPRM. The issue is how many drivers, on average, are investigated and inquired about for every driver hired. The regulatory evaluation in the SNPRM used one driver applicant per job. The text of the SNPRM pointed out FMCSA had conducted a study that reports the number is much higher than one to one (see document 41 in the docket), and asked for information regarding what the estimate should be. The responses to the docket further confirmed there currently are on average multiple rejections per driver hired. The explanation in the paperwork reduction analysis explains how FMCSA determined an estimated average of three applicants per job instead of the former assumption of one applicant per job.

Another example of a change is the percentage of truck drivers that could be found at fault for accidents. This final rule uses estimates developed from preliminary results of FMCSA’s Large Truck Crash Causation Study that were not available when we initially prepared our benefits analysis for the SNPRM. They are used in this final rule as an update for the scenario 1 analysis. The crash causation data supercedes the “contributing factors” data used in the SNPRM analysis. They allow us to establish a much stronger link between the actions taken by the truck driver and the cause of the accident than does

information regarding “contributing factors” to an accident.

Estimating Percentage of Drivers at Fault

The SNPRM used the estimate that 30 percent of accidents a truck driver is involved in could be attributed as the truck driver being at fault. This was based on data about driver fault rates for two vehicle accidents, which was the only relatively definitive data available when the SNPRM was finalized.<sup>4,5</sup> This final rule uses 38.64 percent as the estimate for the accidents the driver could be attributed to the driver being at fault. This revised percentage of at faults is calculated using the new preliminary data from the Large Truck Crash Causation Study.<sup>6</sup> This number was calculated in the following manner.

The LTCCS subdivides its analysis to examine the actions taken by the truck driver in single-truck accidents, and those taken by the truck driver and other driver(s) in two- and multi-vehicle accidents involving trucks. Thus we need an estimate of the percentage of driver fault in each category of accident, and then to combine them to get an overall value.

Examining preliminary data on single-truck accidents, the LTCCS study researchers found that in 32 of the 50 accidents examined to date (or 64 percent), some action by the truck driver (driver non-performance, driver recognition, decision, or performance error) was the “critical reason” for the accident. In two-vehicle accidents involving a truck, the preliminary data revealed that in 46 of the 157 accidents examined to date (or 29.3 percent), some action taken by the truck driver was the critical reason for the accident. In multi-vehicle accidents involving a truck, the preliminary data revealed that in 26 of 78 accidents examined to date (or 33 percent), some action by the truck driver was the critical reason for the accident.

In order to determine the overall percentage of total truck-related accidents where the truck driver’s action (or inaction) was the cause (and therefore could be “charged” with the accident), we must also know the distribution of single-truck, two-vehicle,

<sup>4</sup> “Large Truck Crash Facts 2000,” Federal Motor Carrier Safety Administration, Analysis Division, March 2002. This document is available online at <http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/2000LargeTruckFactsx.pdf>.

<sup>5</sup> “Large Truck Crash Profile: The 1997 National Picture,” by the Analysis Division, Office of Motor Carriers, Federal Highway Administration, September 1998. Table 15 from this report is available in the docket for this rulemaking as document 87.

<sup>6</sup> Progress presentation on the Large Truck Crash Causation Study is included in the docket as document 88.

and multi-vehicle accidents involving a truck as a percent of total truck-related accidents. Categorizing truck-related accident data from MCMIS into single-, two-, and multi-vehicle truck accidents for fiscal years 2001 through 2003, we found that single-truck accidents represented an average of 24.5 percent of all truck-related accidents in MCMIS over these three years, while two-vehicle accidents represented 52.7 percent, and multi-vehicle accidents represented 22.8 percent. These serve as the weighting factors for calculating the overall average percentage of accidents where the truck driver likely was at fault.

Multiplying the percent of total accidents represented by each accident category by the percent of each accident category where the truck driver was at fault, we derived an estimate of the percent of all truck-related accidents where the truck driver would be at fault. The result is 38.64 percent.

24.5% single-truck accidents  $\times$  64% of these where the truck driver was at fault = 15.68.

52.7% two-vehicle accidents  $\times$  29.3% of these where the truck driver was at fault = 15.44.

22.8% multi-vehicle accidents  $\times$  33% of these where the truck driver was at fault = 7.52.

15.68 + 15.44 + 7.52 = 38.64.

This "38.64 percent" estimate represents the percent of all truck-related accidents where the truck driver would have taken an action that served as the critical reason for the accident and therefore could be charged with the accident. Of course, in making this determination, we assumed that the 285 large truck accidents examined to date as part of the Large Truck Crash Causation Study are representative of all truck-related accidents in recent years. We used these results to determine the number of drivers denied employment under scenarios 1 and 2 in this analysis of the final rule.

#### Adjustments Versus Changes

When making such substantial revisions, it is important to distinguish between what are adjustments to the existing burden and what are new changes in burden caused by this rule. Adjustments such as the prospective motor carriers' ongoing costs of performing the required investigations and inquiries are not germane to the new cost/benefit considerations of this rule (*i.e.*, they are not new costs caused by of this rule). Therefore, this regulatory evaluation limits itself to the new costs and benefits resulting from this rule's implementation.

The Paperwork Reduction Act analysis addresses both the adjustments in reporting burden and the new changes in burdens caused by this rule. The adjustments and changes are shown side by side for clarity in that analysis.

#### Development of Benefit Scenarios

The intent of this rule is to reduce accidents by altering some portion of the 403,000 driver hiring decisions made each year within all industries covered by the FMCSRs. Because this rule will provide hiring managers with additional accident and alcohol/controlled substance data with which to evaluate driver applicants, it is reasonable to assume that some drivers will not be hired because of the new data, whereas previously these drivers would have been hired (in the absence of this information). In this analysis, we assumed that the drivers who are denied employment because of the new accident and alcohol/controlled substances data will not obtain other positions as drivers for an average of six months. Drivers with relatively few previous accidents or positive alcohol/controlled substance test results presumably will find work sooner, while those with a relatively large number of previous accidents (or positive test results) are expected to require a longer period. The assumption of the analysis is the vast majority of drivers initially denied employment because of this rule will find alternative positions as drivers over time. One reason is their previous crashes stretching back three years are removed from their records. Another is in some particularly competitive segments, employers must select their drivers from a limited pool of applicants (accidents or no accidents). Only those particularly problematic drivers who exhibit a consistent pattern of poor safety performance over an extended period of time presumably will have difficulty re-entering the industry at some point in the future.

In the particularly competitive market segments, employers experience greater difficulty finding qualified drivers. This is largely because the competitive nature of the segment causes such employers to pay relatively low wages and/or subject drivers to extremely difficult working conditions, erratic hours, time away from home and family, etc. Additionally, the broader macroeconomic climate partially determines the percent of existing capacity of all segments of industries requiring drivers, as well as changing the size of the existing labor pool. Thus the pressures to hire drivers are different under different economic

conditions and thereby affect the point at which employers in all industries, as well as the particularly competitive for-hire trucking segments would need to hire new drivers.

Benefits accrue as a result of accident reductions from prospective employers hiring safer drivers in lieu of the worst-performing drivers. The assumptions used to calculate the benefits in the SNPRM are presented in this final rule as scenario 1. Scenario 1 in this final rule represents a lower bound of the societal benefits of this rule, and still forms what FMCSA believes is a reasonable estimate of benefits that will be obtained because of this final rule. Scenario 2 represents an upper bound of the societal benefits that FMCSA estimates could accrue from this rule. It was added to this analysis to provide perspective on the sensitivity of the estimates used. Scenarios 1 and 2 are based on the following logic.

The only data that previous employers are required to provide to prospective employers is the data maintained in the accident register required by § 390.15. The issue is what difference will such data make in the thousands of driver hiring decisions made by prospective motor carriers each year. Because many accidents are not the fault of the CMV driver, and many motor carriers are under pressure to find drivers, in some number of cases FMCSA realizes the hiring official will discount the accident data and hire the driver anyway. The challenge is to create an estimate of the number of applicants that will be denied employment based on this new data. We have made two different sets of assumptions to generate estimates of what we believe would be lower and upper bounds for the accident reduction potential of this rule.

#### Benefits Scenario 1

Scenario 1 is considered conservative and as such, represents a lower bound. It assumes that of the 38.64 percent of accidents where a truck was involved and the CMV driver was at fault, the hiring official will successfully infer both the fault and decide to deny the driver employment in 1/3 of those cases (or 12.88 percent of all new accident records made available to prospective employers). In other words, the prospective employer must use its own method to infer "cause" or "chargeability" of an accident to a truck driver, and additionally decide how the employer will use that information in deciding whether to deny employment to that driver.

As a result, we calculate 12.88 percent of the 142,500 truck-related accidents

that will become available means 18,300 truck drivers will be denied employment because of the new accident data, since “chargeability/fault” is a very important hiring factor

for safety conscious prospective employers. When coupled with the 1,300 truck drivers we estimate will be denied employment because of the additional year of alcohol/controlled

substance data, the total number of drivers denied positions in any given year is almost 20,000. The benefits associated with this rule under Benefits Scenario 1 are presented in Table 4.

TABLE 4.—SUMMARY OF BENEFITS, BENEFITS SCENARIO 1, 2004–2013, [In millions of dollars]

Benefits scenario 1	First-year benefits	Total discounted benefits, 10-year analysis period
Direct Benefits Only <sup>1</sup> .....	\$7	\$107
With 10% Deterrence Effect <sup>2</sup> .....	8	117
With 25% Deterrence Effect <sup>2</sup> .....	9	133
With 50% Deterrence Effect <sup>2</sup> .....	11	160

<sup>1</sup> Under the “Direct Benefits Only” scenario, all truck-related accident reduction benefits result from those commercial drivers with the worst safety performance records not being hired.

<sup>2</sup> Under the three benefits scenarios including a “Deterrence Effect”, FMCSA assumes that the availability of, and easier access to, new commercial driver safety performance data will result in some drivers improving their driving behavior because prospective employers will have such data available for use in future hiring decisions. Since we were unsure of the exact magnitude of this effect, we illustrated the deterrence effect at zero, 10, 25, and 50 percent of direct truck-related accident reduction benefits.

In calculating benefits for this rule, we attempted to account for both direct and indirect benefits. Direct benefits are reductions in truck-related accidents that result from prospective employers not hiring certain drivers (those with poor accident or alcohol/controlled substance information) because the new accident and additional year of alcohol/controlled substance test and refusal data are made available by previous employers.

Indirect benefits are those associated with a deterrence effect. The FMCSA believes that the availability of, and easier access to, new driver safety performance data will cause some portion of drivers to improve their driving behavior, because prospective employers will now obtain and use such data in hiring decisions. Relevant research documents the existence of this

deterrence effect, most notably in the field of drunk driving, and CMV CDL driver traffic convictions. However, since we do not know the specific magnitude of the deterrence effect associated with the availability of new driver safety performance data, we illustrated this effect as a percentage of the direct accident reduction benefits from this rule.

Benefits Scenario 2

Scenario 2 is considered an optimistic scenario and as such, represents an upper bound of the potential benefits of this rule. It assumes the hiring official will successfully infer in all of the accidents where accident experts would attribute fault to the CMV driver (38.64 percent of accidents involving a truck) that the CMV driver was in fact at fault and will also deny employment to all such drivers.

The full 38.64 percent of drivers at fault from the 142,500 truck-related accidents that will become available to prospective employers for use in the hiring decision once this rule is fully implemented would result in 55,000 truck drivers being denied employment because of the new accident data. When coupled with the 1,300 truck drivers we estimate will be denied employment because of the additional year of alcohol/controlled substance data, the total number of drivers denied positions in any given year would be about 56,000 (after rounding). Total benefits that could be associated with this rule under Benefits Scenario 2 are presented in Table 5 and also illustrate our assumptions regarding the magnitude of the deterrence effect associated with this rule.

TABLE 5.—SUMMARY OF BENEFITS, BENEFITS SCENARIO 2, 2004–2013 [In millions of dollars]

Benefits scenario 2	First-year benefits	Total discounted benefits, 10-year analysis period
Direct Benefits Only <sup>1</sup> .....	\$16	\$271
With 10% Deterrence Effect <sup>2</sup> .....	17	298
With 25% Deterrence Effect <sup>2</sup> .....	20	339
With 50% Deterrence Effect <sup>2</sup> .....	24	406

<sup>1</sup> Under the “Direct Benefits Only” scenario, all truck-related accident reduction benefits result from the industry’s refusal to hire drivers with the worst safety performance records.

<sup>2</sup> Under the three benefits scenarios including a “Deterrence Effect”, FMCSA assumes that the availability of, and easier access to, new commercial driver safety performance data will result in some drivers improving their driving behavior because prospective employers will now use such data in future hiring decisions. Since we were unsure of the magnitude of this effect, we illustrate the deterrence effect at zero, 10, 25, and 50 percent of direct truck-related accident reduction benefits.

Under Benefits Scenario 2, first-year (2004) benefits associated with this final

rule range from \$16 million with no deterrence effect, to \$24 million if the

deterrence effect is equal to 50 percent of the direct accident reduction benefits.

Total discounted benefits associated with this rule range from a low of \$271 million when we assumed no deterrence effect to a high of \$406 million when we assumed the deterrence effect is equal to

50 percent of the direct accident reduction benefits.  
 Net Benefits and Benefit Cost Ratios  
*Benefits Scenario 1.* Comparing total discounted costs and benefits under

Benefits Scenario 1, we calculated net benefits and benefit-cost ratios for this rule. They are presented in Table 6.

TABLE 6.—SUMMARY OF NET BENEFITS AND BENEFIT-COST RATIOS, BENEFITS SCENARIO 1, 2004–2013  
 [In millions of dollars]

Benefits scenario 1	Total discounted net benefits (millions) <sup>1</sup>	Benefit-cost ratio <sup>2</sup>
Direct Benefits Only .....	-\$6	0.95
With 10% Deterrence Effect .....	4	1.04
With 25% Deterrence Effect .....	20	1.18
With 50% Deterrence Effect .....	47	1.42

<sup>1</sup> Total Discounted Net Benefits were derived by subtracting the Total Discounted Cost estimate of \$113 million in Table 3 from each of the Total Discounted Benefits estimates in Column 3 of Table 4. For example, the \$113 million in total discounted costs from Table 3 subtracted by the \$107 million in Total Discounted Benefits under the “Direct Benefits Only” scenario of Table 4 yields Total Net Discounted Benefits of -\$6 million (after rounding) over the 10-year analysis period (2004–2013).

<sup>2</sup> Benefit-Cost Ratios were derived by dividing the Total Discounted Cost estimate of \$113 million in Table 3 from each of the Total Discounted Benefits estimates for each of the Indirect Benefits assumptions located in Column 3 of Table 4. For example, the \$107 million in Total Discounted Benefits under the “Direct Benefits Only” scenario of Table 4 divided by the \$113 million in total discounted costs from Table 3 yields a Benefit-Cost Ratio of 0.95 over the 10-year analysis period (2004–2013). A benefit-cost ratio less than one implies that the rule is not cost beneficial to implement within the 10-year analysis period. It says nothing about the cost effectiveness of the rule beyond 10 years.

When examining the total discounted net benefits and benefit-cost ratios for this conservative scenario contained in Table 6, we find that if one assumes there is no deterrence effect associated with this rule, then the final rule is not cost beneficial when measured within the 10-year analysis period. However, if

one assumes any level of deterrence effect, then the rule is cost beneficial within the 10-year analysis period. Regardless of the assumptions one makes about the deterrence effect, the estimated benefits and costs are relatively equal within the 10-year analysis when we use the conservative

benefits assumptions outlined above for Scenario 1.

*Benefits Scenario 2.* Comparing total discounted costs and benefits under Benefits Scenario 2, we have calculated net benefits and benefit-cost ratios for this rule. They are presented in Table 7.

TABLE 7.—SUMMARY OF NET BENEFITS AND BENEFIT-COST RATIOS, BENEFITS SCENARIO 2, 2004–2013  
 [In millions of dollars]

Benefits scenario 2	Total net discounted benefits <sup>1</sup>	Benefit-cost ratio <sup>2</sup>
Direct Benefits Only .....	\$158	2.40
With 10% Deterrence Effect .....	185	2.64
With 25% Deterrence Effect .....	226	3.00
With 50% Deterrence Effect .....	294	3.61

<sup>1</sup> Total Net Discounted Benefits were derived by subtracting the Total Discounted Cost estimate of \$113 million in Table 3 from each of the Total Discounted Benefits estimates in Column 3 of Table 5. For example, the \$113 million in total discounted costs from Table 3 subtracted by the \$271 million in Total Discounted Benefits under the “Direct Benefits Only” scenario of Table 5 yields Total Net Discounted Benefits of \$158 million (after rounding) over the 10-year analysis period (2004–2013).

<sup>2</sup> Benefit-Cost Ratios were derived by dividing the Total Discounted Cost estimate of \$113 million in Table 3 from each of the Total Discounted Benefits estimates for each of the Benefits Scenarios located in Column 3 of Table 5. For example, the \$271 million in Total Discounted Benefits under the “Direct Benefits Only” scenario of Table 5 divided by the \$113 million in total discounted costs from Table 3 yields a Benefit-Cost Ratio of 2.40 over the 10-year analysis period (2004–2013). A benefit-cost ratio of greater than one implies that the rule is cost beneficial to implement when comparing costs to benefits within the 10-year analysis period.

Under Benefits Scenario 2, total net discounted benefits associated with this optimistic scenario for the rule over the 10-year analysis period, range from a low of \$158 million when we assume no deterrence effect benefits to a high of \$294 million when we assume the magnitude of the deterrence effect is equal to 50 percent of the direct accident reduction benefits. Correspondingly, benefit-cost ratios range from 2.40 when we assume no

deterrence effect benefits to 3.61 when deterrence effect benefits are assumed to equal 50 percent of direct accident reduction benefits.

Uncertainties

As seen from examining Tables 6 and 7, the threshold at which the benefits associated with this rule are greater than the costs (thereby making the rule cost beneficial) is dependent upon several important (and to some degree

uncertain) factors. These include: (1) The percentage of newly-available truck-related accident records that will be provided by previous employers to prospective employers (we assumed all will be provided), (2) the likelihood that the prospective employer will use “chargeability” (and hence fault in an accident) as the determining factor in whether to hire a driver based on this new data (we assumed a lower percentage in scenario 1 and 100

percent in scenario 2), and (3) the likelihood that the prospective employer will be able to determine, or infer in a certain percentage of cases, that the CMV driver was in fact at fault in an accident, based on the information provided by previous employers. (To examine the sensitivity of the second and third uncertainties on the results, we incorporated the two benefits scenarios described above).

Research seems to indicate that the "chargeability" factor is a very important one in the hiring decision for the "safest" motor carriers. This is based on a recent survey of the safest motor carriers conducted by the University of Maryland Robert H. Smith School of Business on driver hiring practices. It revealed that 93 percent of such trucking company officials surveyed indicated that "no chargeable accidents" was an "important" or "very important" factor in their driver hiring decisions.<sup>7</sup> However, there are motor carriers whose operating practices seem to indicate they place a low importance on previous driver safety behavior indicated by convictions on the driver's record obtained from the State.<sup>8</sup> Such motor carriers may place a similar lack of importance on the new safety performance history data such as chargeable accidents required by this final rule. Such motor carriers often are the ones targeted by the FMCSA SafeStat scores to receive a carrier compliance review.

If the LTCCS results on the initial 285 large-truck accidents are representative of all large truck-related accidents, if the hiring motor carrier can determine or infer driver fault for the entire 38.64 percent of truck accidents, and if the motor carrier places the same emphasis on at-fault accident data as the safest motor carriers, then scenario 2 could apply. It seems questionable all these conditions will be met for all motor carriers. For example, the accident data specified at § 390.15 for reporting is not required to contain information about driver fault.

<sup>7</sup> "Best Highway Safety Practices, A Survey of the Safest Motor Carriers About Safety Management Practices," by Thomas Corsi and Richard Barnard, University of Maryland, College Park, R.H. School of Business, 2003, Report to the Federal Motor Carrier Safety Administration. This document is available online at <http://ai.volpe.dot.gov/CarrierResearchResults/CarrierResearchResults.asp?file=PDFs/BestHighwaySafetyPractices.pdf>.

<sup>8</sup> "An Analysis of Commercial Vehicle Driver Traffic Conviction Data to Identify Higher Risk Motor Carriers," Brenda Lantz, North Dakota State University and David Goettee, Federal Motor Carrier Safety Administration, March 2004. A copy of this analysis is available online as document 85 in the docket.

The estimation of costs and benefits of this rule are discussed in more detail in the next two sections.

## II. Costs

### Accident Data

In 1997, the study "Empty Chairs and Musical Seats" prepared for the ATA Foundation, Inc. by the Gallup Organization, estimated that 403,000 commercial drivers will need to be hired by the trucking industry each year between the years 1994 and 2005 in order to meet projected demand. Of this total, Gallup estimated that 320,000 (or 80 percent) will need to be hired due to internal turnover (drivers switching trucking companies), 35,000 (or 8 percent) will need to be hired due to industry growth, and 48,000 (or 12 percent) will need to be hired due to attrition, retirement, and external turnover (drivers leaving trucking for alternative industries). This estimate is used later in the analysis when we determine the costs associated with this rule.

To estimate the new accident records that may be stored and reported on as part of this rule, we used the average annual total for truck-related accidents for 1999 and 2000, which is equal to 445,000 (includes all truck-related fatal, injury, and property-damage-only accidents).<sup>10</sup> Using an estimate of 3 million as the total existing driver population, we estimated the number of annual accidents per driver at 0.148 (445,000/ 3 million).

In this analysis, we assumed drivers being hired due to internal turnover (320,000 positions) will be experienced drivers (with possible accident records) and the remainder (those hired due to attrition, retirement, and industry growth) will be new drivers (those without possible accident records). As such, the number of accidents available for the number of drivers being hired each year will be 47,500 (0.148 × 320,000). Over three years, the number of accidents these drivers will be involved in would total 142,500 (47,500 × 3).

Regarding new data reporting requirements, each driver applying for a

<sup>9</sup> "Empty Seats and Musical Chairs: Critical Success Factors in Truck Driver Retention", page 1, prepared by the Gallup Organization for the American Trucking Associations (ATA) Foundation, October 1997. A copy of this report is available online at [http://www.atri-online.org/research/safety/images/Musical\\_Chairs.pdf](http://www.atri-online.org/research/safety/images/Musical_Chairs.pdf).

<sup>10</sup> This number differs from the number of accidents resulting from application of the definition for accident found at § 390.5 and required to be retained in the accident register by § 390.15(b)(1). For an explanation see full regulatory evaluation for this final rule in the docket, document 86.

new position will potentially generate a new investigation request from the prospective employer, and consequently a new search by the previous employer. The exact number of investigation requests conducted by prospective employers, and responded to by previous employers, depends upon operating practices used by different employers in different industry sectors.

In this analysis, we assumed that on a national average, prospective employers will conduct three driver safety performance history investigations for each position filled within the industry each year. This estimate is based on information supplied to FMCSA in the docket, including ATA, AT&T and others during the public comment period for the SNPRM. (An explanation of how the value of 3 was developed is presented in the Paperwork Reduction Act section of this rule.) Previously, we estimated that 403,000 drivers are hired annually within the industry, of which 320,000 will be drivers with previous experience (and will have a potential accident record to search). Therefore, 960,000 driver record searches will be conducted each year on average for each position filled (320,000 × 3). Additionally, we estimated that 142,500 accident records (47,500 annual accident records × 3 years) will now be reported annually by previous employers to prospective employers.

Since each investigation request requires a search, whether it yields past accidents or not, 960,000 searches will need to be completed per year at \$1.57 per search according to the ARMA. For the 142,500 cases where an accident is discovered within the preceding three years, duplication of the record will need to be performed at \$1.33 per record according to ARMA, and the original record will need to be refiled in the driver's investigation history file at \$1.84 per record according to ARMA. Lastly, we assumed one letter will be mailed, at \$0.37 per letter via first-class mail, for each of the 960,000 driver record searches conducted annually, with the letter either containing the data investigated or a statement indicating that no accidents were found. Multiplying the cost per record for each activity by the number of records handled under each activity, total first-year costs from: (a) Storing/retaining two additional years of driver accident data, (b) searching/retrieving, duplicating, and refiled three years of accident data in preparation for mailing, and (c) mailing out the information are \$2.4 million.



**Note:** Although there are estimated to be 1.39 previous employers per applicant, we decided to be conservative and exclude that from the calculations. This lowers the costs some, but it lowers the benefits by even more than the costs. These considerations are reflected in the information collection analyses for the paperwork reduction analysis.

#### Alcohol and Controlled Substances Test-Related Data

Using data from the 2001 FMCSA Drug and Alcohol Testing Survey, we estimated that an average of 5,120 of the 403,000 drivers hired annually within the industry will fail random and non-random alcohol/controlled substances tests each year, and will be referred for rehabilitation. The final rule requires one additional year of such data to be reported to prospective employers on the 320,000 experienced drivers hired annually (recall that the remainder of drivers hired each year are assumed to be new drivers). Assuming that prospective employers conduct investigations on an average of three potential drivers per position opening, whether it yields past data or not, then 960,000 record searches ( $320,000 \times 3$ ) will have to be completed per year at \$1.57 per search according to the ARMA.

Also, in the 5,120 cases where a violation/referral is discovered for reporting the additional year's results, duplication of the record will have to be performed at \$1.33 per record according to ARMA, and the original record will have to be refiled in the driver's file at \$1.84 per record according to ARMA.

Lastly, we assumed one letter will be mailed at \$0.37 per letter via first-class mail for each of the 960,000 driver record searches conducted annually with the letter containing either the data investigated or a statement indicating that no test/program data were found.

Multiplying the cost per record for each activity by the number of records handled under each activity, total first-year costs from: (a) Searching/retrieving, duplicating, and refiled one year of such data in preparation for mailing, and (b) mailing out the information are \$1.9 million. Because of cost savings and overlaps with the already-existing processes being performed, the actual cost could be less.

Also, we know that some segments of the industry initiate applications using telephone and other means of communication. As a result, the prospective employer initiates the required inquiries and investigations based on the application, before the prospective employer has obtained the signed driver authorization to obtain the drug and alcohol data. Some portion of

these drivers will pass the initial screening. They will be asked to provide the signed authorization for the drug and alcohol data.

These second stage screening investigations for possible alcohol and controlled substances data will be requested from the same previous employers that were investigated initially for accident and other safety performance history data. We do not have enough data to estimate the additional cost these employers will bear for these multiple investigations for the same driver application. Therefore, we did not incorporate any such calculations into our analysis.

#### Costs To Notify Drivers of Rights To Review Data

Under this rule, data obtained through investigation is defined to include driver accident and alcohol/controlled substances data. For this analysis, we assumed that 1.2 million drivers ( $403,000 \times 3$ ) applying for positions annually will be notified of such rights on their employment applications, or via a simple return letter sent to the driver upon receipt of the application. Since we expect that employers will have to purchase new application forms, including the new/revised information, we used the difference between the current cost of a standard application form. This is \$0.06 each when purchased from a large office supply distributor, versus what we believed would be the cost for the new customized form (\$0.12 each). For 1.2 million applications, the annual cost to provide this information to applicants is \$72,500.

There are some segments of the motor carrier industry (such as truckload) that encourage drivers to make initial applications via telephone, where no paperwork is provided to the driver at that stage. To abide by the requirements of the final rule, prospective employers will then be required to notify these applicants via mail of their rights to review, request correction, or rebut safety performance history data furnished by previous employers. To establish an upper bound, we assumed a third of the applications (or 403,000) will be filed via telephone, each requiring notification of driver review, correction and rebuttal rights be mailed. For purposes of this analysis we assume this information is transmitted via a form letter. At \$0.37 for postage and \$1.00 for labor to address and mail each letter, an additional cost of \$552,000 will be incurred. Added to the \$72,500 in costs discussed in the last paragraph, total costs to notify drivers of their right to review and protest safety

performance data are \$625,000 annually.

#### Costs Associated With Driver Requests for Previous Employer Data

Since each driver applying for a new position is notified of his or her rights to review and refute data in their safety performance histories, it is reasonable to assume that some portion of these driver applicants will actually request their data. Of the total 960,000 annual applicants who have previous experience within the industry (and for whom previous safety performance history data will exist), we assumed that the 320,000 who are hired are unlikely to request their data for review, since they were in fact hired.

The question is what percentage of the other two-thirds of applicants with previous employer safety performance history (640,000) who were not offered the position will request this data? In order to create a deterrent to drivers frivolously requesting this information, the rule requires drivers to make their request to receive this information in writing. Additionally FMCSA believes that the dependence of previous employers' limited liability being based on accuracy creates an incentive for previous employers to be accurate. Thus, most of the driver safety performance history data reported will be accurate. Therefore, FMCSA assumes that one-half of those experienced drivers who are denied employment will take the time to make a written request to receive a copy of the information provided by previous employers to review. This is 320,000 drivers ( $640,000 \text{ denied} \times \frac{1}{2}$ ).

Each of these requests is accompanied by a record search, at \$1.57 per search, and duplication at \$1.33 per search, which when multiplied by 320,000 yields costs of \$0.5 million and \$0.4 million, respectively. Additionally, at \$0.37 per mailing, an additional mailing cost of almost \$120,000 must be added. Summing these three cost subtotals yields a total cost of \$1 million annually (after rounding) to provide driver applicants with their safety performance data.

#### Costs Associated With Driver Requests for Correction or Rebuttal

Recall that the rule provides that all drivers have the right to review, comment on, and rebut the safety performance history provided by their previous employers and that 320,000 of the applicants will request such data. Of these, only some portion is likely to file a formal protest, since an investment of personal time is required to initiate such

an action. In this analysis, we assumed that 10 percent of the driver applicants who request their safety performance data each year will then file a protest. This amounts to an average of 32,000 (or  $320,000 \times 10\%$ ) filing protests each year.

In the 32,000 cases where we anticipate a protest will be filed each year, we assumed two additional hours of labor time spent by each driver to develop and file that protest with their previous employer. Additionally, we assumed two additional hours of labor time spent by each previous employer to address each protest. Using an average 2001 hourly wage rate for trucking managers of \$35.94 and 32,000 cases, total costs to the trucking company to address driver protests of their data files are \$2.3 million annually, undiscounted ( $32,000 \times \$35.94 \times 2$ ).<sup>11</sup> Multiplying the 2001 hourly wage rate of \$14.66 (average for a truck driver) by the two additional hours spent by each of the 32,000 drivers to file a protest adds another \$0.9 million to this total annual cost. Aggregating these two components yields an annual total cost to address driver protests of \$3.2 million. In estimating the driver and employer costs associated with potential protests, it was unclear how frequently the driver or the employer will secure the services of an attorney to either file or review such protests. Therefore, costs associated with these services were not included in this analysis. Although the agency invited comments regarding the accuracy of this omission, no public comments were submitted.

#### Costs to Prospective Employers To Review Additional Data

As discussed, the new driver safety performance history data required under this final rule will expand the review process currently being practiced by prospective employers as part of the hiring process. To determine the cost per hiring decision, we estimated the prospective employer's review of driver safety performance history data will be expanded by an additional 10 minutes per hiring decision. Recall that the Gallup poll indicated that of the 403,000 driver position openings filled within the trucking industry each year, 320,000 will be filled due to internal turnover (drivers switching jobs within the

industry). Therefore, for our calculations here, we assumed 960,000 applicants for 320,000 position openings will have safety performance histories for prospective employers to review, with the remainder of industry positions being filled by candidates outside of the industry, whether new workers to the labor force or those switching from outside industries. Using the average 2001 hourly wage rate for a trucking company manager of \$35.94, 960,000 applications by experienced drivers, and a total of 10 additional minutes spent reviewing each driver's safety performance data in preparation for a hiring decision, total annual costs of this activity amount to \$5.8 million (undiscounted).

#### Total Costs

Total first-year costs to implement this final rule amount to approximately \$15 million (undiscounted, after rounding). Total discounted costs over the 10-year analysis period (2004–2013) are \$113 million, using a discount rate of seven percent.

#### III. Benefits

Societal benefits associated with this final rule will accrue from the expected reduction in accidents resulting from the use of safer drivers by all industries subject to the FMCSRs. Specifically, additional driver safety performance history data used in the hiring decision process should result in denying positions to the less safe drivers who prior to this final rule would have been hired. Additionally, it is reasonable to assume this final rule will generate a deterrence effect, since studies of similar social problems and policy approaches have quantified such impacts (reducing alcohol-related accidents via changes in penalties and public attitudes and reduced CDL specified traffic convictions). In this analysis, we quantified the "direct" benefits resulting from a reduction in accidents due to changes in driver hiring decisions. To illustrate "indirect" benefits associated with a deterrence effect, we conducted a sensitivity analysis by assuming that the benefits from a deterrence effect could range anywhere from zero, 10 percent, 25 percent, or 50 percent of the direct accident reduction benefits associated with this rule.

#### Total Number of Drivers Affected by This Rule

We analyze in scenarios 1 and 2 that this rule will alter portions of the 403,000 driver hiring decisions made each year within the trucking industry. Because hiring managers will have

accident and an additional year of alcohol/controlled substance test data with which to evaluate drivers for positions, it is likely that the new data will result in some drivers (who previously would have been hired) not being hired because of this rule.

In the conservative scenario 1 of this benefits analysis, we estimate that once fully implemented 20,000 of the 403,000 commercial drivers hired annually by the industry will now be denied employment because of the new accident and alcohol/controlled substance test data becoming available to prospective employers.

In the optimistic scenario 2 of this benefits analysis, we estimated that once fully implemented 56,000 of the 403,000 commercial drivers hired annually by the industry will now be denied employment because of the new accident and alcohol/controlled substance test data becoming available to prospective employers.

#### Benefits Associated With Accident Reductions

Using the above data on the number of drivers who will not be hired for on average six months as a result of the newly-available accident data, we can estimate the direct accident reduction benefit associated with this rule.

A study conducted by the Volpe National Transportation Systems Center examined the difference in accident rates for motor carriers with a high number of previous accidents versus those with a low number of previous accidents. We used the results of this study as a proxy for the direct accident reduction potential of this rule, under the logic that if a hiring manager, using the new accident data provided under this rule, ends up hiring an applicant with a low previous accident rate (or no accidents in the recent past) in lieu of the applicant with a high previous accident rate, then accident reduction benefits will accrue from this rule. We felt that this was logical considering that a carrier's safety performance profile is a direct extension of that of its drivers.

The Volpe study discovered that motor carriers identified as high-risk, based on accidents experienced during a 36-month period prior to identification, had a post-identification accident rate of 81.4 accidents per 1000 power units. This is in contrast to carriers identified as low risk, based on the absence of past accidents and hence no Accident Safety Evaluation Area (SEA) score, who had a post-identification accident rate of only 29.9 accidents per 1000 power units. As stated, under the premise that a motor carrier's accident profile is a direct

<sup>11</sup> In table 3 of the article "A Cost Benefit Study of Motor Carrier Safety Programs," published in the January 1997 Journal of Transport Economics and Policy, Professors Leon Moses and Ian Savage estimated that the average trucking company manager earns \$31.25 per hour, including wages and benefits. Inflating this figure to 2001 dollars using the GDP price indicator yields an average wage for trucking company managers of \$35.94. A copy of this table is available in the docket as document 89.

extension of its drivers' profiles and is a result of that carrier's commercial driver hiring and screening process, then we can use these results to examine differences in drivers.

At a post-identification accident rate difference of 51.5 accidents per 1000 power units between high- and low-risk carriers, we converted this accident rate difference to a per-driver rate by assuming two drivers per power unit on average within the industry (based on information obtained at the Hours-of-Service Roundtables, July 2000). Therefore, the difference in accidents per driver is .026 (51.5 / (1000 × 2)) over the 18-month post-identification analysis period examined in the study. Assuming an equal distribution of this accident involvement differential over the 18-month period following identification, we estimated the annual difference in accidents between drivers with and without accidents within the preceding 18 months to be 0.017 accidents per driver per year.

Assuming drivers not hired as a result of this final rule will find alternative employment as drivers after an average of six months of searching, the accident reduction differential used to calculate benefits in this analysis was 0.0085 per driver (0.026 – 0.017). By using such a conservative estimate (*i.e.*, it is likely that drivers with a high number of past accidents will find it difficult to secure alternative positions on average within six months), we are ensuring that our estimates of accident reduction benefits will not be overstated.

Using an average cost per truck-related accident of \$79,873 in 2002 dollars, we can estimate the value of accident reduction benefits.<sup>12</sup>

#### Accident Data Benefits Scenario 1

For illustrative purposes, in the first year of the analysis period (2004), one year of accident data (or 47,500 accident records) will be available to prospective employers. Based on an assumption that in 12.88 percent of these cases, the driver will not be hired for on average six months, then 6,100 drivers will be denied employment because of the newly-available accident data. In the second year of the analysis period (2005), two years of accident data (or 95,000 records) are collected on drivers and the number of drivers not hired rises to 12,200 (or 12.88 percent of the 95,000 records). In 2006 and thereafter,

when this final rule will be fully implemented, the number of drivers not hired because of the new accident data will rise to 18,300 (or 12.88 percent of the 142,500 newly-available accident records for the 320,000 experienced drivers hired each year).

At an average cost per accident of \$79,873 in 2002 dollars, an accident differential of .0085, and 6,100, 12,200, and 18,300 drivers who are not hired in 2004, 2005, and 2006, respectively, the undiscounted value of annual accident reduction benefits is equal to \$4.2 million in 2004, \$8.4 million in 2005, and \$12.6 million in 2006 (when three years of data become available to prospective employers). This translates to a total of 52, 105, and 157 accidents avoided in these three years, respectively, as a result of the newly-available accident data. Thereafter, the accident reduction potential (157 accidents) remains the same as that in 2006, the year the accident data retention and reporting requirement will become fully implemented. First-year accident reduction benefits equal \$4.2 million (undiscounted), while total discounted accident reduction benefits from the new accident data are equal to \$82 million (after rounding) over the 10-year analysis period.

#### Accident Data Benefits Scenario 2

In the first year of the analysis period (2004), one year's worth of accident data (or 47,500 records) will be available to prospective employers, since previous employers are currently required to collect and retain one year's worth of such data. Based on our earlier assumption for the second benefits scenario that in 38.64 percent of these cases the driver will not be hired, then 18,300 drivers will be denied employment because of the newly available accident data. In the second year of the analysis period (2005), two years of accident data (or 95,000 records) are collected on drivers, and the number of drivers not hired because of the new accident data rises to 36,700 (or 38.64 percent of the 95,000 records), and in 2006 and thereafter, when this final rule will be fully implemented, the number of drivers not hired because of the new accident data will rise to 55,000 (or 38.64 percent of the 142,500 newly-available accident records available to prospective employers each year).

At an average cost per accident of \$79,873 in 2002 dollars, an accident differential of .0085, and 18,300, 36,700, and 55,000 drivers who are not hired in 2004, 2005, and 2006, respectively, the undiscounted value of annual accident reduction benefits is equal to \$12.6 million in 2004, \$25.2 million in 2005,

and \$37.7 million in 2006 (when three years of data become available to prospective employers). This translates to a total of 157, 315, and 472 accidents avoided in these three years, respectively, as a result of the newly available accident data. Thereafter, the accident reduction potential (472 accidents) remains the same as that in 2006, the year the accident data retention and reporting requirement will become fully implemented. First-year accident reduction benefits equal \$12.6 million (undiscounted), while total discounted accident reduction benefits from the new accident data are equal to \$247 million (after rounding) over the 10-year analysis period.

#### Benefits From Alcohol and Controlled Substances Data

The second source of direct accident reduction benefits will result from the availability of driver alcohol and controlled substance use and rehabilitation program data by prospective employers. Lacking a data source linking positive tests for alcohol and controlled substances with accident rates, we used FMCSR traffic enforcement data for violations of alcohol and controlled substances and accident rates as a proxy.

The MCMIS contains information on the number of accidents experienced by drivers with and without alcohol or controlled substances citations for the period 1999–2001. Results reveal that the difference in accidents for drivers with, and without, citations for alcohol and controlled substances violations is .019 accidents per driver over a three-year period (1999–2001). Assuming an equal distribution of accident involvement and driver exposure over this three-year period, the difference in accident profiles between drivers with, and without, a citation for a serious traffic violation is roughly 0.0633 accidents per driver per year.

As was done with the accident data, we conservatively assumed that drivers who are not hired into positions during any given year because of the new alcohol/controlled substances data will be able to find other driver positions after an average of six months of searching. As such, the accident reduction differential used to calculate benefits in this analysis was 0.0316 per driver (0.0633 × ½ year). In this analysis, we estimated that roughly 25 percent (or 1,280) of those 5,120 commercial drivers who fail random or non-random alcohol/controlled substance tests annually, are referred to rehabilitation programs, and change employment within the industry each year, will now be denied employment

<sup>12</sup> The average cost per truck-related accident was obtained from "Costs of Large Truck- and Bus-Involved Crashes" by Eduard Zaloshnja, Ted Miller, and Rebecca Spicer, 2000. Cost estimates were updated to 2003 using the Gross Domestic Product (GDP) Price Deflator. This document is available in docket FMCSA-00-7382 as document 6.

because of the new alcohol/controlled substance program data made available to prospective employers.

Using an average cost per truck-related accident of \$79,873 and an annual difference in accidents of .0316 per driver, annual benefits associated with this provision equal roughly \$3.2 million in 2004. The number of accidents avoided as a result of the new driver alcohol and controlled substance test and program data is equal to 41 accidents each year between 2004 and 2013 (0.0316 × 1,280 drivers). Total discounted accident reduction benefits from the new alcohol/controlled substance test and program data over the 10-year analysis period are estimated to be \$24 million.

**Total Direct (Accident Reduction) Benefits**

Under Benefits Scenario 1, where we used relatively conservative assumptions regarding the use of accident records by prospective employers, total discounted direct benefits of this rule are \$107 million (after rounding). This total is derived by adding the \$82 million in total discounted accident reduction benefits from the new accident records discussed earlier with the \$24 million in total discounted accident reduction

benefits associated with new alcohol/controlled substance data discussed above. Note that we have not yet incorporated any indirect benefits, or those associated with a deterrence effect. Those are discussed in the next section.

Under scenario 2, where we used more aggressive assumptions regarding the use of accident records by prospective employers, total discounted direct benefits of this rule are \$271 million (after rounding). This total was derived by adding the \$247 million in total discounted accident reduction benefits from the new accident records with the \$24 million in total discounted accident reduction benefits associated with new alcohol/controlled substance data. Again, note that we have not yet incorporated any indirect benefits, or those associated with a deterrence effect. Those are discussed below.

**Benefits From a Deterrence Effect**

FMCSA believes it is reasonable to assume there will be a “deterrence effect” associated with this rule, where a driver will strive to improve his or her safety performance record because he or she will know that such information will be available to prospective employer. This will limit the ability of a driver to “run away” from a bad

accident history, just as it has been for alcohol and controlled substances abuse. However, we are unsure as to the specific magnitude of this effect. Therefore, we performed a sensitivity analysis as part of this evaluation by assuming that the deterrence effect could range anywhere from zero, 10 percent, 25 percent, or 50 percent of the value of direct accident reduction benefits measured earlier. Since the “deterrence effect” benefits are a percentage of the direct accident reduction benefits associated with this rule, they are identified in the next section, where we discuss the total benefits.

**Total Benefits**

Benefits Scenario 1. Recall that under Benefits Scenario 1, we estimated that in 12.88 percent of the accidents where accident data will be made available to prospective employers, the prospective motor carrier will both accurately infer the truck driver was at fault and choose to deny employment as a result. Total benefits associated with this rule under Benefits Scenario 1 are identified in Table 8 and are separated according to our assumptions regarding the magnitude of the deterrence effect associated with this rule.

**TABLE 8.—SUMMARY OF BENEFITS, BENEFITS SCENARIO 1, 2004–2013**  
[In millions of dollars]

Benefits scenario 1	First-year benefits	Total discounted benefits, 10-Year analysis period
Direct Benefits Only <sup>1</sup> .....	\$7	\$107
With 10% Deterrence Effect <sup>2</sup> .....	8	117
With 25% Deterrence Effect <sup>2</sup> .....	9	133
With 50% Deterrence Effect <sup>2</sup> .....	11	160

<sup>1</sup> Under the “Direct Benefits Only” scenario, all truck-related accident reduction benefits result from the industry’s refusal to hire drivers with the worst safety performance records.

<sup>2</sup> Under the three benefits scenarios including a “Deterrence Effect,” FMCSA assumes that the availability of, and easier access to, new commercial driver safety performance data will result in some drivers improving their driving behavior because prospective employers will now use such data in future hiring decisions. Since we were unsure of the magnitude of this effect, we assessed the deterrence effect at zero, 10, 25, and 50 percent of direct truck-related accident reduction benefits.

Under Benefits Scenario 1, first-year (2004) benefits associated with this final rule range from slightly less than \$7 million when we assume there is no deterrence effect to \$11 million when we assume the deterrence effect is equal to 50 percent of the direct accident reduction benefits of this rule.

Total discounted benefits associated with this rule range from a low of \$107 million when we assume no deterrence

effect to a high of \$160 million when we assume the deterrence effect is equal to 50 percent of the direct accident reduction benefits.

*Benefits Scenario 2.* Recall that under Benefits Scenario 2, or what we estimated to be an “upper bound” to the benefits estimates, we assumed that in all 38.64 percent of the accidents where the truck driver is chargeable for the accident, the prospective motor carrier

will both correctly infer the chargeability and deny employment. Total benefits that could be associated with this rule under Benefits Scenario 2 are identified in Table 9 and are separated according to our assumptions regarding the magnitude of the deterrence effect associated with this rule.

TABLE 9.—SUMMARY OF BENEFITS, BENEFITS SCENARIO 2, 2004–2013  
[In millions of dollars]

Benefits scenario 2	First-year benefits	Total discounted benefits, 10-Year analysis period
Direct Benefits Only <sup>1</sup> .....	\$16	\$271
With 10% Deterrence Effect <sup>2</sup> .....	17	298
With 25% Deterrence Effect <sup>2</sup> .....	20	339
With 50% Deterrence Effect <sup>2</sup> .....	24	406

<sup>1</sup> Under the “Direct Benefits Only” scenario, all truck-related accident reduction benefits result from the industry’s refusal to hire drivers with the worst safety performance records.

<sup>2</sup> Under the three benefits scenarios including a “Deterrence Effect,” FMCSA assumes that the availability of, and easier access to, new commercial driver safety performance data will result in some drivers improving their driving behavior because prospective employers will now use such data in future hiring decisions. Since we were unsure of the magnitude of this effect, we assessed the deterrence effect at zero, 10, 25, and 50 percent of direct truck-related accident reduction benefits.

Under Benefits Scenario 2, first-year (2004) benefits associated with this final rule range from \$16 million when we assume there is no deterrence effect to \$24 million when we assume the deterrence effect is equal to 50 percent of the direct accident reduction benefits of this rule.

Total discounted benefits associated with this rule range from a low of \$271 million when we assume no deterrence effect to a high of \$406 million when we assume the deterrence effect is equal to 50 percent of the direct accident reduction benefits.

**List of Subjects**

*49 CFR Part 390*

Highway safety, Intermodal transportation, Motor carriers, Reporting and recordkeeping requirements, Safety.

*49 CFR Part 391*

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety.

■ In consideration of the foregoing, the FMCSA amends chapter III of title 49 CFR parts 390 and 391, as set forth below:

**PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL**

■ 1. The authority citation for 49 CFR part 390 is revised to read as follows:

**Authority:** 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31502, 31504, and sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, Pub. L. 106–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 2. Section 390.5 is amended by adding the following definition in alphabetic order to read as follows:

**§ 390.5 Definitions.**

\* \* \* \* \*

*Previous employer* means any DOT regulated person who employed the driver in the preceding 3 years, including any possible current employer.

\* \* \* \* \*

■ 3. Section 390.15 is revised to read as follows:

**§ 390.15 Assistance in investigations and special studies.**

(a) A motor carrier must make all records and information pertaining to an accident available to an authorized representative or special agent of the Federal Motor Carrier Safety Administration, an authorized State or local enforcement agency representative or authorized third party representative, upon request or as part of any investigation within such time as the request or investigation may specify. A motor carrier shall give an authorized representative all reasonable assistance in the investigation of any accident including providing a full, true and correct response to any question of the inquiry.

(b) For accidents that occur after April 29, 2003, motor carriers must maintain an accident register for three years after the date of each accident. For accidents that occurred on or prior to April 29, 2003, motor carriers must maintain an accident register for a period of one year after the date of each accident. Information placed in the accident register must contain at least the following:

(1) A list of accidents as defined at § 390.5 of this chapter containing for each accident:

- (i) Date of accident.
- (ii) City or town, or most near, where the accident occurred and the State where the accident occurred.
- (iii) Driver Name.
- (iv) Number of injuries.
- (v) Number of fatalities.

(vi) Whether hazardous materials, other than fuel spilled from the fuel tanks of motor vehicle involved in the accident, were released.

(2) Copies of all accident reports required by State or other governmental entities or insurers.

(Approved by the Office of Management and Budget under control number 2126–0009)

**PART 391—QUALIFICATIONS OF DRIVERS**

■ 4. The authority citation for 49 CFR part 391 is revised to read as follows:

**Authority:** 49 U.S.C. 322, 504, 508, 31133, 31136, and 31502; Sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; and 49 CFR 1.73.

■ 5. In § 391.21, paragraphs (b)(10) and (d) are revised to read as follows:

**§ 391.21 Application for employment.**

\* \* \* \* \*

(b) \* \* \*

(10)(i) A list of the names and addresses of the applicant’s employers during the 3 years preceding the date the application is submitted,

(ii) The dates he or she was employed by that employer,

(iii) The reason for leaving the employ of that employer,

(iv) After October 29, 2004, whether the (A) Applicant was subject to the FMCSRs while employed by that previous employer,

(B) Job was designated as a safety sensitive function in any DOT regulated mode subject to alcohol and controlled substances testing requirements as required by 49 CFR part 40;

\* \* \* \* \*

(d) Before an application is submitted, the motor carrier must inform the applicant that the information he/she provides in accordance with paragraph (b)(10) of this section may be used, and the applicant’s previous employers will be contacted, for the purpose of

investigating the applicant's safety performance history information as required by paragraphs (d) and (e) of § 391.23. The prospective employer must also notify the driver in writing of his/her due process rights as specified in § 391.23(i) regarding information received as a result of these investigations.

■ 6. In § 391.23, revise paragraphs (a)(2), (b) and (c), and add new paragraphs (d) through (l) to read as follows:

**§ 391.23 Investigations and inquiries.**

(a) \* \* \*

(1) \* \* \*

(2) An investigation of the driver's safety performance history with Department of Transportation regulated employers during the preceding three years.

(b) A copy of the driver record(s) obtained in response to the inquiry or inquiries to each State driver record agency required by paragraph (a)(1) of this section must be placed in the driver qualification file within 30 days of the date the driver's employment begins and be retained in compliance with § 391.51. If no driving record exists from the State or States, the motor carrier must document a good faith effort to obtain such information, and certify that no record exists for that driver in that State. The inquiry to the State driver record agencies must be made in the form and manner each agency prescribes.

(c)(1) Replies to the investigations of the driver's safety performance history required by paragraph (a)(2) of this section, or documentation of good faith efforts to obtain the investigation data, must be placed in the driver investigation history file, after October 29, 2004, within 30 days of the date the driver's employment begins. Any period of time required to exercise the driver's due process rights to review the information received, request a previous employer to correct or include a rebuttal, is separate and apart from this 30-day requirement to document investigation of the driver safety performance history data.

(2) The investigation may consist of personal interviews, telephone interviews, letters, or any other method for investigating that the carrier deems appropriate. Each motor carrier must make a written record with respect to each previous employer contacted, or good faith efforts to do so. The record must include the previous employer's name and address, the date the previous employer was contacted, or the attempts made, and the information received about the driver from the previous employer. Failures to contact a previous

employer, or of them to provide the required safety performance history information, must be documented. The record must be maintained pursuant to § 391.53.

(3) Prospective employers should report failures of previous employers to respond to an investigation to the FMCSA following procedures specified at § 386.12 of this chapter and keep a copy of such reports in the Driver Investigation file as part of documenting a good faith effort to obtain the required information.

(4) *Exception.* For a drivers with no previous employment experience working for a DOT regulated employer during the preceding three years, documentation that no investigation was possible must be placed in the driver history investigation file, after October 29, 2004, within the required 30 days of the date the driver's employment begins.

(d) The prospective motor carrier must investigate, at a minimum, the information listed in this paragraph from all previous employers of the applicant that employed the driver to operate a CMV within the previous three years. The investigation request must contain specific contact information on where the previous motor carrier employers should send the information requested.

(1) General driver identification and employment verification information.

(2) The data elements as specified in § 390.15(b)(1) of this chapter for accidents involving the driver that occurred in the three-year period preceding the date of the employment application.

(i) Any accidents as defined by § 390.5 of this chapter.

(ii) Any accidents the previous employer may wish to provide that are retained pursuant to § 390.15(b)(2), or pursuant to the employer's internal policies for retaining more detailed minor accident information.

(e) In addition to the investigations required by paragraph (d) of this section, the prospective motor carrier employers must investigate the information listed below in this paragraph from all previous DOT regulated employers that employed the driver within the previous three years from the date of the employment application, in a safety-sensitive function that required alcohol and controlled substance testing specified by 49 CFR part 40.

(1) Whether, within the previous three years, the driver had violated the alcohol and controlled substances prohibitions under subpart B of part 382 of this chapter, or 49 CFR part 40.

(2) Whether the driver failed to undertake or complete a rehabilitation program prescribed by a substance abuse professional (SAP) pursuant to § 382.605 of this chapter, or 49 CFR part 40, subpart O. If the previous employer does not know this information (*e.g.*, an employer that terminated an employee who tested positive on a drug test), the prospective motor carrier must obtain documentation of the driver's successful completion of the SAP's referral directly from the driver.

(3) For a driver who had successfully completed a SAP's rehabilitation referral, and remained in the employ of the referring employer, information on whether the driver had the following testing violations subsequent to completion of a § 382.605 or 49 CFR part 40, subpart O referral:

(i) Alcohol tests with a result of 0.04 or higher alcohol concentration;

(ii) Verified positive drug tests;

(iii) Refusals to be tested (including verified adulterated or substituted drug test results).

(f) A prospective motor carrier employer must provide to the previous employer the driver's written consent meeting the requirements of § 40.321(b) for the release of the information in paragraph (e) of this section. If the driver refuses to provide this written consent, the prospective motor carrier employer must not permit the driver to operate a commercial motor vehicle for that motor carrier.

(g) After October 29, 2004, previous employers must:

(1) Respond to each request for the DOT defined information in paragraphs (d) and (e) of this section within 30 days after the request is received. If there is no safety performance history information to report for that driver, previous motor carrier employers are nonetheless required to send a response confirming the non-existence of any such data, including the driver identification information and dates of employment.

(2) Take all precautions reasonably necessary to ensure the accuracy of the records.

(3) Provide specific contact information in case a driver chooses to contact the previous employer regarding correction or rebuttal of the data.

(4) Keep a record of each request and the response for one year, including the date, the party to whom it was released, and a summary identifying what was provided.

(5) *Exception.* Until May 1, 2006, carriers need only provide information for accidents that occurred after April 29, 2003.

(h) The release of information under this section may take any form that reasonably ensures confidentiality, including letter, facsimile, or e-mail. The previous employer and its agents and insurers must take all precautions reasonably necessary to protect the driver safety performance history records from disclosure to any person not directly involved in forwarding the records, except the previous employer's insurer, except that the previous employer may not provide any alcohol or controlled substances information to the previous employer's insurer.

(i)(1) The prospective employer must expressly notify drivers with Department of Transportation regulated employment during the preceding three years—via the application form or other written document prior to any hiring decision—that he or she has the following rights regarding the investigative information that will be provided to the prospective employer pursuant to paragraphs (d) and (e) of this section:

(i) The right to review information provided by previous employers;

(ii) The right to have errors in the information corrected by the previous employer and for that previous employer to re-send the corrected information to the prospective employer;

(iii) The right to have a rebuttal statement attached to the alleged erroneous information, if the previous employer and the driver cannot agree on the accuracy of the information.

(2) Drivers who have previous Department of Transportation regulated employment history in the preceding three years, and wish to review previous employer-provided investigative information must submit a written request to the prospective employer, which may be done at any time, including when applying, or as late as 30 days after being employed or being notified of denial of employment. The prospective employer must provide this information to the applicant within five (5) business days of receiving the written request. If the prospective employer has not yet received the requested information from the previous employer(s), then the five-business days deadline will begin when the prospective employer receives the requested safety performance history information. If the driver has not arranged to pick up or receive the requested records within thirty (30) days of the prospective employer making them available, the prospective motor carrier may consider the driver to have waived his/her request to review the records.

(j)(1) Drivers wishing to request correction of erroneous information in records received pursuant to paragraph (i) of this section must send the request for the correction to the previous employer that provided the records to the prospective employer.

(2) After October 29, 2004, the previous employer must either correct and forward the information to the prospective motor carrier employer, or notify the driver within 15 days of receiving a driver's request to correct the data that it does not agree to correct the data. If the previous employer corrects and forwards the data as requested, that employer must also retain the corrected information as part of the driver's safety performance history record and provide it to subsequent prospective employers when requests for this information are received. If the previous employer corrects the data and forwards it to the prospective motor carrier employer, there is no need to notify the driver.

(3) Drivers wishing to rebut information in records received pursuant to paragraph (i) of this section must send the rebuttal to the previous employer with instructions to include the rebuttal in that driver's safety performance history.

(4) After October 29, 2004, within five business days of receiving a rebuttal from a driver, the previous employer must:

(i) Forward a copy of the rebuttal to the prospective motor carrier employer;

(ii) Append the rebuttal to the driver's information in the carrier's appropriate file, to be included as part of the response for any subsequent investigating prospective employers for the duration of the three-year data retention requirement.

(5) The driver may submit a rebuttal initially without a request for correction, or subsequent to a request for correction.

(6) The driver may report failures of previous employers to correct information or include the driver's rebuttal as part of the safety performance information, to the FMCSA following procedures specified at § 386.12.

(k)(1) The prospective motor carrier employer must use the information described in paragraphs (d) and (e) of this section only as part of deciding whether to hire the driver.

(2) The prospective motor carrier employer, its agents and insurers must take all precautions reasonably necessary to protect the records from disclosure to any person not directly involved in deciding whether to hire the driver. The prospective motor carrier

employer may not provide any alcohol or controlled substances information to the prospective motor carrier employer's insurer.

(l)(1) No action or proceeding for defamation, invasion of privacy, or interference with a contract that is based on the furnishing or use of information in accordance with this section may be brought against—

(i) A motor carrier investigating the information, described in paragraphs (d) and (e) of this section, of an individual under consideration for employment as a commercial motor vehicle driver,

(ii) A person who has provided such information; or

(iii) The agents or insurers of a person described in paragraph (l)(1)(i) or (ii) of this section, except insurers are not granted a limitation on liability for any alcohol and controlled substance information.

(2) The protections in paragraph (l)(1) of this section do not apply to persons who knowingly furnish false information, or who are not in compliance with the procedures specified for these investigations.

(Approved by the Office of Management and Budget under control number 2126-0004)

■ 7. In § 391.51, paragraph (b)(2) and the last line for Office of Management and Budget authority are revised to read as follows:

**§ 391.51 General requirements for driver qualification files.**

\* \* \* \* \*

(b) \* \* \*

(2) A copy of the response by each State agency concerning a driver's driving record pursuant to § 391.23(a)(1);

\* \* \* \* \*

(Approved by the Office of Management and Budget under control number 2126-004)

■ 8. Add a new § 391.53 to read as follows:

**§ 391.53 Driver Investigation History File.**

(a) After October 29, 2004, each motor carrier must maintain records relating to the investigation into the safety performance history of a new or prospective driver pursuant to paragraphs (d) and (e) of § 391.23. This file must be maintained in a secure location with controlled access.

(1) The motor carrier must ensure that access to this data is limited to those who are involved in the hiring decision or who control access to the data. In addition, the motor carrier's insurer may have access to the data, except the alcohol and controlled substances data.

(2) This data must only be used for the hiring decision.

(b) The file must include:

(1) A copy of the driver's written authorization for the motor carrier to seek information about a driver's alcohol and controlled substances history as required under § 391.23(d).

(2) A copy of the response(s) received for investigations required by paragraphs (d) and (e) of § 391.23 from each previous employer, or documentation of good faith efforts to contact them. The record must include the previous employer's name and address, the date the previous employer was contacted, and the information received about the driver from the previous employer. Failures to contact a previous employer, or of them to provide the required safety performance history information, must be documented.

(c) The safety performance histories received from previous employers for a driver who is hired must be retained for as long as the driver is employed by that motor carrier and for three years thereafter.

(d) A motor carrier must make all records and information in this file available to an authorized representative or special agent of the Federal Motor Carrier Safety Administration, an authorized State or local enforcement agency representative, or an authorized third party, upon request or as part of any inquiry within the time period specified by the requesting representative.

(Approved by the Office of Management and Budget under control number 2126-004)

Issued on: March 22, 2004.

**Annette M. Sandberg,**

*Administrator, Federal Motor Carrier Safety Administration.*

[FR Doc. 04-6793 Filed 3-29-04; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Parts 380 and 391

[Docket FMCSA-97-2176]

RIN 2126-AA08

#### Minimum Training Requirements for Longer Combination Vehicle (LCV) Operators and LCV Driver-Instructor Requirements

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

**ACTION:** Final rule.

**SUMMARY:** The Federal Motor Carrier Safety Administration (FMCSA)

establishes standards for minimum training requirements for the operators of longer combination vehicles (LCVs) and requirements for the instructors who train these operators. This action is in response to section 4007 of the Intermodal Surface Transportation Efficiency Act of 1991, which directed that training for the operators of LCVs include certification of an operator's proficiency by an instructor who has met the requirements established by the Secretary of Transportation (Secretary). The purpose of this final rule is to enhance the safety of commercial motor vehicle (CMV) operations on our Nation's highways.

**EFFECTIVE DATE:** June 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Redmond, Office of Safety Programs, (202) 366-9579, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m., EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** Sec. 4007(b) of the Motor Carrier Act of 1991 [Title IV of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102-240, 105 Stat. 1914, 2152; 49 U.S.C. 31307] directs the U.S. Department of Transportation (DOT) to establish Federal minimum training requirements for drivers of LCVs. The ISTEA also requires that the certification of these drivers' proficiency be accomplished by instructors who meet certain Federal minimum requirements to ensure an acceptable degree of quality control and uniformity. Sec. 4007(f) of the ISTEA defines an LCV as "any combination of a truck tractor and 2 or more trailers or semi-trailers" that has a gross vehicle weight (GVW) greater than 80,000 pounds (36,288 kilograms) and is operated on the Interstate Highway System. This final rule implements the requirements of Sec. 4007.

#### Background

In the early 1980s, the Federal Highway Administration (FHWA) determined that a need existed for technical guidance in the area of truck driver training. FHWA is the predecessor agency to FMCSA within DOT. Research at that time had shown that many driver-training schools offered little or no structured curricula or uniform training programs for any type of CMV.

To help correct this problem, FHWA developed the *Model Curriculum for Training Tractor-Trailer Drivers*, issued in 1985 (GPO Stock No. 050-001-

00293-1). The Model Curriculum, as it is known in the industry, incorporated the agency's "Proposed Minimum Standards for Training Tractor Trailer Drivers" (1984). The Model Curriculum is a broad set of recommendations that incorporates standardized minimum core curriculum guidelines and training materials, as well as guidelines pertaining to vehicles, facilities, instructor hiring practices, graduation requirements, and student placement. Curriculum content includes the following areas: basic operation, safe operating practices, advanced operating practices, vehicle maintenance, and nonvehicle activities.

The Professional Truck Driver Institute (PTDI) was created in 1986 by the motor carrier industry to certify training programs offered by truck driver training schools. Originally named the Professional Truck Driver Institute of America, the group changed its name in November 1998 to reflect the addition of Canada to the organization. PTDI derived its certification criteria from the Model Curriculum, and, in mid-1988, began certifying truck-driver training programs across the country. As of February 2003, approximately 64 schools in 27 States and Canada have received the PTDI certification. Although many schools have a number of truck driving courses, most have only one course that is certified by PTDI.

The Commercial Motor Vehicle Safety Act of 1986 (CMVSA) (49 U.S.C. 31301 *et seq.*), although not directly targeted at driver training, was intended to improve highway safety. Its goal was to ensure that drivers of large trucks and buses possess the knowledge and skills necessary to operate these vehicles safely on public highways. The CMVSA established the commercial driver's license (CDL) program and directed the agency to establish minimum Federal standards that States must meet when licensing CMV drivers. The CMVSA applies to virtually anyone who operates a commercial motor vehicle in interstate or intrastate commerce, including employees of Federal, State, and local governments. As defined by the implementing regulation, a CMV is a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the vehicle meets one or more of the following criteria:

(a) Has a gross combination weight rating (GCWR) of 11,794 or more kilograms (26,001 or more pounds) inclusive of a towed unit with a gross vehicle weight rating (GVWR) of more than 4,536 kilograms (10,000 pounds).

(b) Has a GVWR of 11,794 or more kilograms (26,001 or more pounds).