

television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would therefore be classified as small entities.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

16. Possible requirements under consideration in this FNPRM would impose use of new narrowband technology at least one voice path per 6.25 kHz of spectrum by a date certain. Assuming the rules adopted earlier in the same docket in another context are a good model for the transition to 6.25 kHz narrowband technology (which assumption has yet to be established), the FCC might require licensees to convert to 6.25 kHz operation by a date certain; and/or establish dates after which equipment capable of operating at a higher bandwidth could no longer be certified, manufactured or imported; or freeze the filing of new applications for 12.5 kHz operation. These steps may be necessary to facilitate efficient management and use of spectrum.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.

18. The objective in the *Refarming* proceeding was to provide a means to transition licensees to 6.25 kHz technology, *see* para. 27, *supra*. Migration to 12.5 kHz technology was viewed as a stepping stone to operation at 6.25 kHz technology, *see id.* However, requiring the use of 6.25 kHz technology by a date certain could have an impact some small entities by requiring them to upgrade their communications systems before they would otherwise do so. An alternative would be to maintain the current rules, which are intended to foster migration to narrowband technology by way of progressively more stringent type certification requirements. The FCC issues this FNPRM in order to consider whether a

change in its rules would benefit small entities and other PLMR licensees.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

19. None.

Ordering Clauses

20. Accordingly, pursuant to sections 1, 2, 4(i), 5(c), 7(a), 11(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 155(c), 157(a), 161(b), 301, 302, 303, 307, 308, 309(j), 310, 312a, 316, 319, 323, 324, 332, 333, 336, 337, and 351, the Balanced Budget Act of 1997, Public Law Number 105-33, Title III, 111 Stat. 251 (1997), and §§ 1.421 and 1.425 of the FCC's rules, 47 CFR 1.421 and 1.425, it is ordered that the *Second Further Notice of Proposed Rule Making* is hereby adopted.

21. It is further ordered that notice is hereby given of the proposed regulatory changes contained in the *Second Further Notice of Proposed Rule Making*, and that comment is sought on these proposals.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

[FR Doc. 03-18055 Filed 7-16-03; 8:45 am]

BILLING CODE 6712-01-U

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: Supplemental notice of proposed rulemaking (SNPRM); request for comments.

SUMMARY: In March 1996, the Federal Motor Carrier Safety Administration's predecessor, the Federal Highway Administration (FHWA), published a notice of proposed rulemaking (NPRM) specifying what minimum safety performance history information new or prospective employers would be required to seek concerning commercial motor vehicle (CMV) drivers and from where that information should be obtained. This SNPRM: Addresses

issues raised in response to the NPRM, including small business burden, and incorporates new requirements of limitation on liability and driver privacy protections imposed by the Transportation Equity Act for the 21st Century (TEA-21).

DATES: FMCSA must receive your comments by September 2, 2003.

ADDRESSES: You may submit comments to DOT DMS Docket Number FMCSA-97-2277 by any of the following methods:

- Web site: <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2251.

- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the *Public Participation* subheading at the beginning of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Mr. David Goettee, (202) 366-4097, FMCSA, 400 Seventh Street, SW., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Public Participation: The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the "help" section of

the DMS web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Background

Summary of NPRM

Discussion of Comments to the NPRM

Summary of the SNPRM

Impacts of Other Related Rulemakings

Rulemaking Analyses and Notices

Regulatory Evaluation: Summary of Benefits and Costs

Background and Summary

Costs

Benefits

Background

Section 391.23 of Title 49 of the Code of Federal Regulations (CFR), Investigations and Inquiries, sets forth a motor carrier's responsibility to check the driving record and investigate the employment history of a new driver. The section directs the motor carrier to investigate information about the employment history from a driver's previous employers during the last three years. It does not specify what type of information must be investigated. The driver's driving records are to be obtained from each State in which the driver held a motor vehicle operator's license or permit during the preceding three years. These inquiries and investigations must be completed within 30 days of hiring the new employee. Currently, there is no specification of what information must be investigated, or a requirement for a current or previous employer to respond to such investigations. Consequently, many former employers refuse 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. 5101–5127. Section 114 of the HazMat Act directed the Secretary of Transportation to amend § 391.23 to specify minimum safety information to be investigated from previous employers when performing employment record investigations on driver candidates and newly hired drivers. A copy of section 114 of the HazMat Act is included in the docket as document 37. Section 114 specified that a motor carrier must investigate a driver's 3-year accident record, and drug and alcohol history, from employers the driver worked for

within the previous three years. Current or previous employers must be required to respond to the investigating employer within thirty days of receiving the investigation request.

The agency published the NPRM for implementing regulations in the **Federal Register** on March 14, 1996 (61 FR 10548). A copy of the NPRM is in docket FMCSA–1997–2277.

Summary of NPRM

The March 14, 1996, NPRM 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 from 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 obtain a driver's driving record(s) from the State(s) would be retained. To harmonize § 391.23(e) with then current drug and alcohol regulations under § 382.413, the agency also proposed the motor carrier obtain the driver's written authorization to investigate the required drug and alcohol information.

Current and former employers would 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 this right 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 proposal requiring 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, the agency drug and alcohol 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) allowed a previous employer to pass along drug and alcohol test information received from other previous employers (as long as the information covered actions occurring within the previous two-year period). Under § 382.413(b), if an employer found that it was not feasible to obtain the drug and alcohol information prior to the first time a driver performed a safety-sensitive function for the employer, that employer could 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 had made a good faith effort to obtain it.

In its 1996 NPRM, the agency also proposed numerous conforming amendments to expand the type of drug and alcohol 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 other DOT agencies; and (2) failed to undertake or complete a SAP's rehabilitation referral pursuant to § 382.605, or the alcohol or controlled substances rules 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.” At that time, 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 have helped to ensure that persons applying for positions that require 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 § 382.413(a)(2) requirement to pass along drug and alcohol information received from other previous employers when responding to an employer's investigation under § 382.413 was subsequently incorporated into the FMCSRs as a technical amendment in a final rule published in the **Federal Register** on March 8, 1996, (61 FR 9546). However, because § 382.413(a)(2) constituted a substantive change which should be subject to public notice and comment before becoming a final rule, the agency also included it in the March 14, 1996 NPRM.

In a related change proposed under § 382.405, disclosure of the information pursuant to § 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 proposed § 382.413(b), the agency would have extended the time period allowed to use a driver in a safety-sensitive function without having received the requisite drug and alcohol 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 having documented a good faith effort to obtain, the driver's drug and alcohol history.

Discussion of Comments to the NPRM

Small Business Administration Concerns

The Small Business Administration (SBA) believes that a substantial number of small entities would be economically impacted by the NPRM, and offered recommendations for minimizing such impacts. In particular, the SBA recommended FMCSA give more attention to the intent of the HazMat Act requirements relative to the Regulatory Flexibility Act certification regarding impacts on small entities, and specifically include estimates of the number and size of entities and the estimated costs they would incur. The SBA also requested that more extensive information be included about the estimated paperwork burden.

FMCSA Response: The FMCSA agrees that more extensive attention to regulatory flexibility is appropriate, and has included a more detailed Regulatory Flexibility Act analysis as part of this SNPRM. The agency has also prepared an initial regulatory evaluation and placed a copy of the regulatory evaluation in the docket for this rulemaking as document number 38. A summary of the regulatory evaluation is provided in this SNPRM under the section entitled "Regulatory Evaluation: Summary of Benefits and Costs." FMCSA addresses SBA recommendations for major issues under the following topical discussions.

Employer Liability and Driver Rights

Many comments to the NPRM concerned issues of (1) employer liability for using investigative driver history background information in the hiring decision, (2) employer liability for furnishing the driver history background performance records, and (3) drivers' rights to review and comment on the accuracy this safety performance information and to processes for drivers to seek revision or provision for rebuttal. Seventeen commenters addressed the employer liability issues. Eighteen addressed the drivers' rights issue.

The American Trucking Associations (ATA) wrote:

"The potential liability arising from providing information about a former employee to a prospective employer continues to be a matter of the greatest concern to motor carriers. It has been a major factor inhibiting the effectiveness of the present provisions of § 391.23(c) for the past quarter-century. The general view, based on experience, is that a mere requirement for notification to drivers set forth in proposed § 383.35(f) and 391.21(d), or as currently required in § 391.21, is totally inadequate. We are also concerned with the present provisions and proposed amendments to § 382.413 because a driver-applicant is not specifically advised of the regulatory requirements that the prospective employer obtain the information and the obligation of the previous employer to provide it. * * * Even if the carrier successfully defends its action in providing factual information to the prospective employer, it will have almost surely been put to considerable needless expense to defend itself."

A few commenters feared that providing the driver with full access to information received during the employment history investigation, and not just that proposed in the NPRM under § 391.23(c)(1), would increase the threat of litigation for employers, particularly if that information was the basis for denying the driver employment.

Several commenters proposed various remedies. The Regular Common Carrier Conference (RCCC) and Interstate Truckload Carriers Conference (ITCC) suggested the proposed driver's written release required for alcohol and controlled substances information under § 391.23(c)(1)(iii) and (iv) be required for all investigative information under § 391.23(c)(1). The RCCC believes this modification would greatly reduce the potential liability for unlawfully disclosing investigative information, and ensure that drivers know beforehand their safety performance records will be investigated from prior employers.

In supplemental comments to the docket, the ITCC noted that legislative relief was their preferred option for dealing with employer liability issues. The ITCC further believes the driver's signed release would provide an appropriate measure of protection for employers named as defendants in employment litigation. It pointed out that many employers have already incorporated some sort of release language into the printed employment application. Drivers subscribe to the release when signing the application.

The ITCC further proposed that the agency incorporate language into the final rule stating that the act of applying for employment denotes a driver's implied consent to the release of all information that carriers are required to obtain to make a considered employment decision. The inclusion of such "implied consent" language could be especially useful in satisfying the concerns of carriers accepting applications using non-written means, such as drivers calling 800 numbers provided by the carrier for recruiting new drivers. The ATA and DAC Services, Inc. also recommended including implied consent language in the final rule. The United Motorcoach Association (UMA) supports employer protection for releasing driver investigative information by adding a "hold harmless" clause to the final rule.

In the March 14, 1996, NPRM the agency requested specific comments on whether to define a "reasonable opportunity" for a driver to review and comment on safety performance records and whether this driver right should have time restrictions.

The Advocates for Highway and Auto Safety (AHAS) urged the agency to define "reasonable opportunity" rather than leave implementation of this proposal to the motor carrier industry.

Pinnacle Transport Services (Pinnacle) encouraged the agency to entirely eliminate the proposed right for the driver to review the furnished

information, as well as the corresponding stipulation under the proposed § 383.35(f) and § 391.21(d) that employers notify driver applicants of this right. Pinnacle believed that "(u)ntil the Department of Labor makes this suggestion generally applicable to all employers, you are unreasonably forcing companies to become clearinghouses for minutiae."

Some commenters suggested drivers be allowed to review the furnished investigative information only if they made a written request.

Dart Transit Company and Fleetline, Inc. recommended that only drivers who have been denied employment or a contract, in whole or in part, based on the furnished safety performance background information, be allowed to review and comment. They also suggested these drivers be given up to 30 days after notification of disposition of the application to provide written comments to the investigating carrier. In addition, they suggested a corresponding requirement that the prospective motor carrier advise all driver-candidates of their rights to request an opportunity to review and comment on the background data that is received.

Six commenters recommended all drivers be allowed to review and comment on only the safety items originally proposed under § 391.23(c)(1). Contract Freighters, Inc. suggested that only accident information be open to a driver's review and comment.

Several commenters recommended specific time frames for the driver applicant review and comment period. These range from within 3 workdays to 10, 30 or 60 days after receipt of notification of disposition of the application, commencement of the application process, or receipt of the investigation reports from the responding employer.

The United Motorcoach Association (UMA) proposed requiring employers to complete an employment record within 48 hours of an employee leaving, unless hindered by extenuating circumstances or authorized by a mutually agreed upon extension of that period. That employment record would be the one transmitted to subsequent employers investigating a prospective driver. The UMA also proposed drivers be granted the right to add brief personal and enlightening comments to the previous employer's report and that the combined record be forwarded to investigating employers upon request.

The International Brotherhood of Teamsters proposed a similar requirement, but favored allowing the

employer 10 days in which to provide separated employees with his or her complete employment record. The employee would similarly be entitled to file supplemental comments.

FMCSA Response: On June 9, 1998, the President signed TEA-21. Section 4014 of the Act addresses this rulemaking by preempting State and local liability laws and regulations, thus limiting employer liability for investigating, furnishing and using previous employer driver safety performance records as part of the hiring decision (*i.e.*, the proposed driver safety performance history information enumerated under § 391.23(d) and (e) of this SNPRM), when carried out in accordance with FMCSA rules. A copy of section 4014 of TEA-21 is included in the docket as document 39. Section 4014 further directs the FMCSA to amend the Safety Performance History of New Drivers NPRM to specify details of protection for driver privacy, including establishing procedures whereby drivers may review, correct, or rebut investigative information received by a prospective motor carrier employer from a previous employer. FMCSA believes these procedures replace the phrase "reasonable opportunity" and fully address the concerns expressed above from AHAS.

Section 4014(a) amends 49 U.S.C. chapter 5, by adding section 508, preempting the right of anyone to bring action against employers rightfully fulfilling their requirement to investigate, provide and use specified previous employer driver safety performance history of driver-applicants as part of the hiring decision.

After implementation of these liability limitation provisions proposed in this SNPRM, no one would be allowed to bring actions or proceedings against a motor carrier requesting, providing and using this information in conformance with the procedures put forth in this SNPRM. This limitation would only apply if in accordance with FMCSA regulations the prospective employer has conducted the required investigations for driver safety performance information, the previous employers provided the required information to the investigating motor carrier, the previous employer is not found to have provided false information, and these processes were carried out in compliance with the proposed regulations. The proposed regulations would require observing the driver's right to review, correct or rebut the previous employer furnished records, and the requirement at 49 CFR 391.23(f) of this SNPRM to first obtain the driver's written authorization to

release his/her drug and alcohol information.

As a result of the limitation on liability being granted, FMCSA believes the concerns of those who wanted to restrict drivers' rights to review previous employer investigative data to only safety items are fully addressed. FMCSA believes the drivers' right to review, comment, or rebut applies to all investigative information provided to prospective employers and used as part of the hiring decision process.

In addition, the method proposed in this SNPRM to further provide protection for driver privacy for drug and alcohol information is modeled on that already operational in the DOT drug and alcohol regulations under 49 CFR part 40, which meet the intent of section 114 of the HazMat Act. Although results of DOT-mandated drug and alcohol tests were determined not to be medical records, DOT policy treats the release of such results similar to the release of medical records.

Thus, the applicant would continue to be required to sign a written authorization for the specific employer (or agent) to provide investigative information about the applicant's drug and alcohol history to the prospective employer specified on the authorization. Any use of the information by the prospective employer for other than hiring purposes, such as release to anyone not involved in the hiring process, would be permitted only in accordance with the terms of the driver's authorization.

Various third party consumer reporting agencies sell services to the truck and bus industry for obtaining and providing a variety of information, including inquiries for State driving records and investigations for employer history pertaining to CMV drivers. A similar function under the DOT alcohol and controlled substance regulations is referred to by the term "Service Agent." Such agents are prohibited by 49 CFR 40.321 from releasing a driver's personal alcohol and controlled substance information without the driver's written consent for that specific release.

The DOT Office of the Secretary, Office of Drug and Alcohol Policy and Compliance interprets the restriction on releasing information to mean that such third party service agents are prohibited from disclosing even that a driver's alcohol and controlled substance information exists in the service agent's files without the driver's written consent. The proposals in this SNPRM for provision of alcohol and controlled substances information contain this same restriction on release of this information by previous employers or

their agents operating under the limited liability provisions contained in this SNPRM.

The method proposed in this SNPRM to ensure the driver's right to review, correct, or rebut contains two major parts. First, as part of the application process prospective employers are required to notify driver applicants in writing of their review rights. Second, the furnishing previous employer is required to work with the driver to either revise the report, or allow the driver to have his/her rebuttal appended to the carrier report.

This process is generally modeled after provisions in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*) as it applies to motor carriers obtaining investigative information as part of the hiring decision process. Prospective employers would be authorized to investigate, and previous employers would be required to provide, non-drug and alcohol safety performance history information without a signed authorization from a prospective employee. Prospective employers would be required to provide the driver a copy of the information received if the driver submits a written request to the carrier to review the information (electronic or Internet requests would be acceptable).

In the interest of allowing drivers prompt access to the information critical to their hiring, the FMCSA proposes two business days for the prospective employer to provide a copy of the investigative data received upon receipt of a written request from the driver to review the information. If the driver chooses to correct or add a rebuttal to a previous employer's information, it is proposed that the previous employer have up to thirty calendar days to respond to the driver's request for such changes or incorporation of the rebuttal.

Comments are requested on the appropriateness of the number of days proposed for employer responses in this SNPRM. For example, should the prospective employer have more business days, such as five, or 10, to provide the driver with copies of the investigative data received? Should the previous employer be required to respond earlier than 30 calendar days, such as 10 or 15 business days, since the driver may not be receiving compensation pending resolution of adverse information provided by the previous employer?

The liability limitation protections under 49 U.S.C 508(a) only apply to motor carrier employers carrying out these investigations and other parties functioning as the agent for a previous or prospective employer. Companies functioning as a consumer-reporting

agency providing reports from their repository of driver safety performance information, rather than as the agent for a specific motor carrier, are not granted the liability limitation proposed in this SNPRM. Instead they are subject to protections specified in the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* In addition, the protections under TEA-21 would not apply to motor carriers found to have knowingly provided false information. The previous or current employer's response should be based on fact and not opinion or hearsay.

Title 49 U.S.C. section 508 requires that the § 391.23(c) safety performance history information be accessible only to authorized persons involved in the hiring decision process and the motor carrier's insurance company. Under current regulations, motor carriers maintain information received in response to § 391.23(c) investigations in the Driver Qualification (DQ) file, along with various other types of information required by the FMCSRs. These include information related to the § 391.25 driving record annual review, and the § 391.41(a) bi-annual review of a driver's medical qualifications. The multiple functions of the DQ file increases the potential that motor carrier personnel other than those involved in hiring decisions would repeatedly have access to a driver's background employment records.

However, sections 114(b)(2) and (3) of the HazMat Act specify that drug and alcohol information are part of the minimum safety performance information to be sought under § 391.23(c). Therefore, that information is included in the information specified under section 4014 of TEA-21 as being restricted to limited accessibility, and only used for the hiring decision.

DOT regulated employers are already required by § 40.25(i) and § 382.401(a) to maintain drug and alcohol records confidentially in a secure location with controlled access. As a result, the industry has already developed procedures for complying with the recordkeeping requirements of parts 40 and 382. It is accepted practice to maintain drug and alcohol records separately from the DQ file in order for the employer to ensure that the data is adequately secured, and access to it is controlled in compliance with parts 40 and 382 recordkeeping requirements. Those persons with access to the drug and alcohol records are specifically designated and charged with keeping the data secure, and their access is controlled to ensure this is not compromised.

Therefore, the established recordkeeping practices for drug and

alcohol records fulfill the requirements of section 4014 of TEA-21 for all previous employer investigative information. Accordingly, this SNPRM proposes under § 391.53 to require that all investigative information received from previous employers pursuant to § 391.23(c) be kept in the controlled, access-secured file. FMCSA believes that this meets the accessibility requirements necessary for employers being granted the limited liability specified in section 4014 of TEA-21.

Therefore, this proposal would revise § 391.23(c) to require that investigative information received be maintained as specified at § 391.53. Current instructions in § 391.51(b)(2) for retaining information relating to the § 391.23(c) investigations in the driver qualification file would be removed. The restriction contained in 49 U.S.C. 508(b)(1)(C) that investigative information received from previous employers can only be used for the hiring decision means the accident data received cannot be considered in the annual reviews of the driver's driving record required by § 391.25.

Section 4014 of TEA-21, codified at 49 U.S.C. 508 requires the Secretary to develop regulations implementing liability limitations on motor carriers requesting and providing investigative driver safety performance history information, and that those include procedures for prospective drivers to review, comment or rebut the information provided to prospective motor carriers. This SNPRM has modeled driver rights to review, comment or rebut driver safety performance on those contained in the Fair Credit Reporting Act for investigative information.

This SNPRM provides notification at § 391.23(i) of the right of the driver to request access to information provided to the prospective motor carrier employer, and at § 391.23(j) for the driver and the previous motor carrier to resolve any differences. FMCSA requests comments on the sufficiency of these procedures, and specific, proposed methods to improve them.

Hours of Service Violations Resulting in an Out-of-Service Order

SBA recommends FMCSA eliminate its proposal that motor carriers investigate information about a driver's hours-of-service violations that resulted in an out-of-service order. SBA does not believe the agency has adequately explained how the information would contribute to safety. It points out that section 114 of the Hazmat Act does not require information about a driver's hours-of-service violations, and the

FMCSRs do not require former employers to record or retain such information. Similarly, other commenters, including J.B. Hunt and Mobile Corporation, saw little or no relationship to safety performance.

FMCSA Response: The regulatory evaluation for this proposed rule reveals a strong and positive relationship between: (1) Hours-of-service violations that result in out-of-service orders, and (2) future safety performance. However, FMCSA has decided to eliminate the proposal for the following reasons: (1) Section 114 of the HazMat Act does not specifically require this information, (2) information about hours-of-service violations that resulted in out-of-service orders would be difficult for prospective employers to obtain from previous employers, because this information is only systematically reported to FMCSA as part of the Motor Carrier Safety Assistance Program (MCSAP) enforcement activities of the States, (3) requiring this information collection and establishing a motor carrier recording requirement would be particularly burdensome to small entities, and (4) comments to the docket opposed the proposal.

Drug and Alcohol Reporting

SBA believes the NPRM would result in an increased number of inquiries for drug and alcohol information under § 382.413, and that the 30-day response time would place new burdens upon small entities. SBA believes opinion and hearsay should be discouraged to minimize liability and circulation of false information.

To decrease the potential reporting burden and ensure that only fact-based information would be provided, SBA recommends the agency specify what information must be sought under § 382.413. The SBA further believes it would be difficult for employers to report the drug and alcohol violations and rehabilitation referrals of other DOT agencies, as proposed under § 382.413(a)(1). The SBA suggested FMCSA: (1) List the specific DOT modal regulations; (2) explain how to find records of violations for these rules, and (3) state the effect of such violations upon a driver's qualifications.

The SBA disagreed with the NPRM provision at § 382.413(a)(2) to require former employers to pass along driver information that a previous employer received from prior employers. The SBA recommended the FMCSA eliminate this requirement.

FMCSA Response: For reasons set forth under the following section entitled "Impacts of Other Rulemakings," the agency has

withdrawn conforming amendments to part 382, and believes the SBA concerns were largely addressed in previous rulemakings issued during 2000 and 2001 and affecting 49 CFR parts 40 and 382.

There is another issue on which FMCSA requests comments. Section 4014 of TEA-21, codified at 49 U.S.C. 508 (a)(3), relating to limitation on liability, states the limitation applies to "the agents or insurers of a person described in paragraph (1) or (2)." Section 508 (b)(1) restricts applicability of the limitation on liability within the requesting process for use by motor carriers. Sub item (B) specifically applies to agents and insurers by requiring that "the motor carrier and any agents and insurers of the motor carrier have taken all precautions reasonably necessary to protect the records from disclosure to any person, except for such an insurer, not directly involved in deciding whether to hire that individual." Section 508 (b)(2) restricts applicability of the limitation on liability to the previous motor carrier providing the information. Sub item (B) applies to insurers by requiring that "the complying person and any agents and insurers of the complying person have taken all precautions reasonably necessary to protect the records from disclosure to any person, except for such insurer, not directly involved in forwarding the records."

FMCSA points out that insurers are currently not allowed access to the drug and alcohol information by part 40. FMCSA interprets the requirements in section 114 of the HazMat Act as creating the authority to grant a limitation on liability if the drug and alcohol data is made available to the insurance providers, but does not mandate that they be given access to this information. Thus, for consistency with the existing drug and alcohol policy of the DOT established by part 40, FMCSA proposes that insurers be allowed access to the investigative information, but exclude any alcohol and controlled substances information provided by previous employers under written authorization of the driver applicant.

Comments are desired on whether alternative legal interpretations regarding insurer access to alcohol and controlled substances information are intended by the HazMat Act. If so, how should such access be managed? FMCSA does not have regulatory and enforcement authority to ensure the insurance providers remain in compliance with the requirement that the data only be used for the hiring decision.

Accidents

The SBA pointed out that immediate implementation of the proposal to extend the retention period for accident information from one to three years would be impossible, *i.e.*, it can only become three years after passage of time to allow motor carriers to retain accident data for up to that period. For this reason, the SBA suggested amending § 390.15 by stating that accidents occurring one year preceding the rulemaking or after its effective date must be kept for at least three years. Alternatively, the agency could provide compliance guidance that reminds field personnel that motor carriers may be unable to immediately provide information about accidents occurring more than a year prior to the effective date of the rule because it was not previously required. The SBA believes the agency should encourage field personnel to waive penalty or enforcement against carriers until sufficient time has elapsed to fully comply with the new accident recordkeeping requirement under § 390.15.

FMCSA Response: The FMCSA agrees with the recommendation to phase in this requirement and has amended § 390.15 to reflect the suggested phase in process.

Employment History Form

SBA and other commenters suggested the agency should include more details specifying the minimum data that must be investigated, and provided by previous employers. SBA additionally recommended that FMCSA develop, as part of its guidance materials, a non-mandatory form for use by inquiring and responding employers.

FMCSA response: In this SNPRM, FMCSA has clarified in the proposed § 391.23(d) and (e) the information that must be investigated and provided, and also eliminated redundant amendments to § 382.413. The description of the required alcohol and controlled substances records in proposed § 391.23(e) is revised to convey that only those existing records filed pursuant to § 382.401 are required. If the previous employer cannot provide the information regarding completion of a rehabilitation referral, the investigating employer must obtain it from the driver.

Summary of the SNPRM

The importance of obtaining access to previous employer driver safety performance history information is long established as a best hiring practice. The purpose of this proposed regulation is to enhance the ability of prospective

employers to make sound hiring decisions. The procedures proposed in this SNPRM will enable obtaining more complete driver safety performance information by motor carriers. It will also maximize the use of this information by providing a limitation on liability of those providing and using this information, while subjecting them to administrative controls to protect driver privacy.

The SNPRM specifies minimum safety performance history data that a motor carrier must investigate about a driver's employment history under the proposed § 391.23(d) and (e). It differs from the NPRM by: (1) Refining the list of what information is to be investigated from previous employers, (2) establishing employer protections for providing and using the 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, and (5) dropping conforming amendments to part 382 because they were already addressed under separate rulemakings discussed in the preamble.

FMCSA has refined the safety performance history data list in response to comments to the docket and because of changes to agency drug and alcohol regulations made by recent rulemakings. Section 4014 of the TEA-21 mandated the new employer liability limitation and driver protections being proposed. Enhanced Regulatory Flexibility analysis is provided in response to comments to the docket from the Small Business Administration.

Impacts of Other Related Rulemakings

Recent Changes in Alcohol and Controlled Substance Regulations

When the NPRM for driver safety performance history was issued in 1996, the detailed regulations governing investigations into an employee's drug and alcohol history were codified at 49 CFR 382.413. Since that time, DOT has revised its major regulations regarding drug use and alcohol abuse. Changes to the DOT drug and alcohol regulations, 49 CFR part 40, were finalized in a document entitled "Workplace Drug and Alcohol Testing Programs; Final Rule" (65 FR 79462, December 19, 2000). A correction to the final rule was published at 66 FR 3884, January 17, 2001; final compliance date details were published at 66 FR 28400, May 23, 2001; and technical amendments to the December 2000 final rule were published at 66 FR 41944, August 9,

2001. These documents are available in DOT docket number OST-1999-6578. The Department's program written by the Office of the Secretary and jointly issued by each of the Operating Administrations was finalized at 66 FR 41955, August 9, 2001. It provides the background for and an overview of the general, common elements of the modal rules. FMCSA finalized conforming amendments to the part 40 changes in its drug and alcohol regulations codified at 49 CFR part 382 and published them in a final rule at 66 FR 43097, August 17, 2001. A copy of that document has been placed in DOT docket number FMCSA-2000-8456.

Among other things, these rules streamlined drug and alcohol testing program requirements for all of the Department's modal entities having drug and alcohol regulations. All DOT regulated employers—not just motor carriers—must investigate the drug and alcohol history of a person intended to be deployed in a safety-sensitive function. Similarly, DOT-regulated employers must immediately respond to such investigations. The specific requirements governing investigations about drug and alcohol information were revised and moved from § 382.413 to 49 CFR § 40.25. The new § 382.413 cross-references § 40.25.

The HazMat Act directs the Secretary to amend § 391.23. Section 114(b)(2) of the HazMat Act requires motor carriers covered by part 391 to investigate certain drug and alcohol information about a driver as well as investigating his/her employment history. The motor carrier drug and alcohol investigation requirements were in existence when the HazMat Act was signed into law (codified at 49 CFR part 382, which applies only to motor carriers subject to the 49 CFR part 383—Commercial Driver's License Standards, Requirements and Penalties).

Because Congress specified no changes for part 382, FMCSA believes Congress also intended that the new § 391.23 requirement specify that motor carriers not otherwise subject to the alcohol and controlled substances testing requirements under part 382, or the CDL standards in part 383, are also required to investigate this data. This would create an extra level of safety by requiring these motor carriers to investigate a driver's alcohol and controlled substances history if the driver previously held a safety sensitive position subject to the part 382 requirements. This includes obtaining information about drivers who may have violated part 382 prohibitions, and may be seeking to work for uncovered motor carriers without having

completed DOT return-to-duty requirements, or who have relapsed subsequent to treatment.

FMCSA believes the new part 40 adequately reflects the spirit of section 114 of the HazMat Act because it directs employers to: (1) Investigate completion of a SAP's rehabilitation referral, (2) immediately respond to drug and alcohol history investigations from new or prospective employers, and (3) retain certain drug and alcohol records for up to 3 years. This is because the § 40.25(b)(5) requirement for "documentation of the employee's successful completion of DOT return-to-duty requirements * * *" describes in a positive voice the intent under the HazMat Act section 114 that motor carriers investigate a driver's possible failure to undertake or complete recommended treatment.

Because the Department has: (1) Recently completed extensive revisions to its alcohol and controlled substances regulations, (2) incorporated provisions that accomplish the intent of section 114, and (3) thoroughly determined the information collection burdens and economic impacts of these changes, the FMCSA believes it is unnecessary to propose changes to part 382. The HazMat Act requirement for modifying § 391.23 to investigate 3-years of possible alcohol and controlled substances information for all drivers hired by motor carriers covered by part 391 is placed in § 391.23(e).

Existing § 382.413 cross-references § 40.25 requirements that an employer investigate an employee's (in the case of FMCSA regulated entities, a driver's) 2-year drug and alcohol history. That investigation would include, among other things, information about the successful completion of DOT return-to-duty requirements for any employee found to have violated DOT alcohol and controlled substances rules (*i.e.*, the alcohol and controlled substances regulations of any DOT agency). The existing requirement in § 40.25 to investigate two years of information is one year less than required by section 114 of the HazMat Act and the proposed § 391.23(e) in this SNPRM. Both require motor carriers to make a 3-year investigation of the alcohol and controlled substances history, and for previous employers to provide that information.

The major difference between § 40.25(b)(5) and § 391.23(e) involves the time period and scope of the alcohol and controlled substances testing records. This SNPRM would require a prospective employer to investigate a previous motor carrier's employer information about violations of only the

FMCSA alcohol and controlled substances regulations (*i.e.*, 49 CFR part 382, subpart B). Note that part 382 in conformance with part 40, requires motor carriers to investigate alcohol and controlled substance information from any previous employer during the prior two years where the driver held a safety sensitive job.

Specifically, the prospective motor carrier would have to investigate whether a driver had received a rehabilitation referral from an SAP pursuant to § 382.605. If so, the prospective motor carrier would have to receive: (1) Documentation of the driver's successful completion of DOT return-to-duty requirements, and (2) any positive test results or refusals to be tested that occurred subsequent to completion of return-to-duty requirements.

In a related issue, FMCSA would continue not requiring previous employers to divulge information regarding self disclosed violations of the alcohol and controlled substances prohibitions made under § 382.121. Such disclosures are not required to be reported as testing violations nor are they subject to DOT return-to-duty requirements.

Request for Comments

The FMCSA requests comments on any and all aspects of the revised proposals in this SNPRM. The comments to the docket on the NPRM remain active. Thus, there is no need to revisit the issues discussed in the 1996 NPRM.

Rulemaking Analyses and Notices

Regulatory 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 has 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 (44 FR 11034, February 26, 1979). It has been reviewed by the

Office of Management and Budget. The subject of requirements for background checks of prospective driver safety performance history information will likely generate considerable public interest within the meaning of Executive order 12866. We have classified the rule as significant because of the high level of public and congressional interest in the rule.

This SNPRM modifies an earlier notice of proposed rulemaking by: (1) Including an expanded discussion of the economic and information collection burdens of the proposal, (2) setting limitations on employer liability for using and providing the safety performance history data of a driver by including the requirements of section 4014 of TEA–21 codified at 49 U.S.C. 508, and (3) establishing the Act's required due process rights of drivers. FMCSA anticipates that the economic impact of this SNPRM will not exceed the annual \$100 million threshold for economic significance.

Under a following section of this SNPRM entitled "Regulatory Evaluation: Summary of Benefits and Costs," the agency estimated the first-year costs to implement this rule would amount to approximately \$10 million. Total discounted costs over the 10-year analysis period (2003–2012) would be \$76 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. The first-year net benefits associated with this rule would be negative. Total discounted benefits over the 10-year analysis period (2003–2012) would be equal to \$88 million. Total discounted net benefits from implementing this rule would equal \$12 million over the 10-year analysis period (2003–2012).

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 proposed rule upon small entities, and the determination that this is considered a significant rulemaking proposal, the agency has prepared an initial regulatory evaluation and the following RFA analysis.

(1) *A description of the reasons why action by the agency is being considered.* A large number of motor

carriers must hire drivers 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 on the nation's roads and highways. Public concern regarding the safety of commercial motor vehicles and their operators has heightened awareness of the limited driver safety performance information available to prospective motor carrier employers when making hiring decisions. If prospective employers had access to more information about driver safety performance history it would enable employers to make more informed decisions regarding the relative safety risk of drivers who apply for employment.

With enactment of section 114 of the HazMat Act, Congress directed FMCSA to revise its safety regulations to specify additional minimum driver safety performance information a prospective employer must investigate from previous employers. Additionally, the HazMat Act sets a time limit for previous employers to respond to the investigations, and provides the driver an opportunity to review and, if necessary, correct or rebut the safety performance information provided by current or previous employers to the prospective employer.

In response to industry concerns about the legal liability which would arise from providing information about driver employment safety 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 investigation records, and to have them corrected or include a rebuttal from the driver, is made statutory. FMCSA is directed to develop procedures for implementing these requirements as part of the changes to § 391.23 mandated by section 114 of the HazMat Act.

(2) *A succinct statement of the objectives of, and legal basis for, the proposed rule.* The legal bases for this proposed rule are the Congressional directives contained in section 114 of the HazMat Act and section 4014 of TEA–21. Congressional intent is to ensure prospective motor carriers have

access to increased information about the safety performance history of drivers, including access to investigation information from prior employers about driver applicants.

Regulations at § 391.23(a)(2) and (c) currently require prospective employers to investigate a driver's employment record with 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 MCSIA for a Report to Congress on the possibility of requiring employers to report positive controlled substances test results and for prospective employers to check such a computer source for the existence of such information as part of the hiring decision process. A copy of section 226 of MCSIA is included in the docket as document 40.

The objective of this proposed rulemaking is to improve the quantity and quality of investigations made to previous employers, as well as the quantity, quality and timeliness of background driver safety performance information provided to prospective employers. This should foster more informed employment judgments about the safety risks of potential new employees, while affording drivers the opportunity to review and comment on the accuracy of information provided by previous employers.

This proposed regulation specifies minimum information that must be investigated, and proposes process modifications 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 defamation lawsuits, etc.

(3) *A description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.* This proposal will apply to all motor carrier employers regulated by the FMCSRs whose employees apply to work for a motor carrier in interstate commerce. This includes small motor carriers as well as numerous entities in other 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 part 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 proposed rule at approximately 419,000 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 the background information proposed in this SNPRM becomes available to prospective employers.

It is difficult to determine exactly how many existing motor carriers would be affected by this proposed rule, since it is not known year-to-year how many employers on average hire drivers. However, it is known from the Motor Carrier Management Information System (MCMIS) that there are approximately 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 but still having files within 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 (\$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 operations characteristics of the private trucking firms would be generally similar to those of for-hire motor carriers. Using the 90-percent estimate to identify the small business portion of the existing industry indicates that 450,000 out of 500,000 total existing motor carriers could be defined as small businesses within this industry. Also, we had estimated that a net 419,000 hiring decisions would be affected by this proposed rule annually. These 419,000 net annual hirings within the industry represent 14 percent of the total three million drivers currently employed within the trucking industry. To be conservative, we assumed that 14 percent of existing motor carriers would be filling the 14 percent of driver positions each year. Therefore, 14 percent of existing motor carriers translates to 70,000 out of the 500,000 existing motor carriers who would be hiring drivers each year.

We conservatively assumed that these 70,000 hiring employers would bear the full cost of the data retention and reporting on the 419,000 drivers to be hired each year for the driver data search, duplication, and reporting costs incurred by previous employers for providing the information. (This may not be true based on FMCSA policy that the previous employer cannot demand payment as a condition for releasing the data.) Conversely, if we assumed previous employers would bear these costs (and we assume at least one previous employer to each driver over the past three years), we could divide compliance costs by 140,000 carriers. However, to ensure we do not underestimate the impact to small employers, we will stick with the 70,000 estimate.

Total discounted compliance costs of this proposed rule are estimated at \$76 million over the 10-year analysis period (2003-2012), while first-year costs (in 2003) are estimated at \$10 million. If we divide these first-year costs by the 70,000 hiring companies estimated to be hiring drivers within a given year, the

result is a total compliance cost of roughly \$143 per motor carrier in the first year of 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 (\$143), as % of avg. revenues percent | Average pre-tax profit margins, by revenue size (percent) |
|-----------------------------|--|------------------------------------|---|---|
| <\$100 | 1,487 (5%) | \$67 | 0.21 | 9.5 |
| \$100–\$249.9 | 8,715 (30%) | 160 | 0.09 | 9.5 |
| \$250–\$499.9 | 5,687 (19%) | \$356 | 0.04 | 9.5 |
| \$500–\$999.9 | 4,890 (17%) | 710 | <0.01 | 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 total first-year regulatory compliance costs (\$10 million) to the number of existing motor carriers in the industry we anticipated would be hiring drivers in that year (70,000). As seen in the above table, the compliance costs of this proposed rule per existing motor carrier (\$143) represent 0.21 percent (or a little more than 2/10 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 group, compliance costs represent 0.09 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 would reduce, although not eliminate average pre-tax profits for carriers in any of the carrier revenue groups. The smallest revenue group in this table (<\$100,000 annual revenues), which represents 5 percent of the firms in the Economic Census table, would experience an average reduction in pre-tax profit margins of 2.2 percent (0.25/9.5=2.2%). For the second smallest revenue group (\$100–\$249.9), which

represents 30 percent of the small carriers in this motor carrier group, pre-tax profit margins are reduced by about 0.9 percent. For the third smallest revenue group, the annual compliance costs associated with this proposed rule are expected to reduce these carriers' average pre-tax profit margins by 0.4 percent.

(4) *A description of the proposed reporting, recordkeeping and other compliance requirements of the proposed 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 motor carrier employers of the previous three years to prospective motor carrier employers. For employees who assert their right to disagree with the investigative driver safety performance data reported by that previous employer, those previous employers will also be required to work with their previous employees.

In the case of alcohol and controlled substances all previous employers subject to DOT drug and alcohol regulations or their agents, 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 would 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 this data.

3. Information indicating whether the driver failed to undertake or complete a rehabilitation referral prescribed by a SAP within the previous three years, but only if that information is recorded with the responding previous employer. Previous employers would 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 would not be required to seek alcohol and controlled substances data they are not already required to retain by part 382.

5. Information indicating whether the driver was involved in any accidents as defined in § 390.5.

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 proposed rulemaking.

Motor carriers are already required to respond to alcohol and controlled

substances inquiries under part 382. However, requests for that data are the last information requested in the screening process because of the requirement for a signed authorization to release any such data, and this occurs only for that portion of drivers still under consideration for employment. This proposed rule would enhance the ability to take enforcement action if a previous employer does not provide the information required in a timely manner.

All small entities for the previous three years would now be required to provide their employment investigative safety performance history data. That data, minus the alcohol and controlled substances data, likely would be requested routinely for all driver applicants from all previous motor carriers 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 a focus group meeting 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. If some employers operate more as employers of entry-level drivers, then they could often be required to provide investigation information, but not get much benefit of receiving such investigations from other previous employers. In such cases, if the motor carriers furnishing the investigation data are small entities, the costs could potentially rise to the level of a significant economic impact on a substantial number of small entities.

If such entities are unable to insist on receiving payment for the costs of performing this function prior to releasing the data because of FMCSA policy, there could be a negative impact on them. FMCSA requests comments on how significant this might be.

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

Employers are currently required by § 391.23(c) to keep prior employer furnished investigative information in the driver qualification file. Because 49 U.S.C. 508 restricts previous employer investigative data to just the hiring decision, this SNPRM proposes changing the specification of where previous employer investigative information is kept to instead 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 alcohol and controlled substances data. That function requires a person who is designated as having controlled access to that data. The addition of reporting accident data could be an added 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 proposed rule.* The Fair Credit Reporting Act (FCRA) specifies procedures that must be followed by consumer reporting agencies when providing inquiry and investigative data to motor carriers as part of the hiring decision process. If such a consumer reporting agency is also the agent of a motor carrier, then there could be overlap between proposals in this SNPRM and the FCRA.

(6) *A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed 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 with previous employers and use of that data in the hiring decision process. This SNPRM responds to additional prescriptive requirements contained in section 4014 of TEA-21, and to concerns expressed by various commenters, including the SBA. FMCSA believes that the alternatives discussed in this SNPRM are the ones available to the agency within the mandates of the HazMat Act and the 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 proposed in this rulemaking would 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)

The safety performance of drivers operating commercial motor vehicles on

the nation's roads and highways is a matter of national concern. Congress recognized the need for mandating a more complete background check of drivers' safety performance from previous DOT regulated employers when drivers apply to work for a new motor carrier employer. This data is vital to prospective employers establishing a driver's safety performance history. In section 114 of the HazMat Act, Congress directed FMCSA (then FHWA) to amend its regulations to specify the minimum safety information that a motor carrier must investigate from a driver's former DOT regulated employers, and require those employers to provide that data to the requesting motor carrier in a timely fashion.

The motor carrier industries expressed great concern that the proposals in the 1996 NPRM could subject them to considerable litigation and expense by drivers denied employment based on this data. In section 4014 of TEA-21, Congress responded to those concerns and specifically granted limited liability to employers and agents furnishing and using this information by preempting State and local laws and regulations creating such liability. It directed FMCSA to include provisions addressing implementation of this limited liability in a revision to the previously issued 1996 NPRM.

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 provided incorrect information.

The Act replaces the litigation alternative with a mandated administrative process as the means for a prospective driver to address their privacy rights to challenge potentially incorrect safety performance data provided by a previous employer. This mandated process would enable a driver to review his/her investigative information provided by a previous DOT regulated employer, request

correction of incorrect information, and require inclusion of a driver provided rebuttal if agreement is not reached between the driver and the previous employer furnishing the investigative background information.

The Act says " * * * 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." The process proposed in this SNPRM is similar to what is specified under the Fair Credit Reporting Act (FCRA) (15 U.S.C. 1681 *et seq.*) for protecting a person's rights when investigating previous employer background information. Processes are also proposed in this SNPRM 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.

Drivers, State and local subdivisions, and others still have the right to allege non-compliance with these proposed regulations by reporting to FMCSA under its complaint procedures at 49 CFR 386.12. Such complaints could result in an enforcement follow-up for a motor carrier compliance review. An increasing number of States are participating under the MCSAP grants as the investigating agents for FMCSA of these motor carrier regulations, *i.e.*, in such States it is State agents that perform motor carrier compliance reviews. Thus, States could be the investigating agents to verify that employers are complying with the driver protections proposed in this SNPRM.

This action was analyzed in accordance with the principles and criteria contained in Executive Order 13132 that requires agencies to certify they have evaluated Federalism issues. The original NPRM was published in 1996 and there was no preemption of State or local liability laws or regulations in that proposal. Consequently, the agency did not receive any comments from elected State or local officials on the preemption issue.

We anticipate implementation of this proposed rule change, in conformance with the specification contained at 49 U.S.C. 508(c), would not add any additional costs or preemption burdens to States or local subdivisions. We also anticipate these changes would have no effect on the State or local subdivisions' ability to discharge traditional governmental functions.

Because the preemption requirement set forth in this SNPRM was established in 1998 by the TEA-21, this is the first

time this preemption is being set forth as a proposed regulatory change. FMCSA is seeking comments on possible compliance costs or preemption implications from elected State and local government officials as part of this SNPRM stage.

Comments to the docket are sought from State and local officials on whether there may be any major concerns about the proposed preemption of State and local law and regulations for these Federally protected interests. The FMCSA is requesting States and local government officials, or their representatives, to express any concerns they may have by submitting comments to the public docket. The agency will address any concerns prior to issuing a final rule on this subject.

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 the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. FMCSA has determined that the proposals in this SNPRM would 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.

The effect of this SNPRM on the burdens of the last two of these will be minimal, and will relate primarily to the length of time that records must be kept. The FMCSA, while acknowledging that there may be a minor impact associated with these collections, is not making estimates or discussing these minimal impacts at this time. Instead, the agency is focusing on the information collection regarding Driver Qualification Files, which will be impacted in a significant manner by this proposed rule.

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. The agency continues to explore methods of more precisely determining the number of drivers that could be affected by FMCSA regulations.

The truck driving industry is characterized, in general, by a high driver turnover rate. Previous information collections have estimated there are burden hours associated with 839,596 driver applications each year. That represents 13 percent of the 6,458,430 truck driver positions. Comments to the docket describe various driver-screening processes used by trucking companies to fill these driver positions. However, no data is currently available on how many applicants, or what percentage of applicants, are denied employment using current screening practices. FMCSA requests comments addressing what the current denial rates may be under existing driver screening processes.

This proposed rule would provide employers with more information about the background and safety history of the applicants for employment as drivers. The agency estimates that an additional 10 percent of the driver applicants with accidents over the last 3 years (14,300) and 25 percent of the drivers with positive alcohol or controlled substances tests for the 1 additional year (1,300) will be refused employment because of the heightened scrutiny of their background information. Rounded up to the nearest thousand, this represents 16,000 additional drivers that will be involved in the hiring process. Employing these figures, the agency estimates this proposed rule would require motor carriers to make requests for driver safety background information for a total of approximately 855,596 (839,596 + 16,000) drivers.

In addition, the proposed rule would require the prospective employer to seek information from all previous employers for whom the applicant has worked in the past 3 years. For purposes of this information collection, the agency is estimating that, on average, each

applicant had 1.39 employers in the past 3 years. Therefore, the number of requests for background information would be 1,189,278 (1.39 employers \times 855,596 drivers).

This proposed rule would also require driver applicants to be advised they can review, request correction, or rebut what a previous employer provided as that driver's employment history with that employer. The majority of these notifications would be made via a statement on the job application; therefore, we are not assigning an information collection burden for this notification. We request comments on whether there might be any significant burden in sectors of the industry using telephone job application processes.

The currently-approved Driver Qualification Files information collection can be broken down into two sections: (1) Addressing the burdens of prospective employers and driver applicants during the hiring process, and (2) addressing the burdens related to carriers and drivers who are currently employed (e.g., annual review). This proposed rule would require revisions to the first section and leave the second section unchanged. In addition, it would create a third section—to address new burdens imposed by the proposed rule on the former employers of drivers. The resulting three elements of this information collection, as proposed, would 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.

First Element of IC. The changes proposed by this SNPRM to the first item—the hiring process—address the specific types and timeframes of employment history to be requested (includes accident data). The proposed changes to specific types of safety performance history requested and timeframes of employment do not increase the information collection burden for the prospective employer investigations as part of the hiring process. However, prospective employers would be required to notify drivers of their right to review their safety performance history received from prospective employers and provide them with that information, if requested. The burden estimate for this element is 1,333 burden hours (16,000 drivers \times 5 minutes for prospective employers to provide the data to each of those drivers, divided by 60 minutes).

Another increase regarding the various elements of the hiring process is to adjust the number of driver applicants estimate to include 16,000

additional drivers who would need to apply to fill the positions of the 16,000 it is estimated would not be hired due to enhanced safety performance history data being received. The increase in the various elements within the hiring section results in an additional burden of 4,799 hours for this first IC item (799 hours for the driver and motor carrier to perform 16,000 additional employment application-related activities + 4,000 hours for motor carriers to request driving and safety performance history data for 16,000 additional applicants).

Second Element of IC. The second element of the Driver Qualification Files—annual review—would be unaffected by this proposal.

Third Element of IC. The third element of this information collection is created due to the changes made in this SNPRM. In the past, previous employers were not required to systematically provide employment history on their former employees. This proposal would require all employers to provide driver safety performance history data (including accident data) for the 3-year period preceding the date of the request. The annual burden for this requirement is estimated to be 99,107 burden hours (855,596 drivers \times an estimated 1.39 previous employers per driver \times 5 minutes, divided by 60 minutes).

This rule also proposes a new right for former drivers to protest or rebut employment data supplied by previous employers to prospective employers. Prospective employers would be required to provide the driver applicant with copies of the information it receives from the former employer. Former employers would have a duty and be required to: (1) Provide the past employee/driver the opportunity to rebut; (2) review a rebuttal, if submitted; (3) amend records, if persuaded by the rebuttal; (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 send: (a) the revised record to the prospective employer, or a copy of the driver's rebuttal, and (b) the employment history with the appended rebuttal when requested in the future.

The agency assumes that 16,000 drivers would protest the employment history provided by former employers. The FMCSA estimates it would take approximately 2 hours for the driver to create and submit a protest. It is further estimated that it would take the previous employer 2 hours to address and respond to each protest. Therefore, the burden estimate for this activity is 64,000 hours ((16,000 \times 2 hours per protesting driver) + (16,000 \times 2 hours per previous employer)).

The total burden associated with this third area is 163,107 (99,107 (burden associated with previous employers providing safety performance history) + 64,000 (burden associated with rebuttals/protests)).

Accordingly, Table 2 estimates that the total burden hour increase for the Driver Qualification Files information collection would be 169,239 (1,333 (notification and driver rights to review data received) + 4,799 (adjustment taking into account the additional 16,000 drivers who would need to go through the hiring process when this proposed rule is promulgated) + 99,107 (providing 3 years of safety performance history) + 64,000 (duties associated with drivers who rebut and protest employment history)).

TABLE 2.—DRIVER QUALIFICATION FILES INFORMATION COLLECTION

| New activity | Estimated burden hours |
|---|------------------------|
| Notification and driver rights | 1,333 |
| Adjustment for 16,000 additional applicants | 4,799 |
| Providing 3 years of safety performance history | 99,107 |
| Driver rebuttals | 64,000 |
| Total | 169,239 |

Interested parties are invited to send comments regarding any aspect of these information collection requirements, including, but not limited to: (1) Whether the collection of information is necessary for the performance of the functions of the FMCSA, including whether the information has practical utility, (2) the accuracy of the estimated burden and the various assumptions made in this PRA section, (3) ways to enhance the quality, utility, and clarity of the information collection, and (4) ways to minimize the collection burden without reducing the quality of the information collected.

National Environmental Policy Act

The Federal Motor Carrier Safety Administration (FMCSA) is a new administration within the Department of Transportation (DOT). The FMCSA analyzed this rule under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) (NEPA), the Council on Environmental Quality Regulations Implementing NEPA (40 CFR 1500–1508), and DOT Order 5610.1C, Procedures for Considering Environmental Impacts.

This rule would be categorically excluded from further analysis and documentation in an environmental

assessment or environmental impact statement under paragraph 4.c.(3) of DOT's Order as a project amendment that does not significantly alter the environmental impact of the action. This rule would specify minimum safety performance history information to be sought and provided during the course of a § 391.23(c)(1) investigation into a driver's employment history.

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 costs of this proposed rule involve retaining, investigating, providing, and reviewing additional driver safety performance data by employers (previous or current and prospective) for use in hiring decisions. Specific types of additional driver safety performance data include driver accident, alcohol/controlled substance test, and rehabilitation program data.

Specific costs to previous or current employers (hereafter referred to as previous employers) include retaining an additional two years of accident data on each of its drivers and reporting such investigative data to all prospective employers of drivers for three years after a driver leaves their employ. Current regulations require employers to collect and retain one year of accident data on drivers, and no requirement to report to prospective employers. Additionally, previous employers would be required to report on three years of alcohol/controlled substances test and rehabilitation program data to prospective employers (in lieu of the two years of data currently required by existing regulations).

Previous employers are already required by part 382 to report on driver violations of Federal regulations regarding alcohol and controlled

substances use and/or failure to complete rehabilitation programs within the preceding two years. This SNPRM proposes adding a requirement to the § 391.23 pre-employment investigation requirements and increasing the number of years to be reported by previous employers from two to three years.

Specific costs to prospective employers include investigating driver accident and alcohol/controlled substances data from previous employers and using that data in hiring decisions. Current regulations require prospective employers to attempt to obtain appropriate driver Motor Vehicle Record(s) (MVRs) and to investigate employment records for the preceding three years.

FMCSA has a policy that previous employers cannot make receiving payment for their costs a condition of providing alcohol and controlled substances data. If this is also applied to this new requirement of providing accident data in response to investigations, then the costs incurred by previous employers for providing all safety performance history information will be largely borne by previous employers. If these costs are relatively equally shared, *i.e.*, each employer gets as much value from investigations to other employers as from providing the information, then who incurs these costs is not directly important to calculation of the estimated total costs of this proposed SNPRM.

The 1997 CDL Effectiveness study contained a report of a focus group meeting of motor carrier safety directors. (CDL Focus Group Study, November 1996, copy of the Safety Director comments are included in the docket as document 41.) It documents that a number of motor carriers require drivers to have obtained previous experience driving a CMV before that carrier will hire the driver. If some employers operate more as employers of entry-level drivers, then they could often be required to provide investigation information, but not get much benefit of receiving such investigations from other previous employers. In such cases, if the motor carriers furnishing the investigation data are small entities, the costs could potentially rise to the level of a significant economic impact on a substantial number of small entities. FMCSA requests comments regarding any information that might indicate a different analysis of costs should be used if such inequalities might be created by the existing FMCSA policy preventing motor carriers who are furnishing investigation information from receiving payment for the

information as a condition of releasing the information.

The discussion that follows is a summary of the costs and benefits associated with this proposed 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 is contained. A summary of the costs

associated with this proposed rule is included in Table 3.

TABLE 3.—SUMMARY OF COSTS, 2003–2012
[In millions of dollars]

| | |
|--|------|
| First Year Costs | \$10 |
| Total Discounted Costs, 10-Year Period | 76 |

First-year costs associated with this rule total \$10 million, while total discounted costs over the entire 10-year analysis period total \$76 million. These figures represent our best estimate of the costs associated with implementation of this rule. Where uncertainties exist regarding these cost estimates, we have noted them in the discussion and invite comment.

The benefits associated with this rule are contained in Table 4.

TABLE 4.—SUMMARY OF BENEFITS, 2003–2012
[In millions of dollars]

| Benefits scenario | First-year benefits | Total discounted benefits, 10-year analysis period |
|---|---------------------|--|
| Direct Benefits Only ¹ | \$6 | \$88 |
| With 10% Deterrence Effect ² | 7 | 97 |
| With 25% Deterrence Effect ² | 8 | 110 |
| With 50% Deterrence Effect ² | 10 | 132 |

¹ 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.

² 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 would result in some drivers improving their driving behavior for fear that prospective employers would 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.

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 commercial drivers (*i.e.*, those with poor accident or alcohol/controlled substance information) because the new accident and alcohol/controlled substance test and program data was made available by

previous employers. Indirect benefits are those associated with a deterrence effect. The FMCSA assumes that the availability of and easier access to new commercial driver safety performance data would cause some percentage of drivers to improve their driving behavior, for fear that prospective employers would now obtain and use such data in their hiring decisions. Since we do not know the specific

magnitude of the deterrence effect associated with this new data availability, we calculated this effect as a percent of the direct accident reduction benefits from this rule.

Comparing total discounted costs and benefits, we have calculated net benefits estimates and benefit-cost ratios for this rule. They are contained in Table 5.

TABLE 5.—SUMMARY OF NET BENEFITS AND BENEFIT-COST RATIOS, 2003–2012
[In millions of dollars]

| Benefits scenario | Total discounted net benefits ¹ | Benefit-cost ratio ² |
|----------------------------------|--|---------------------------------|
| Direct Benefits Only | \$12 | 1.16 |
| With 10% Deterrence Effect | 21 | 1.27 |
| With 25% Deterrence Effect | 34 | 1.45 |
| With 50% Deterrence Effect | 56 | 1.74 |

¹ Total Discounted Net Benefits were derived by subtracting the Total Discounted Cost estimate of \$76 million in Table 3 from each of the Total Discounted Benefits estimates in Column 3 of Table 4. For example, subtracting the \$76 million in total discounted costs from Table 3 by the \$88 million in Total Discounted Benefits under the "Direct Benefits Only" scenario of Table 4 yields Total Net Discounted Benefits of \$12 million over the 10-year analysis period (2003–2012) examined here.

² Benefit-Cost Ratios were derived by dividing the Total Discounted Cost estimate of \$76 million in Table 3 from each of the Total Discounted Benefits estimates for each of the Benefits Scenarios located in Column 3 of Table 4. For example, dividing the \$88 million in Total Discounted Benefits under the "Direct Benefits Only" scenario of Table 4 by the \$76 million in total discounted costs from Table 3 yields a Benefit-Cost Ratio of 1.16 over the 10-year analysis period (2003–2012) examined here. A benefit-cost ratio greater than one implies that the rule is cost effective to implement when comparing costs to benefits within the 10-year analysis period.

When examining the total discounted net benefits and benefit-cost ratios, we see that in all scenarios identified in Table 4, this rule is cost effective when measured within the 10-year analysis period. The costs and benefits of this

SNPRM will be discussed separately in the next two sections.

II. Costs

Accident Data

In 1997, the Gallup Organization performed a study for ATA where they

estimated that 403,000 commercial drivers would 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) would need to be hired due to internal

turnover (*i.e.*, drivers switching trucking companies), 35,000 (or 8 percent) would need to be hired due to industry growth, and 48,000 (or 12 percent) would need to be hired due to attrition, retirement, and external turnover (*i.e.*, drivers leaving trucking for alternative industries).

We anticipate that this proposed rule would alter some portion of the 403,000 driver hiring decisions made each year within the trucking industry. Because hiring managers will have additional accident and alcohol/controlled substance test data with which to select drivers for positions, it is likely that the new data would result in some drivers (who previously would have been hired) not being hired because of this rule. In this analysis, we estimated that roughly 16,000 of the 403,000 commercial drivers hired annually by the industry would now be denied employment because of the new accident and alcohol/controlled substance test data becoming available to prospective employers. Of these 16,000 total commercial driver applicants, 14,300 would not be hired because of the new accident data and 1,300 would not be hired because of the new alcohol/controlled substance test and program data. When rounded to the nearest 1,000 (our standard practice in this analysis), it yields 16,000 total driver applicants likely to be denied employment each year as a result of this proposed rule. Therefore, we estimated the total number of drivers being considered/hired for positions each year within the trucking industry at 419,000 (403,000 + 16,000).

To calculate the new accident records that would likely need to 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). Using an estimate of 3 million as the total existing driver population, we estimated the number of annual accidents per driver at 0.148 (*i.e.*, 445,000/3 million). In this analysis, we assumed drivers being hired due to internal turnover (*i.e.*, 320,000 positions) would be experienced drivers (*i.e.*, with accident records) and the remainder (*i.e.*, those hired due to attrition, retirement, and industry growth) would be new drivers (*i.e.*, those without previous accidents). As such, the number of accidents for which the number of drivers being hired each year would be responsible is equal to 47,500 (*i.e.*, 0.148 × 320,000).

Over three years, the number of reportable accidents these drivers would be involved in would total 143,000. We

assumed for 10 percent of these accidents (or almost 14,300 cases, after rounding), the driver would not be hired as a result. Assuming one accident per driver, we estimate this new data would reverse 14,300 of the 403,000 hiring decisions made each year within the industry. We believe the 10-percent assumption is reasonable, given the importance of accident data in determining insurance rates and forecasting potential liability costs for trucking companies. For example, of the average 445,000 truck-related annual accidents reported in calendar years 1999 and 2000, one percent (or 4,450) were fatal, 22 percent (or 98,000) were injury-related, and 77 percent (or 343,000) were property-damage-only (PDO).¹ Also, FMCSA research into NHTSA's Fatal Accident Reporting System (FARS) database reveals in almost 30 percent of two-vehicle accidents involving a large truck and passenger vehicle, the driver of the truck exhibited behavior that may have contributed to the accident.²

Since the literature carefully notes a "contributing factor" cannot be equated with crash causation (and FMCSA does not yet have definitive data on crash causation factors), we must assume that in only a certain percentage of these crashes did the truck driver's behavior actually cause the crash. We assume a prospective employer would use "cause" as the primary criterion in deciding whether to hire a driver or not. In this analysis, we assumed that in only one-third of these "contributing factor" crashes, or 10 percent of all crashes (*i.e.*, 1/3 of 30% of all crashes = 10%), did the truck driver's behavior cause of the crash. In the other two-thirds of "contributing factor" crashes, we assumed the truck driver's behavior either did not in fact cause the crash or that further investigation on cause was inconclusive and the driver was hired.) Therefore, in 14,300 of the cases where three years of new accident data would be made available the hiring decisions would be reversed, *i.e.*, the driver would be denied employment. The FMCSA invites comments regarding the accuracy of these assumptions.

Regarding retention costs for this new accident data, employers would be required to store an additional two years of all truck-related accidents, or 890,000 records, at an average of \$0.15 per record (according to the Association for

Records Management Activities (ARMA)).

Regarding new data reporting requirements for the 419,000 drivers being considered/hired annually within the industry, 143,000 records (47,500 annual accident records × 3 years) will now have to be reported annually by previous employers to prospective employers. Since each inquiry requires a search (whether it yields past accidents or not), 419,000 record searches will have to be completed per year (@ \$1.57 per search according to the ARMA). For the 143,000 cases where an accident is discovered within the preceding three years, duplication of the record will have to be performed (@ \$1.33 per record according to ARMA) and the original record will have to be refiled in the driver's file (@ \$1.84 per record according to ARMA). Lastly, we assumed one letter would be mailed (@ \$0.37 per letter via first-class mail) for each of the 419,000 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 \$1.4 million.

Alcohol and Controlled Substances Test-Related Data

Using data from the 2001 FMCSA Drug and Alcohol Testing Survey, we estimated that an average of 5,100 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 to a rehabilitation. This proposed rule requires one additional year of such data to be reported to prospective employers on the 419,000 drivers considered/hired annually. Since each inquiry requires a search (whether it yields past data or not), 419,000 record searches will have to be completed per year (@ \$1.57 per search according to the ARMA). Also, in the 5,100 cases where a violation/referral is discovered for reporting the additional year's results, duplication of the record will have to be performed (@ \$1.33 per record according to ARMA) and the original record will have to be refiled in the driver's file (@ \$1.84 per record according to ARMA). Lastly, we assumed one letter would be mailed (@ \$0.37 per letter via first-class mail) for

¹ "Large Truck Crash Facts 2000", Federal Motor Carrier Safety Administration, Analysis Division, March 2002.

² "Large Truck Crash Profile: The 1997 National Picture", by the Analysis Division, Office of Motor Carriers, Federal Highway Administration, September 1998.

each of the 419,000 driver record searches conducted annually (with the letter either containing 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 refiling one year of such data in preparation for mailing, and (b) mailing out the information are \$0.8 million. Because of cost savings and overlaps with the already existing processes being performed, the actual cost likely could be less.

In this analysis, we estimated that roughly 25 percent (or 1,300) of those 5,100 commercial drivers who fail random or non-random alcohol/controlled substance tests annually, who are referred to rehabilitation programs, and who change employment within the industry each year would now be denied employment because of the new alcohol/controlled substance program data made available to prospective employers. Coupled with the 14,300 we earlier estimated would not be hired because of the new accident data, we have estimated a total of 16,000 commercial driver applicants likely to be denied employment as a result of this proposed rule's implementation. This estimate will be revisited when we estimate accident reduction benefits.

Implicit in parts of the above discussion, where we discussed the number of driver safety performance investigations to be made to previous employers, we assumed one applicant per job and therefore one set of investigations to previous employers per prospective driver, *i.e.*, not multiple drivers applying for one job each being investigated to all previous employers. This is likely an underestimate of the true number of investigations likely to be made to previous employers each year, since in some cases a prospective employer will request safety performance data on more than just one prospective driver. The safety directors in the CDL Effectiveness Focus Group Study (November 1996) reported having to screen many drivers to obtain one good driver to hire. "It will take 100 applications to find 10 or 20 good ones, and that's good." Additionally, some portion of prospective drivers will likely have had more than one previous employer within the last three years, which would further increase the total number of investigations made to previous employers within a given year.

However, FMCSA was not able to estimate with any certainty the number of drivers a prospective employer might

consider "serious candidates" for a position and for whom safety performance history data would be requested. Additionally, although recent estimates on industry turnover would indicate that across all segments, an average driver would likely be with the same employer for three or more years, it is well reported that some segments have much higher turnover rates. In such segments a prospective driver may have had multiple employers within the past three years. Given the relative uncertainty in these numbers though, we assumed one investigation per position to be filled for the purposes of this evaluation. The agency invites comments regarding the accuracy of these assumptions and encourages commenters to provide data to support their position.

Also, we know that some segments of the industry initiates 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 drug and alcohol data would be to the same previous employers who were investigated for accident and other safety performance history data. We do not have enough data to estimate the additional cost these employers would bear for these multiple investigations for the same driver application.

Costs To Notify Drivers of Rights To Review Data

Under this proposed rule, the § 391.23 investigation into a driver's employment history involves the prospective employer acquiring driver safety performance data from previous employers. Under this rule, data obtained through investigation is defined to include driver accident and alcohol/controlled substances data. For this analysis, we assumed that 419,000 drivers applying for positions would be notified of such rights on their employment applications, or via a simple return letter sent to the driver upon receipt of the application and signed consent form (for the purposes of retrieving accident and alcohol/controlled substances data from previous employers). Since we expect that employers would have to purchase new application forms (including the

new/revised information), we used the difference between the current cost of a standard application form (at \$0.06 each when purchased from a large office supply distributor) and what we believed would be the cost for the new customized form (\$0.12 each). For 419,000 applications, the annual cost to provide this information to applicants is much less than \$0.1 million.

We do not have sufficient data to estimate the costs that would be incurred to provide the required notification of driver rights by those employers who initiate the application process by telephone or other such means rather than by a form application. However, such costs would presumably be relatively small. We invite comments on this issue.

Costs Associated With Driver Data Protests

This SNPRM provides that all drivers have the right to review, comment on, and refute the investigative employment data provided by their previous employers to prospective employers. However, those drivers most likely to refute such data are those denied employment as a result of the information. As such, we assume only those drivers who are denied employment as a result of the new data (or 16,000 drivers) would contest their safety performance data provided by a previous employer.

For these 16,000 cases, we assumed two additional hours of labor time spent by each driver to file a request/protest with their previous employer and two additional hours of labor time spent by each previous employer to address each request/protest. We used an average 2001 hourly wage rate for trucking managers of \$35.94, obtained from a cost-benefit analysis performed for FMCSA by Moses and Savage, 1993, and updated to 2001 using the GDP Price Deflator. We multiplied this figure by 16,000 cases, yielding total costs to the trucking company to address driver protests of their data files of roughly \$1.1 million annually (undiscounted).

As stated, we also assumed the driver would spend two hours filing the protest with the previous employer. Using the 2001 hourly wage rate of \$14.66 and 16,000 drivers, this cost adds another \$0.5 million to annual total. Lastly, at \$0.15 per record filing (using ARMA recordkeeping estimates) and 16,000 cases, filing activities add only \$2,300 to this cost. Totaling these three components yields an annual total cost to address driver protests of \$1.6 million.

In estimating the driver and employer costs associated with potential protests,

it was unclear how frequently the driver or the employer might secure the services of an attorney to either prosecute or defend against such protests. Presumably the hourly cost of attorneys would exceed the cost assumed for trucking managers of \$35.94. If this should occur very often, it could alter the assumed costs. However, because of the uncertainty costs associated with possible attorney services were not included in this analysis. The agency invites comments regarding this approach and encourages commenters to provide data to support their position.

Costs to Prospective Employers To Collect/Review Additional Data

As discussed, the new driver performance data required under this proposed rule would expand the investigative data collection and 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 performance data would be expanded by an additional one-half hour per hiring decision. Using the average 2001 hourly wage rate for a trucking company manager of \$35.94 and 320,000 experienced drivers (*i.e.*, those who will have performance histories for these employers to review), total annual costs of this activity amount to \$5.8 million (undiscounted).

Costs to Prospective Employers To Interview "Replacement Hires"

There will also be new costs to prospective employers to interview the approximately 16,000 replacement drivers for those applicants now rejected for positions because of the newly available accident and alcohol/controlled substance data. We assumed one additional hour per prospective employer to interview each "replacement driver". At an hourly wage rate of \$35.94 per hour per trucking company manager and 16,000 applicants, total annual costs of this activity amount to \$0.6 million (undiscounted).

Total Costs

Total first-year costs to implement this proposed rule amount to approximately \$10 million (after rounding). Total discounted costs over the 10-year analysis period (2003–2012) are \$76 million, using a discount rate of seven percent.

III. Benefits

Societal benefits associated with this proposed rule would accrue from the

expected reduction in accidents resulting from the use of safer drivers by industry. Specifically, additional driver safety performance data used in the hiring decision should result in denying positions to the less safe drivers who prior to this proposed rule would have been hired. Additionally, it is reasonable to assume this proposed rule would generate a deterrence effect, since studies of similar social problems and policy approaches have quantified such impacts (*i.e.*, reducing alcohol-related accidents via changes in penalties and public attitudes). In this analysis, we quantified the "direct" benefits resulting from a reduction in accidents due to changes in driver hiring decisions. To estimate "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.

Benefits Resulting From Newly-Available Accident Data

The first source of direct benefits expected from this proposed rule would occur as a result of trucking company managers using driver accident data from the three preceding years in their hiring decisions. A study conducted by the Volpe 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 to him 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 would accrue from this rule.

Using the study conducted by the Volpe National Transportation Systems Center, we 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 versus only 29.9 accidents per 1000 power units by carriers identified as low-risk (based on the absence of past accidents and hence no Accident Safety Evaluation Area (SEA) score). Under the premise that a motor carrier's accident profile is a direct extension of his 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 (*i.e.*, $51.5 / (1000 \times 2)$) 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 proposed rule would 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. By using such a conservative estimate (*i.e.*, it is likely that drivers with a high number of past accidents or alcohol/controlled substance violations would find it difficult to secure alternative positions 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 (taken from Zaloshnja, Miller, and Spicer, and updated using the Gross Domestic Product (GDP) Price Deflator), we can estimate the value of accident reduction benefits.

In the first year of the analysis period (2003), one year of accident data (or 47,500 accident records) would be available to prospective employers. Based on an assumption that in 10 percent of these cases, the driver hiring decision would be reversed, then 4,750 drivers would be denied employment because of the newly-available accident data. In the second year of the analysis period (2004), two years of accident data (or 95,000 records) are collected on drivers and the number of hiring decisions reversed rises to 9,500 (or 10 percent of the 95,000 records). In 2005 and thereafter, when this proposed rule would be fully implemented, the number of hiring decisions reversed because of the new accident data would rise to 14,300 (or 10 percent of the 143,000 newly-available accident records for the 419,000 experienced drivers hired each year).

At an average cost per accident of \$79,873 in 2002 dollars, an accident differential of .0085, and 4,750, 9,500, and 14,300 drivers who are not hired in 2003, 2004, and 2005, respectively, the discounted value of annual accident reduction benefits is equal to \$3.3 million in 2003, \$6.5 million in 2004, and \$9.8 million in 2005 (when three years of data become available to prospective employers). This translates to a total of 41, 81, and 122 accidents avoided in these three years, respectively, as a result of the newly-available accident data. Thereafter, the accident reduction potential (122 accidents) remains the same as that in 2005, the year the accident data retention and reporting requirement would become fully implemented. First-year accident reduction benefits equal \$3.3 million, while total discounted accident reduction benefits from the new accident data are equal to \$64 million (after rounding) over the 10-year analysis period.

Alcohol and Controlled Substances Data

The second source of direct accident reduction benefits would result from the availability of driver alcohol and controlled substance use and rehabilitation program data by prospective employers. The Motor Carrier Management Information System (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 in any given year because of the new data would 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 for new alcohol/controlled substances data.

Recall that we estimated that 1,300 commercial driver applicants would now be denied employment 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 2003. 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 2003

and 2012 (*i.e.*, $0.0316 \times 1,280$ 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.

Benefits From a Deterrence Effect

We believe it is plausible to assume there would be a “deterrence effect” associated with this rule, (*i.e.*, where a driver may strive to improve his safety performance record if he knows that such information would be available to prospective employers in future hiring decisions). However, we were unsure as to the specific magnitude of this effect. Therefore, we incorporated a sensitivity analysis framework into 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

Total benefits associated with this rule are identified in Table 6 and are separated according to our assumptions regarding the magnitude of the deterrence effect associated with this rule.

TABLE 6.—SUMMARY OF BENEFITS, 2003–2012

[In millions of dollars]

| Benefits scenario | First-year benefits | Total discounted benefits, 10-year analysis period |
|---|---------------------|--|
| Direct Benefits Only ¹ | \$6 | \$88 |
| With 10% Deterrence Effect ² | 7 | 97 |
| With 25% Deterrence Effect ² | 8 | 110 |
| With 50% Deterrence Effect ² | 10 | 132 |

¹ 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.

² 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 would result in some drivers improving their driving behavior for fear that prospective employers would 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.

First-year (2003) benefits associated with this proposed rule range from slightly less than \$6.5 million (rounded down to \$6 million in the table) when we assume there is no deterrence effect to almost \$10 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 \$88 million when we assume no deterrence effect to a high of \$132 million when we assume the deterrence effect is equal to 50 percent of the direct accident reduction benefits.

IV. Net Benefits

Total discounted net benefits associated with this proposed rule are included in Table 7.

TABLE 7.—SUMMARY OF NET BENEFITS AND BENEFIT-COST RATIOS, 2003–2012
[In millions of dollars]

| Benefits scenario | Total discounted net benefits ¹ | Benefit-cost ratio ² |
|----------------------------------|--|---------------------------------|
| Direct Benefits Only | \$12 | 1.16 |
| With 10% Deterrence Effect | 21 | 1.27 |
| With 25% Deterrence Effect | 34 | 1.45 |
| With 50% Deterrence Effect | 56 | 1.74 |

¹ Total Discounted Net Benefits were derived by subtracting the Total Discounted Cost estimate of \$76 million in Table 3 from each of the Total Discounted Benefits estimates in Column 3 of Table 4. For example, subtracting the \$76 million in total discounted costs from Table 2 by the \$88 million in Total Discounted Benefits under the "Direct Benefits Only" scenario of Table 4 yields Total Net Discounted Benefits of \$12 million over the 10-year analysis period (2003–2012) examined here.

² Benefit-Cost Ratios were derived by dividing the Total Discounted Cost estimate of \$76 million in Table 3 from each of the Total Discounted Benefits estimates for each of the Benefits Scenarios located in Column 3 of Table 4. For example, dividing the \$88 million in Total Discounted Benefits under the "Direct Benefits Only" scenario of Table 4 by the \$76 million in total discounted costs from Table 3 yields a Benefit-Cost Ratio of 1.16 over the 10-year analysis period (2003–2012) examined here. A benefit-cost ratio of greater than one implies that the rule is cost effective to implement when comparing costs to benefits within the 10-year analysis period.

Total net discounted benefits associated with this rule over the 10-year analysis period range from a low of \$12 million when we assume no deterrence effect benefits, to a high of \$56 million when we assume the magnitude of the deterrence effect is equal to 50 percent of the direct accident reduction benefits associated with the rule. Correspondingly, benefit-cost ratios range from a low of 1.16 when we assume no deterrence effect benefits to a high of 1.74 when deterrence effect benefits are assumed to equal 50 percent of 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 proposes to amend title 49 CFR chapter III, parts 390, and 391 as set forth below:

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL [AMENDED]

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 390.15 is amended by revising paragraphs (a), (b), introductory text and by adding paragraph (c) 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 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 of the Federal Motor Carrier Safety Administration 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 [Insert date one year prior to the effective date of the final rule.], motor carriers must maintain an accident register containing at least the information required by paragraphs (b)(1) and (b)(2) of this section and retain that information for three years after the date of each accident. For accidents that occurred on or prior to [Insert date one year prior to the effective date of the final rule.], motor carriers must retain the record containing at least the information required by paragraphs (b)(1) and (b)(2) of this section in the accident register for a period of one year after an accident occurred.

* * * * *

(c) Within 30 days after receiving a request for information about a former driver's accident record from his/her new or prospective employer, a motor carrier must transmit the information listed in paragraph (b)(1) of this section for all accidents contained in the accident register involving that driver that occurred after [Insert date one year prior to the effective date of the final rule.] .

PART 391—QUALIFICATIONS OF DRIVERS [AMENDED]

3. 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.

4. 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) Whether the job was a safety-sensitive function as defined under § 382.107, and thus subject to alcohol and controlled substances testing under 49 CFR part 382, and

(iv) The reason for leaving the employ of that employer;

* * * * *

(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 background as required by § 391.23(c). The prospective employer must also notify the driver in writing of due process rights as specified in § 391.23(i) regarding information received as a result of the investigations required by § 391.23(c).

5. In § 391.23, revise paragraph (c) and add new paragraphs (d) through (m) to read as follows:

§ 391.23 Investigations and inquiries.

* * * * *

(c) The investigation of the driver's employment record required by paragraph (a)(2) of this section must be completed within 30 days of the date the driver's employment begins. 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. The record must include the previous employer's name and address, the date the previous employer was contacted, and the information provided about the driver. The record must be maintained pursuant to § 391.53.

(d) The motor carrier must investigate, at a minimum, the information listed in this paragraph from all previous employers that employed the driver to operate a CMV within the previous three years:

(1) General information about a driver's employment record;

(2) (i) Any accidents, as defined by § 390.5 of this subchapter, involving the driver that occurred in the three-year period preceding the date of the employment application. The specific information to be sought regarding any accident is described in § 390.15(b)(1) of this chapter.

(ii) Exception. Until [Insert date two years after the effective date of the final rule.] carriers need only provide information for accidents that occurred after [Insert date one year prior to the effective date of the final rule.].

(e) The motor carrier must investigate the information listed below in this paragraph from all previous employers that employed the driver within the previous three years in a safety-sensitive function, as defined under § 382.107 of this chapter, that required controlled substance and alcohol testing pursuant to part 382 of this chapter:

(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.

(2) For a driver reported pursuant to paragraph (e)(1) of this section, 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. 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 reported pursuant to paragraph (e)(1) of this section 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 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 must provide to the previous motor carrier the driver's written consent 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 must not permit the driver to operate a commercial motor vehicle for that motor carrier.

(g) Previous employers must respond to requests for the information in paragraphs (d) and (e) of this section within 30 days after the request is received. The previous employer must take all precautions reasonably necessary to ensure the accuracy of the records.

(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 records from disclosure to any person not directly involved in forwarding the records, except the previous employer's insurer.

(i)(1) The prospective employer must expressly notify the driver—via the application form or other written document—that he or she has the following rights regarding the investigative information 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 providing 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 submitting previous employer disagrees with the driver that the information is incorrect.

(2) Drivers wishing to review previous employer-provided investigative information must submit a written request to the prospective employer.

The prospective employer must provide this information to the applicant within two (2) business days. If the prospective employer has not yet received the requested information from the previous employer(s), then the two-business days deadline will begin when the prospective employer receives the requested information. If the driver has not arranged to pick up or receive the requested records within thirty (30) days, the prospective motor carrier may consider the driver to have waived his/her request to review the records.

(j)(1) Drivers wishing to correct erroneous information in records provided pursuant to paragraphs (d) and (e) of this section must send the allegation of error, proof of error, and request to correct, to the previous employer who provided the records to the prospective employer.

(2) If the previous employer and the driver agree the information in question is erroneous, the previous employer must correct the information and, within thirty (30) business days after receiving the driver's allegation/proof/request to correct, must send the corrected information to the prospective employer. The previous employer must also retain the corrected information for providing to subsequent prospective employers when requests for this information are received.

(3) If the previous employer and the driver cannot agree the information in question is erroneous, then the previous employer must accept a rebuttal from the driver, if he or she wishes to provide one, and within thirty (30) business days after receiving the driver's allegation/proof/request to correct, must send a copy of the driver's rebuttal to the prospective employer. The previous employer must append the driver's rebuttal to the information in its file and provide the complete appended information to any subsequent investigating prospective employer.

(k)(1) The prospective employer must use the information described in paragraphs (d) and (e) of this section only to decide whether to hire the driver who is the subject of those records.

(2) The prospective employer and 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, except that disclosure (excluding any alcohol or controlled substances information) may be made to the prospective employer's insurer for the purpose of determining whether to include the driver on carrier insurance.

(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) or (l)(2) 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) 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.

6. In § 391.51, paragraph (b)(2) is 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);

* * * * *

7. Add a new § 391.53 to read as follows:

§ 391.53 Driver Employment History File.

(a) Each motor carrier must maintain records relating to the investigation into the employment history of a new or prospective driver pursuant to paragraphs (d) and (e) of this section. 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) for the purpose of determining whether to include the driver on the carrier's insurance policy.

(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 drug and alcohol history as required under § 391.23(d).

(2) A copy of the response(s) received to request for information under paragraphs (d) and (e) of § 391.23 from each previous employer, or documentation of a good faith effort to

contact them. The record must include the previous employer's name and address, the date the previous employer was contacted, and the information provided about the driver.

(c)(1) The record 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.

(2) The record for a driver who is not hired must be retained for one year.

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

Issued on: July 11, 2003.

Annette M. Sandberg,
Acting Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 697

[I.D. 070203E]

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Application for Exempted Fishing Permit (EFP)

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of a request for an EFP to harvest horseshoe crabs; request for comments.

SUMMARY: NMFS announces that the Director, Office of Sustainable Fisheries, is considering issuing an EFP to Limuli Laboratories of Cape May Court House, NJ to conduct a third year of an exempted fishing operation otherwise restricted by regulations prohibiting the harvest of horseshoe crabs in the Carl N. Schuster Jr. Horseshoe Crab Reserve (Reserve) located 3 nautical miles (nm) seaward of the mouth of Delaware Bay. NMFS is considering issuing an EFP for the harvest of 10,000 horseshoe crabs for biomedical purposes and requiring as a condition of the EFP the collection of data related to the status of Delaware Bay horseshoe crabs within the Reserve. Therefore, this document invites

comments on the issuance of an EFP to Limuli Laboratories.

DATES: Comments on this action must be received on or before August 1, 2003.

ADDRESSES: Written comments should be sent to John H. Dunnigan, Director, Office of Sustainable Fisheries, NMFS, 1315 East West Highway, Room 13362, Silver Spring, MD 20910. Mark the outside of the envelope "Comments on Horseshoe Crab EFP Proposal." Comments may also be sent via facsimile (fax) to (301) 713-0596. Comments will not be accepted if submitted via e-mail or the Internet.

FOR FURTHER INFORMATION CONTACT: Tom Meyer, Fishery Management Biologist, (301) 713-2334.

SUPPLEMENTARY INFORMATION:

Background

The regulations that govern exempted fishing, at 50 CFR 600.745(b) and 697.22 allow a Regional Administrator or the Director of the Office of Sustainable Fisheries to authorize for limited testing, public display, data collection, exploration, health and safety, environmental clean-up and/or hazardous removal purposes, the targeting or incidental harvest of managed species that would otherwise be prohibited. An EFP to authorize such activity may be issued, provided there is adequate opportunity for the public to comment on the EFP application, the conservation goals and objectives of the fishery management plan are not compromised, and issuance of the EFP is beneficial to the management of the species.

The Reserve was established on February 5, 2001 (66 FR 8906), to provide protection for the Atlantic coast stock of horseshoe crabs, and to promote the effectiveness of the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan (ISFMP) for horseshoe crab. The final rule prohibited fishing for horseshoe crabs in the Reserve and the possession of horseshoe crabs on a vessel with a trawl or dredge aboard while in the Reserve. The rule did not allow for any biomedical harvest or the collection of fishery dependent data. However, in the comments and responses section, NMFS stated that it would consider issuing EFPs for the biomedical harvest of horseshoe crabs from the Reserve.

The biomedical industry collects horseshoe crabs, removes approximately 30 percent of their blood, and returns them alive to the water. Approximately 10 percent do not survive the bleeding process. The blood contains a reagent called Limulus Amebocyte Lysate (LAL)