BEFORE THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

DEPARTMENT OF TRANSPORTATION

COMMENTS OF THE

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO A NOTICE OF PROPOSED RULEMAKING;

COMMERCIAL DRIVER'S LICENSE

DRUG AND ALCOHOL CLEARINGHOUSE

Docket No. FMCSA-2011-0031

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COMMENTS DUE: May 21, 2014

I. STATEMENT OF INTEREST

These comments are submitted on behalf of Owner-Operator Independent Drivers Association, Inc. ("OOIDA" or "Association") in response to a Notice of Proposed Rulemaking ("Notice" or "NPRM") entitled "Commercial Driver's License Drug and Alcohol Clearinghouse published by the Federal Motor Carrier Safety Administration, ("FMCSA" or "Agency"), Docket No. FMCSA-2011-0031, 79 Fed. Reg. 9703 (February 20, 2014). The Notice announces new rules "to establish the Commercial Driver's License Drug and Alcohol clearinghouse (Clearinghouse), a database under the Agency's administration that will contain controlled substances (drug) and alcohol test result information for the holders of commercial driver's licenses (CDLs)." NPRM at 9703.

OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional drivers. The approximately 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The mailing address of the Association is:

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The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts,

other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers, including those with their own federal motor carrier operating authority. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

The purpose of the proposed clearinghouse, and the rules that govern the participants in the process, is to ensure that employers and others have access to the most accurate information about a commercial motor vehicle operator's drug testing history. Not only does the rule affect most every member of OOIDA, but it also affects the service provided by OOIDA's CMCI, a drug testing consortium for its small business members. The report of a bad drug test can be the end of a driver's employability. OOIDA's individual members are concerned that every rule and procedure be carefully considered to maximize accuracy and to eliminate or minimize the creation and distribution of inaccurate and erroneous drug testing information. Similarly, OOIDA members are also concerned that the motor carrier's role in the drug and alcohol testing and reporting process has, on occasion, been misused to punish or retaliate against drivers in ways that afford drivers no recourse. OOIDA submits these comments with suggestions for the final rule that would address these concerns, but add minimal burden to the drug testing and reporting process.

II. COMMENTS

OOIDA opposes the operation of a CMV - or any motor vehicle - while under the influence of drugs or alcohol. DOT's drug testing program is intended to immediately suspend or end a drivers' ability to drive a truck when he or she may pose a hazard to highway safety due to drug or alcohol use. As designed, a report of a positive drug test or of a refusal to be tested can damage a driver's present and future employability. With the greater availability and dissemination of such potentially damaging information under the NPRM, FMCSA has greater duties to ensure that the reports of drug test results are accurate, not misleading, and are only provided by and reported to authorized individuals who understand their responsibilities under the law.

A. THE NEED TO PREVENT CARRIERS FROM REPORTING FALSE "REFUSAL" TO THE CLEARINGHOUSE

The most serious problem that OOIDA members report under the current drug testing program is the situation where a record of a "refusal" is created about them that is either false or the product of an impossible request. When a report of a "refused" test is not the product of a driver's unwillingness to take the test, then it is an inaccurate report. When the report of a "refusal" is the product of a request to submit to a test on a schedule that is impossible to comply with, then it has a meaning not intended by the regulation and is inaccurate. The Clearinghouse program should be designed so that no such inaccurate reports may enter the database, and if they are submitted, they can be removed quickly.

One category of inaccurate report is a refusal falsely created by a motor carrier. OOIDA members describe motor carriers who report refusals in order to coerce, retaliate against, or punish drivers. One scheme motor carriers use is to require a driver to take a drug test at a date and time that is impossible for the driver to meet – whether due to the distance the driver must

travel to the drug testing facility or the simultaneous work demands of the carrier. Another scheme is to tag a driver with a refusal after the driver is terminated or resigns from the motor carrier. We do not refer here to the situation where a driver is notified of a random drug test and then quits the motor carrier to avoid taking the test – a practice that OOIDA does not condone. In some instances, the motor carrier does not give the driver the direction to take the drug test before reporting a refusal to test. False or misleading reports occur because they are the product of unchecked motor carrier discretion and virtually unverifiable fact patterns. This has permitted some motor carriers to use the report of refusal (or the threat thereof) as a tool of coercion against drivers. FMCSA has a duty provided under the Moving Ahead for Progress in the 21st Century Act (MAP 21) to ensure that any regulations it adopts do not result in coercion of drivers by motor carriers. OOIDA suggests the following changes to the rule to minimize the use of the proposed rule as a tool of coercion and to hold those who report false "refusals" accountable:

1. CLARIFY THE TERMS "REFUSAL" AND "A REASONABLE TIME"

Regarding the definition of the term "refuse to submit," OOIDA asks FMCSA to revise its definition or issue guidance to clarify that the term "a reasonable time" used to define "refuse to submit" takes into account and excludes the following circumstances: when the driver is under load and has an obligation to meet a delivery schedule; when the driver does not have sufficient time under the hours of service rules to travel to the designated drug testing facility; and whether the direction to take a drug test takes place after date and time of the communication of the driver's separation from the motor carrier (after the motor carrier's termination of the driver or of the driver's resignation).

Because FMCSA does not have the authority (only the Secretary has the authority) to revise the reference to "refusal" in Part 40 (cited in the NPRM), FMCSA should revise the parallel references applicable to motor carriers in Part 382. OOIDA suggests these amendments to the current definition of "*Refuse to submit*" in section 382.107:

> *Refuse to Submit* (to an alcohol or controlled substances test) means that a driver, **while employed by a motor carrier:**
>
> ***Reasonable time* includes the time necessary for the driver to first complete any pending time-specific dispatch order and the time necessary to travel safely to the designated testing facility in compliance with the Hours of Service rules.**

Suggested amendment to proposed section 382.705(b):

> (iii) A refusal to submit to a required alcohol or controlled substance test 49 C.F.R. §§ 382.107 and 382.211
>
> (iv) [DELETE]

If the references to Sections 40.261 and 40.191 in the NPRM have a different meaning or serve a different function in the NPRM than would the references to current similar sections 382.107 and 382.121, OOIDA asks FMCSA to elaborate on this difference so that we may recommend an alternate amendment.

2. PROHIBIT FALSE REPORTS OF REFUSALS

The NPRM appropriately prohibits the false or inaccurate reporting to the proposed Clearinghouse (proposed 49 C.F.R. § 382.705(e)) and backs up that requirement with civil or criminal penalties (proposed 49 C.F.R. §382.725(d). OOIDA suggests the following revision to the proposed § 382.705(e):

> **(e) Prohibition. No person may report information to the Clearinghouse that is false, misleading, or in any way inconsistent with this Part.**

OOIDA suggests removing the term "knowingly" because that word provides an incentive for the sources of Clearinghouse data to act with less than full knowledge of the rules and of the information being reported. The rules should encourage, rather than discourage, participants' full knowledge and understanding of the accuracy and appropriateness of their data/record contributions to Clearinghouse. Whether or not the act of reporting false or inaccurate information was done "knowingly" can be taken into account by the agency when considering penalties under proposed section 382.727 and 49 U.S.C. § 521(b)(2)(C).

OOIDA asks that persons who are on FMCSA's list of motor carrier management with a history of non-compliance should not be permitted access to the Clearinghouse. The rules should provide that persons who have been found to have accessed or contributed information to the Clearinghouse with a pattern of disregard for the Clearinghouse rules should have their privileges to access the Clearinghouse revoked and their non-compliance recorded in FMCSA's records of patterns of safety violations of motor carrier management.

3. CREATE A MECHANISM TO PROTECT AGAINST FALSE REPORTS OF REFUSAL TO SUBMIT AND OTHER DATA

OOIDA asks that FMCSA require that motor carriers, employers, medical review officers, or contractors/third-party administrators, where appropriate, maintain records that can substantiate each of the data elements required to be reported to the Clearinghouse, including a report of a driver's refusal to submit. Such a requirement would put a check on careless contributions to the database, reduce FMCSA's administrative costs of addressing requests to correct the database, and give drivers a more certain data correction process.

A motor carrier or service agent should be able to produce documentation that demonstrates that the "request to submit" occurred while the driver was still employed by or under contract with the motor carrier. Those documents should include:

- a document, such as an email, containing an acknowledgement by the drug testing facility that the motor carrier or consortium arranged for or requested, on a specific date and time, a drug test for a particular driver on an upcoming date.

- a document, such as an email, displaying the time and date of a driver's acknowledgement of the carrier's instruction to submit to a test

- a document, such as an email, by which the motor carrier communicated the driver's termination or the driver communicated his or her resignation on a specific date and time.

OOIDA welcomes suggestions for any other documents that contemporaneously records the date and time of a driver's employment, termination, and drug testing direction.

B. ENSURE THAT THE CLEARINGHOUSE DOES NOT ACCEPT OR REPORT DUPLICATE REPORTS OF THE SAME DRUG TEST

OOIDA is concerned that there is no proposed technical specification that would prevent the same test result from being contributed to the Clearinghouse from several different sources, resulting in one test appearing in the Clearinghouse multiple times. This would result in an inaccurate Clearinghouse report, giving the incorrect impression that the driver who tested positive once tested positive several times.

OOIDA is aware that, although not standardized, drug and alcohol testing facilities routinely assign a specific number (specimen number, tracking number, chain of custody number) to each test. OOIDA urges FMCSA to maximize the accuracy of the Clearinghouse by requiring the use of such a tracking number, requiring that it be transmitted to the Clearinghouse for all test results, providing a process for identifying duplicate test results (those for one driver with the same tracking number), and reporting only report one instance of each test result on a drivers Clearinghouse report.

C. OOIDA OPPOSES THE PETITION BY ATA AND CVSA TO PERMIT MOTOR CARRIERS TO REPORT UNVERIFIED ALLEGATIONS OF MISUSE TO THE CLEARINGHOUSE

OOIDA opposes the Petition for a Supplemental Notice of Proposed Rulemaking filed by ATA, CVSA and others to permit employers to submit reports of "actual knowledge" of misuse or driver acknowledgements of misuse into the Clearinghouse database. The proponents of the Petition appear to believe that the duties of a motor carrier with "actual knowledge" of drug or alcohol misuse are only found in Part 382 subpart B and are unrelated to their duties to direct a driver to testing when it has "reasonable suspicion" of misuse under 49 C.F.R. §382.307.

Under 49 C.F.R. §382 subpart B, the agency requires motor carriers to act upon the high standard of "actual knowledge" for the limited purpose of removing a driver from a safety sensitive function in the exigent circumstance where there is a likely risk to public safety. The definition" in §382.107 is clear to point out that the lesser standard of "reasonable suspicion" described in §382.307 is not a sufficient basis upon which to support "actual knowledge." It should be clear, however, that the reverse ***is*** true: "actual knowledge" is more than a sufficient basis to support "reasonable suspicion." Once a motor carrier with "actual knowledge" removes a driver from a safety sensitive function, there is no conflict or rule that prevents or forgives the motor carrier from also complying with its duties under §382.307 to order the testing of the driver and then, under the new rule, for those test results to be submitted to the Clearinghouse.

OOIDA would support new guidance from the Agency, if it is now less than clear to motor carriers, that the observations and admissions of misuse that support "actual knowledge" are a sufficient basis to form "reasonable suspicion" and trigger a motor carrier's duties to order a drug or alcohol test under §382.307. These rules do not conflict with one another, are not exclusive of one another, and are intended to work together.

Unverified allegations of "actual knowledge" of drug or alcohol misuse have no place in the Clearinghouse database. A rule permitting submission of mere allegations of drug or alcohol misuse on a driver's permanent record would be an abuse of the system and an abuse of drivers. OOIDA can think of no process or evidentiary record (other than a test) that would be a sufficient basis for a driver to refute a motor carrier's false allegations It would give a new tool for carriers to coerce and punish drivers. As reviewed above, under MAP-21, FMCSA is required to ensure that its rules are not used to coerce drivers. The Clearinghouse should only report information related to drug and alcohol misuse where there is evidence to support it (such as a test result), not merely an accusation. FMCSA should deny the petition.

D. THE NEED FOR A SPEEDY AND EFFECTIVE DATA CORRECTION PROCEDURE

Because of the severe consequences to a driver of a report with a positive drug test or refusal to submit, false or inaccurate reports must be corrected as soon a possible to minimize their damage to innocent drivers.

1. DRIVER ACCESS TO CLEARINGHOUSE DATA

OOIDA fully supports the proposal that drivers have free access to their drug and alcohol Clearinghouse reports. But the data provided to the individual should include not just the report that is available to authorized persons with proper consent. The driver should also be given a record of all of the data collected concerning who accessed and contributed data to the clearinghouse about him or her. This should include, who (name and carrier) accessed the information, when it was accessed and the claimed authorized purpose for accessing the information. The report should contain all of the data related to who (name and company or organization) submitted data about the individual to the Clearinghouse, what data that person submitted, and when it was submitted. The recording and reporting of this information would

be the most efficient way for FMCSA to ensure that the individuals who interact with the Clearinghouse can be held accountable for their actions. Such accountability will ensure greater compliance with the Clearinghouse rules, greater accuracy of the data submitted, and less opportunity for unauthorized use of the Clearinghouse system.

This report would likely be the only tool available to drivers to obtain notice of and to begin to defend themselves from false or inaccurate Clearinghouse reports. Once a driver receives his or her report and learns of false or misleading information on it, the correction process must be speedy to minimize any unsubstantiated damage to that driver's reputation and career. OOIDA recommends the following changes to the proposed rule:

2. FMCSA SHOULD PERMIT BROADER CHALLENGES TO INACCURATE CLEARINGHOUSE REPORTS.

The scope of permitted challenges under proposed rule 382.717(c) is too vague. OOIDA understands that FMCSA does not intend for the Clearinghouse rules to give a driver a new opportunity to challenge the results of the drug testing process itself – challenges that are already provided and limited under the rules. But the Clearinghouse rules must permit challenges to the accuracy and correctness of Clearinghouse data that the driver otherwise has no existing opportunity under the law to challenge.

For example, drivers should be able to challenge motor carrier determinations reported to the Clearinghouse, including refusals to submit if they do not believe that the motor carrier can demonstrate that the driver received notification of direction to submit to a drug test, that the driver has sufficient time and opportunity to present themselves to the drug testing facility, and that the drug testing facility received the request to drug test that driver on a date and time that precedes the driver's separation from the company.

3. DATA CORRECTION SHOULD OCCUR IMMEDIATELY

The 90 and 30 day time periods that the NPRM allows FMCSA to correct Clearinghouse data are far too long. The damage that an inaccurate drug testing report can do to a driver's career and business can be irreparable and is not amenable to mitigation the longer it is reported. The proposed rule requires that Medical Review officers and substance abuse professionals to report certain information to the clearinghouse within 1 day of obtaining the information. The critical need that FMCSA identifies as justification for such speedy submission of information, (the immediate availability and use by employers and state officials and the interest of the driver to be cleared to operate again) also describes the critical need for drivers to be given speedy correction of damaging false or incorrect information before they unfairly lose employment opportunities.

OOIDA understands the need for FMCSA to discourage unsubstantiated challenges or corrections to Clearinghouse data. But to avoid unnecessary damage to a driver's reputation and employability, the rule should provide that, if a driver submits a substantive request for correction, with complete supporting documentation, the Clearinghouse should cease reporting the challenged information until the challenge is reviewed and overturned. This procedure will ensure that somebody else's mistake does not unfairly prejudice a driver. It will ensure speedy processing of the request is in the hands of the party responsible for reviewing the request.

For drivers who may not have the ability to submit the most complete documentation to support a challenge, the drivers who have been stopped from conducting safety-sensitive functions (i.e. driving) should be given a response to their petition within 14 days. If the Clearinghouse report being protested does not prohibit a driver from operating a truck, and the nature of protest is a clerical mistake, there is no reason to believe that this type of correction

should take longer than 21 days. OOIDA appreciates FMCSA's recognition of the differences in impact that incorrect drug testing reports can have, but the proposed correction schedules must be eliminated when well supported, or shortened in other cases, to avoid unintended negative consequences on blameless drivers.

4. INCLUSION OF A DRIVER'S STATEMENT

The correction process does not end at FMCSA's review of a driver's correction request. Under the Clearinghouse authorizing statute, the agency is required to comply with certain requirements for the release of information under the Privacy Act and Fair Credit Reporting Act. 49 U.S.C. § 31305a(d). Each of those Acts give individuals the right to submit a statement to their record disputing or explaining their record, and that statement is required to be reported on their record. See 5 U.S.C. § 552a(d) and 15 U.S.C. § 1681i(b). The proposed rule does not provide an opportunity for a driver to insert a statement to the database to be reported with a Clearinghouse report. FMCSA must create such a process to comply with the authorizing statute.

E. DRIVER CONSENT TO EMPLOYERS TO ACCESS CLEARINGHOUSE MUST BE STRICTLY DEFINED.

Appropriately, FMCSA permits access to clearinghouse data only with driver consent. OOIDA is concerned that the important control intended by this part of the rule will not be effective unless more detail is prescribed. OOIDA proposes the following:

- FMCSA should prescribe the exact language for the consent form, specifying:
    - who is giving consent
    - who is receiving consent
    - whether the consent is a blanket consent or limited consent and the implications of those terms
    - the exact limited purpose authorized by law for the consent being sought (pre-employment or annual check only during period of employment)

- the driver's rights under the Clearinghouse rules, including the right to obtain a free copy of his or her Clearinghouse data and the right to seek corrections to it

No form should permit consent for any or all permissible purposes without a time limit. There should be a consent form for the limited purpose of a pre-employment check, and separate consent form for the annual employment check of current employees. Motor carriers should be required to obtain a new consent form for the annual employment check every five years or as often as a new agreement is signed, whichever is shorter. Finally, the driver should be given a copy of each consent form he or she signs.

F. ACCESS TO OBTAIN AND REPORT DRUG TESTING INFORMATION MUST BE TIGHTLY REGULATED.

FMCSA identifies very specific persons and entities who may contribute to and access the proposed Clearinghouse (proposed section 382.711 of the NPRM). OOIDA is concerned that without more specific controls, unauthorized persons will seek access to the Clearinghouse to obtain data for unauthorized purposes or to submit data not in accordance with the rules. As already suggested in these comments, OOIDA asks that FMCSA put in place controls on access to the Clearinghouse as follows:

1. The specific individuals who work at each of the authorized entities under proposed section 382.711 should be required to register individually, by name, title, and employer, and to identify which specific authorized access for the Clearinghouse is within their work responsibility.

2. The Clearinghouse should not accept registrations from an individual identified under 49 C.F.R. Part 385 as having engaged, or having been in the management of a motor carrier that engaged, in a pattern or practice of non-compliance with the safety rules.

3. As the Secretary cited to 49 U.S.C. Chapter 311 among the authorities to promulgate the Clearinghouse rules, FMCSA should make clear that non-

compliance with the proposed rules will contribute to any finding of a pattern or practice of non-compliance with the safety rules under 49 C.F.R. Part 385.

4. Each time an individual accesses the Clearinghouse, they should be required to certify each of the following line items (by a radio button or other on-screen acknowledgement):

    a. their identity - that they are the person registered to access the Clearinghouse;
    b. if they are seeking information, for which permissible purpose under the rule they are seeking information;
    c. the driver's consent;
    d. if for a routine annual driver check, that the driver is still employed or under contract with the motor carrier, and whether the search is the limited query or the full query;
    e. if they are reporting information, that the information they are reporting is true and accurate, and acknowledge if that information is not true and accurate that he or she may be liable for possible civil and criminal penalties under 49 U.S.C. § 521 and loss of Clearinghouse privileges

5. If a service agent is accessing the Clearinghouse to obtain or submit information, then the Clearinghouse should capture the transaction and report to the driver on which motor carrier's behalf the action is being taken.

6. The Clearinghouse database should confirm that a request for a full query annual employment check was preceded by a limited query, or not permit a full query unless a limited query was first accessed within a short period of time.

7. When a submission of information is made to the Clearing house concerning a "prospective employee," prospective employee must be defined as a person who does not currently operate for the motor carrier, has applied to operate for a motor carrier, and who's consent was given within 14 days of the date access to the Clearinghouse is sought. This definition will prevent motor carriers from relying upon a blanket consent forms, accessing employment histories about former employees from credit reporting agencies under fiction that they are "prospective employees," even if that drivers do not have pending applications with their former employer.

8. The Clearinghouse must keep a record of each time someone accesses or submits driver information to the Clearinghouse that contains who, what, when, and for

what authorized purpose. That record should be given to the driver upon each request for his or her Clearinghouse information. That information is important for the driver to check the accuracy of his drug testing data and to assert an informed request to correct such information. The rules do not give employers any duties related to knowing the name of other employers who contributed information to the Clearinghouse, and the rules should specifically exclude the disclosure of that information.

G. ACCESS TO STATE OR LOCAL OFFICIALS MUST BE MORE SPECIFIC

The employer and service agent disclosure of information under proposed rule 49 C.F.R. § 382.405(d) is too broadly defined. It includes "any State or local official with regulatory authority over the employer or any of its drivers." NPRM at 9723 Col. 1. OOIDA assumes this means any state or local authorities among FMCSA's MCSAP partners with responsibility to enforce or take regulatory action under the state equivalent of the FMCSRs. OOIDA can think of no other possible authorized purpose for the disclosure of Clearinghouse information. Therefore, the proposed rule should be narrowed to serve that purpose. If FMCSA has a different purpose in mind for the broader disclosure of Clearinghouse information, OOIDA asks FMCSA to disclose its purpose and authority to do so and to permit public comment.

H. KEEP UNAUTHORIZED THIRD PARTIES OUT OF THE CLEARINGHOUSE PROCESS

OOIDA asks that third-party vendors that help motor carriers perform their background check obligations not be given any greater access to Clearinghouse data than motor carriers. If FMCSA were to permit third-party vendors to have access to the Clearinghouse data, then they must make all of the same certifications suggested above (including identifying the pre-registered name of the individual requesting access, the purpose for which access is sought, and acknowledgement of liability for unauthorized access and use of Clearinghouse data, and the

identity of the motor carrier for whom it is acting as an agent). In no way should third-party vendors not involved in the drug-testing process be permitted to contribute data to the Clearinghouse or to retain and store Clearinghouse data for any future or other use.

I. INCLUDE IN CLEARINGHOUSE DATA THE NUMBER OF FOLLOW UP TESTS COMPLETED.

The rule is primarily focused on the reporting of drug testing information that a motor carrier must have to know whether an individual is not permitted to operate a truck under the rules – positive drug tests and incomplete return to duty processes. This leaves out one piece of good information from the process that should be reported – the number of follow-up tests taken by a driver.

Drivers who have tested positive are typically required to take a number of follow-up tests that continue even after the negative test that allows a driver to return to duty. If a driver goes to a new carrier after successfully returning to duty, under the proposed rule, the carrier will only have access to the report laying out the return to duty process. It will not have access to how many follow-up tests have been completed. In similar circumstances under the current rules, drivers' new motor carriers have access to the return to duty plan but not the number of follow up tests completed (unless negative). Therefore, to ensure a driver completed all of the follow-up test prescribed, and not knowing how many of those tests have been completed, the carrier required the driver to start again and take the full number of follow–up tests. Because owner-operators bear the cost of such tests, this practice has resulted in a significant and unnecessary expense to drivers. Therefore, OOIDA asks that FMCSA ensure that the number of follow-up tests is reported to and from the clearinghouse so that the driver is not required to take any more tests than required under the rules.

J. HAIR TESTING DOES NOT SATISFY THE DRUG TESTING RULES AND SHOULD NOT BE MADE PART OF THE CLEARINGHOUSE.

OOIDA believes that some entities in the industry are advocating that hair testing results be included in the Clearinghouse data. Hair testing and standards for it have not yet been approved by the Department of Health and Human Services ("HHS") or by DOT. While hair testing results may be acceptable under individual corporate policies, they cannot be the basis for an employer's decisions required under the federal drug testing program. Data related to such testing, therefore, is not a necessary component of complying with the rules. It would be premature to include such data in the Clearinghouse.

In July 2013, medical experts participating in the Department of Health and Human Service's Drug Testing Advisory Board raised basic questions about the science behind hair-based testing as well as detailed issues regarding how such a testing system should be implemented:

- Mechanisms of exactly how and how fast drugs/metabolites get into hair;
- Environmental or external contamination;
- Interpretation of test results – "use" vs. "exposure";
- Relatively low sensitivity to marijuana compared to relative high sensitivity to cocaine;
- Propensity for hair-testing to result in a higher percentage of false positives than urine testing;
- Hair color bias; and
- Comparability of test results from hair testing to other test system, including urine.

The July 2013 session, which is part of an on-going review of hair testing by HHS, also touched upon unresolved legal issues raised by hair testing:

- A number of state laws prohibit or limit use of hair for workplace testing; and

- Legal concerns regarding reliability, racial disparity, and probable cause.

There are also significant limitations with hair-based testing, including its inability to detect recent drug use as it takes anywhere from 4-10 days for the hair containing the drug to grow far enough from the scalp. Therefore, urine-based testing will still need to be used to detect recent use.

The variances in hair types have also posed problems in standardizing drug testing. Hair shape, size, color, texture, formation, etc., varies by race, sex, age, and position on the scalp. According to the American Civil Liberties Union, dark hair is more likely to test positive for a drug and additionally African-Americans are more likely to test positive than Caucasians. Differing portions of the scalp hair can even be dormant at any given time and would not reflect drug use.

These issues demonstrate that hair testing needs much more study before it can be considered an accurate and fair method of determining drug use both under the standards of the federal drug testing program and for incorporation in the Clearinghouse. OOIDA believes that the unreliability and inconsistency in hair testing would produce data that does not meet the standards for accuracy required of federal databases of personal data under the Privacy Act. At a minimum, FMCSA should wait until HHS has approved hair testing standards as an effective, reliable, and non-discriminatory method of determining drug use, and then adopt rules that apply the particular capabilities of hair testing to the motor carrier industry, before considering allowing hair testing data to be contributed to and disclosed from the Clearinghouse.

K. PERMIT OTHER LIMITED USES FOR CLEARINGHOUSE WITH DRIVER CONSENT

OOIDA believes that the agency must give greater scrutiny to the applicants for operating authority in fulfilling their duties under 49 U.S.C. §13902, and the Clearinghouse gives them

another tool to do so. There is a circumstance in which a driver fails a drug test and then, employment prospects dimmed, stays in the business by obtaining federal motor carrier operating authority. By this action, the individual effectively avoids the scrutiny of the drug testing process (at least for a while) by becoming a self-employed driver. And the individual's ability to comply with the required safety management procedures is particularly questionable. To address this problem, OOIDA suggests two solutions. The first is for FMCSA, as a part of the licensing process, to check the Clearinghouse for the existence of unresolved drug testing reports for any principles listed in application for motor carrier authority. Evidence of positive drug tests or a refusal to submit (and incomplete follow-up procedures) would be strong indication of the individual's lack of willingness and ability to comply with the safety regulations – a requirement of 49 U.S.C. §13902.

Another method of addressing this fact pattern would be for FMCSA to permit providers of motor carrier public liability insurance to request from the motor carrier the Clearinghouse report for all drivers for the motor carrier. The consent form required under the rule should give notice of this potential use of Clearinghouse reports. And the insurance companies should be prohibited from storing or using the Clearinghouse reports for any purpose other than underwriting the motor carrier's federally mandated public liability insurance. This procedure would allow the insurance industry to continue to play its intended role: to adjust the availability and cost of public liability insurance to the safety record of an individual or motor carrier. This result would both fulfill the Congressional and regulatory schemes for public liability insurance and for the drug testing program.

L. THE COST OF A QUERY OF THE CLEARINGHOUSE

The statutory mandate implemented by the proposed rule requires that a motor carrier conduct an annual "limited query" of the Clearinghouse for each driver. This could pose a significant new cost to motor carriers. OOIDA encourages FMCSA to scale the cost of a "limited query" to be much lower than a "full query." This would lessen the routine cost and burden on (and provide another incentive to) motor carriers whose safety management practices result in no positive drug test information about their in the system. A lower cost "limited query" may also encourage motor carriers to query the Clearinghouse more frequently – a benefit that comports with the purposes of the Clearinghouse.

Similarly, the cost of a "limited query" would also be a new burden on individual owner-operators who have their own federal operating authority. Assuming under the rules that the reports are the same, OOIDA asks that FMCSA clarify or write into the rules that the free Clearinghouse report that may be obtained by the driver suffices as the annual report a motor carrier is required to obtain under the rules.

M. THE APPLICATION OF THE RULE TO MEXICAN DRIVERS

The NPRM states that the proposed rule will apply to Mexican drivers, but the Notice otherwise is silent as to how the new rules would interact with Mexico's so-called equivalent drug testing standards, or how they would be complied with across the international border. The North American Free Trade Agreement did not commit the United States to grant any exceptions to our motor carrier safety rules to Mexican carriers hauling NAFTA freight. And yet there are no provisions here describing whether and how the parties in Mexico with responsibilities under this rule are prepared to comply with the proposed rule.

III. CONCLUSION

OOIDA asks FMCSA to take these comments into consideration to make the final Clearinghouse rule one that hold the participants accountable, prevents it from being used to coerce drivers, is fairer to the driver, and is a more effective tool of public safety.

Respectfully submitted,

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