DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 382, 383, 384 and 391

[Docket No. FMCSA–2011–0031]

RIN 2126–AB18

Commercial Driver's License Drug and Alcohol Clearinghouse

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

ACTION: Final rule.

SUMMARY: FMCSA amends the Federal Motor Carrier Safety Regulations to establish requirements for the Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse), a database under the Agency's administration that will contain information about violations of FMCSA's drug and alcohol testing program for the holders of commercial driver's licenses (CDLs). This rule is mandated by the Moving Ahead for Progress in the 21st Century Act (MAP–21). It will improve roadway safety by identifying commercial motor vehicle (CMV) drivers who have committed drug and alcohol violations that render them ineligible to operate a CMV.

DATES: *Effective Date:* January 4, 2017. *Compliance Date:* January 6, 2020.

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I. Executive Summary

A. Purpose and Summary of the Major Provisions of the Clearinghouse

The purpose of the Clearinghouse, as mandated by section 32402 of MAP–21, is to maintain records of all drug and alcohol program violations in a central repository and require that employers query the system to determine whether current and prospective employees have incurred a drug or alcohol violation that would prohibit them from performing safety-sensitive functions covered by the FMCSA and U.S. Department of Transportation (DOT) drug and alcohol testing regulations. This will provide FMCSA and employers the necessary tools to identify drivers who are prohibited from operating a CMV and ensure that such drivers receive the required evaluation and treatment before resuming safety-sensitive functions. Specifically, information maintained in the Clearinghouse will ensure that drivers who commit a drug or alcohol violation while working for another employer, or who attempt to find work with another employer, do not perform safety-sensitive functions until completing the return-to-duty process. The Clearinghouse thus addresses the situation in which drivers can conceal their drug and alcohol violations merely by moving on to the next job or the next jurisdiction. As explained below, drug and alcohol violation records maintained in the Clearinghouse will ''follow'' the driver regardless of how many times he or she changes employers, seeks employment or applies for a CDL in a different State. The Clearinghouse will be administered and maintained in strict compliance with applicable Federal security standards. The Agency will comply with the consent requirements of the Privacy Act prior to releasing any driver's Clearinghouse record to an employer.

Employers and medical review officers (MROs), or their designated representatives, are required to report information about positive drug test results, alcohol test results greater than 0.04 blood alcohol content, refusals to test and other non-test violations of FMCSA's drug and alcohol regulations. In addition, Substance Abuse Professionals (SAPs) are required to report information about drivers undergoing the return-to-duty drug and alcohol rehabilitation process. Employers must search the Clearinghouse for information during the pre-employment process for prospective employees and at least once a year for current employees to determine whether anyone has incurred a drug or alcohol violation with a different employer that would prohibit him or her from performing safety-sensitive functions.

B. Benefits and Costs

In the Initial Regulatory Analysis, the Agency estimated the annual benefit of the proposed rule at $187 million and the annual cost at $186 million. The present value of the proposed rule was $8 million at a 7 percent discount rate. The Final Regulatory Impact Analysis estimates the annual benefit of the final rule at $196 million and the annual cost at $154 million. Net present value benefit is estimated at $316 million at a 7 percent discount rate.

The principal factor causing the reduction in costs is the analytical change necessary to account for the program change concerning the testing rate for annual random drug tests. Effective January 1, 2016, the random drug testing rate is now 25 percent of drivers employed by a carrier, as opposed to 50 percent. This change was made pursuant to 49 CFR 382.305, and is unrelated to the Clearinghouse or the final rule. The industry has only been in operation for less than a year at the lower testing rate. Therefore, no drug survey data available that indicates that the random positive drug test rate has, or will, materially diverge from the three-year average of positive test rates used to estimate the number of positive random drug tests for the forecast period. This change reduces the estimate of the number of annual random positive drug tests from 28,000 in the Initial Regulatory Impact Analysis to 10,000 in the Final Regulatory Impact Analysis. The principal effect of this change is a reduction in return-to-duty costs from the $101 million estimated in the Initial Regulatory Impact Analysis to $56 million in the Final Regulatory Impact Analysis. In addition, FMCSA estimated drivers' opportunity cost for the personal income they would forgo for the hours in which they are in substance abuse education or treatment programs. This opportunity cost is included in the estimate of total return-to-duty costs. In the Final RIA, FMCSA estimated employers' opportunity cost as the monetized value of on-duty time lost for the entire period of time drivers, with drug and alcohol violations are detected as a result of the final rule, are prohibited from performing safety-sensitive functions.

The Agency estimates about $196 million in annual benefits from crash

reductions resulting from the rule. The benefits consist of $55 million in safety benefits from the annual queries and $141 million in safety benefits from the pre-employment queries. FMCSA estimates that the rule would result in $154 million in total annual costs, which include:

- $29 million that is the estimated monetized value of employees' time to prepare annual employer queries;
- $11 million that is the estimated monetized value of employees' time to prepare pre-employment queries;
- $3 million for employers to designate service agents, and $1 million for SAPs to report initiation of the return-to-duty Initial Assessment;
- $5 million incurred by various reporting entities to register with the Clearinghouse, verify authorization, and become familiar with the rule, plus an additional $700,000 for these entities to report positive tests;
- $35 million of fees and consent and verification costs consisting of $24 million in Clearinghouse access fees incurred by employers for pre-employment queries, limited annual queries and full annual queries, plus $11 million of the monetized value of drivers' time to provide consents to employers and verification to FMCSA to allow employers access to drivers' records;
- $2.2 million for development of the Clearinghouse and management of records;
- $56 million incurred by drivers to go through the return-to-duty process, including $7 million of opportunity costs in the form of income forgone for those hours spent in substance abuse education and treatment programs in lieu of hours that could be spent in non-safety-sensitive in positions; and
- $11.5 million of opportunity costs incurred by employers due to lost on-duty hours and profits associated with drivers suspended from safety-sensitive functions until successful completion of the return-duty-process.

Total net benefits of the rule are $42 million annually ($196 million–$154 million). The 10-year projection of net benefits is $316 million when discounted at 7 percent and $369 million when discounted at 3 percent. The annualized net benefit of the final rule is $42 million at the 7 percent and 3 percent discount rates. The estimated benefits include only those associated with reductions in CMV crashes.

TOTAL NET BENEFIT PROJECTION OVER A 10-YEAR PERIOD

Total	Annual	10-year	10-year
Discount rate		7%	3%
Total Benefits	$196,000,000	$1,472,985,521	$1,722,077,349
Total Costs	154,000,000	1,157,345,766	1,353,060,774
Total Net Benefits	42,000,000	315,639,754	369,016,575

II. Abbreviations

AAMVA American Association of Motor Vehicle Administrators
ABA American Bus Association
AMRO American Medical Review Officers, LLC
ATA American Trucking Associations
ATF Alcohol Testing Form
BLS Bureau of Labor Statistics
Boeing The Boeing Company
CAA Clean Air Act
Cahill-Swift Cahill Swift LLC
CCF Federal Drug Testing Custody and Control Form
CCTA California Construction Trucking Association
CDL Commercial Driver's License
CDLIS Commercial Driver's License Information System
Clearinghouse FMCSA's Commercial Driver's License Drug and Alcohol Clearinghouse
CLP Commercial Learner's Permit
CMV Commercial Motor Vehicle
C/TPA Consortia/Third Party Administrator
CVTA Commercial Vehicle Training Association
DOT U.S. Department of Transportation
Driver Check Driver Check Medical Testing and Assessment
DrugPak DrugPak LLC
DUI Driving a Commercial Motor Vehicle While Under the Influence of Alcohol or Drugs
eCCF Electronic Custody and Control Form
EIN Employer Identification Number
E-MAIL Electronic Mail
FCRA Fair Credit Reporting Act
FE FirstEnergy Corporation
FMCSA Federal Motor Carrier Safety Administration
FMCSRs Federal Motor Carrier Safety Regulations
Foley Foley Carrier Services
GAO Government Accountability Office
Greyhound Greyhound Lines, Inc.
HHS Health and Human Services
HIPAA Health Insurance Portability and Accountability Act of 1996
IBT International Brotherhood of Teamsters
IT Information Technology
J.B. Hunt J.B. Hunt Transport, Inc.
MAP–21 Moving Ahead for Progress in the 21st Century Act
MRO Medical Review Officer
MROCC Medical Review Officer Certification Council
NCSL National Conference of State Legislators
NGA National Governors Association
NPRM Notice of Proposed Rulemaking
NPTC National Private Truck Council
NTSB National Transportation Safety Board
NYAPT New York Association for Pupil Transportation
OMB Office of Management and Budget
OOIDA Owner-Operator Independent Drivers Association, Inc.
OTETA Omnibus Transportation Employee Testing Act of 1991
PII Personally Identifiable Information
PSP Pre-Employment Screening Program
PTC Pipeline Testing Consortium, Inc.
Quest Diagnostics Quest Diagnostics Incorporated
RIA Regulatory Impact Analysis
SAMHSA Substance Abuse and Mental Health Services Administration
SAP Substance Abuse Professional
SAPAA Substance Abuse Program Administrators Association
Schneider Schneider National, Inc.
SDLA State Driver Licensing Agency
TTD Transportation Trades Department, AFL–CIO
UMRA Unfunded Mandates Reform Act of 1995
WPCI Western Pathology Consultants, Inc.

III. Legal Basis for the Rulemaking

Section 32402 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, 126 Stat. 405), codified at 49 U.S.C. 31306a, directs the Secretary of Transportation (Secretary) to establish a national Clearinghouse containing CMV operators' violations of FMCSA's drug and alcohol testing program. This rule implements that mandate.

In addition, FMCSA has general authority to promulgate safety standards, including those governing drivers' use of drugs or alcohol while operating a CMV. The Motor Carrier Safety Act of 1984 (the 1984 Act), codified at 49 U.S.C. 31136(a), provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. The 1984 Act requires the Secretary to prescribe safety standards for CMVs which, at a minimum, shall ensure that: (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on CMV operators do not impair their ability to

operate the vehicles safely; (3) the physical condition of CMV operators is adequate to enable them to operate the vehicles safely; (4) CMV operation does not have a deleterious effect on the physical condition of the operators; and (5) CMV drivers are not coerced by a motor carrier, shipper, receiver, or transportation intermediary to operate a CMV in violation of regulations promulgated under 49 U.S.C. 31136 or 49 U.S.C. chapters 51 or 313 (49 U.S.C. 31136(a)). Section 211 of the 1984 Act also grants the Secretary broad power, in carrying out motor carrier safety statutes and regulations, to ''prescribe recordkeeping and reporting requirements'' and to ''perform other acts the Secretary considers appropriate'' (49 U.S.C. 31133(a)(8) and (10)).

The FMCSA Administrator has been delegated authority under 49 CFR 1.87(e) and (f) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313 and 49 U.S.C. chapter 311, subchapters I and III, relating to CMV programs and safety regulation. This rule will implement, in part, the Agency's delegated authority under 49 U.S.C. 31136(a)(1) to ensure that CMVs are ''operated safely,'' and, under section 31136(a)(3), to ensure that ''the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely.'' The final rule does not directly address the operational responsibilities imposed on CMV drivers (section 31136(a)(2)) or possible physical effects caused by driving a CMV (section 31136(a)(4)). FMCSA prohibits employers from submitting false reports of drug or alcohol violations to the Clearinghouse, which could be used to exercise coercive influence over drivers (49 U.S.C. 31136(a)(5)). FMCSA also exercises the broad recordkeeping and implementation authority under 49 U.S.C. 31133(a)(8) and (10).

The Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102–143, Title V, 105 Stat. 917, at 952, October 28, 1991, codified at 49 U.S.C. 31306), mandated the alcohol and controlled substances (drug) testing program for DOT. OTETA affirmed the existing regulations for drug testing and required the Secretary to promulgate regulations for alcohol testing for persons in safety-sensitive positions in four modes of transportation—motor carrier, airline, railroad, and mass transit. Those regulations, including subsequent amendments, are codified at 49 CFR part 40, ''Procedures for Transportation Workplace Drug and Alcohol Testing Programs.'' Part 40 establishes requirements for all DOT-regulated parties, including employers of drivers with CDLs subject to FMCSA testing requirements, for conducting drug and alcohol tests. Part 40 also defines the roles and responsibilities of service agents, including MROs, SAPs, and consortia/third party administrators (C/TPAs), who perform critical functions under DOT-wide drug and alcohol testing program requirements.

In 1994, FMCSA's predecessor agency, the Federal Highway Administration (FHWA), published a final rule addressing the OTETA and amending regulations, including penalties, codified in 49 CFR part 382, ''Controlled Substances and Alcohol Use and Testing.'' In 2001, FMCSA revised its regulations in 49 CFR part 382 to make FMCSA's drug and alcohol testing procedures consistent with and non-duplicative of the revised regulations at 49 CFR part 40.

This rule incorporates many of the findings and recommendations contained in FMCSA's March 2004 report to Congress, which was required under section 226 of the Motor Carrier Safety Improvement Act of 1999 (Pub. L. 106–159, 113 Stat. 1748, 1771, December 9, 1999).[1]

IV. Background on FMCSA's Drug and Alcohol Testing Program

Agency regulations at 49 CFR part 382 apply to persons and employers of such persons who operate CMVs in commerce in the United States and who are subject to the CDL requirements in 49 CFR part 383 or the equivalent CDL requirements for Canadian and Mexican drivers (49 CFR 382.103(a)). Part 382 requires that employers conduct pre-employment drug testing, post-accident testing, random drug and alcohol testing, and reasonable suspicion testing, as well as return-to-duty testing and follow-up testing for those drivers who test positive or otherwise violate DOT drug and alcohol program requirements.

Motor carrier employers are prohibited from allowing an employee to perform safety-sensitive functions, which include operating a CMV, if the employee tests positive on a DOT drug or alcohol test, refuses to take a required test, or otherwise violates the DOT or FMCSA drug and alcohol testing regulations. The prohibition on performing safety-sensitive functions continues until the employee satisfies all of the requirements of the return-to-duty process prescribed in 49 CFR part 40, subpart O. Additionally, part 382 provides that an employer may not allow a covered employee to perform safety-sensitive functions when the employer has actual knowledge that a driver has engaged in on-duty or pre-duty alcohol use, used alcohol prior to post-accident testing, or used a controlled substance. An employer has ''actual knowledge'' of a driver's drug or alcohol use while performing safety-sensitive functions based upon the employer's direct observation of employee drug or alcohol use, an admission by the employee of drug or alcohol use, information provided by a previous employer, or if the employee receives a traffic citation for driving a CMV while under the influence of drugs or alcohol. An employer may not use a driver under these circumstances until the driver has completed the return-to-duty process prescribed in 49 CFR part 40, subpart O. Although not required to do so, the employer may, at its discretion, fire the employee without giving the opportunity to complete the return-to-duty process. FMCSA does not regulate an employer's decision to terminate or the conditions under which an employer chooses to keep a driver on after a drug or alcohol violation.

The Federal Motor Carrier Safety Regulations (FMCSRs) require that a motor carrier employer obtain information from a job applicant that includes the names and addresses of the applicant's employers for the past 3 years, and whether or not the applicant was subject to the FMCSRs and to the drug and alcohol testing requirements under 49 CFR part 40 (49 CFR 391.21(b)). Interstate motor carrier employers are then required to investigate the applicant's history under the DOT drug and alcohol testing program by contacting any named DOT-regulated employers to determine whether the applicant has, within the past 3 years, violated the drug and alcohol prohibitions under part 382 or the testing requirements under part 40 (49 CFR 391.23(e)). A similar background check requirement exists in part 40. *See* 49 CFR 40.25 (DOT-regulated employers must contact all of the applicant's employers for the 2 years prior to the employee application date and obtain drug and alcohol test information, including information that these employers obtained from previous employers).

Part 40 defines an ''employee'' as ''any person who is designated in a DOT agency regulation as subject to drug testing and/or alcohol testing'' including ''applicants for employment subject to

[1] ''A Report to Congress On the Feasibility and Merits of Reporting Verified Positive Federal Controlled Substance Test Results to the States and Requiring FMCSA-Regulated Employers to Query the State Databases Before Hiring a Commercial Drivers License (CDL) Holder,'' Federal Motor Carrier Safety Administration, March 2004, Pg. 2.

pre-employment testing'' (49 CFR 40.3). Pursuant to this definition, an individual is an employee of any DOT-regulated employer for whom the individual takes a pre-employment drug test, regardless of whether the individual is subsequently hired by the employer. As a result, an individual must list that prospective employer, when applying for a new covered position (*see* 49 CFR 40.25).

FMCSA published the Notice of Proposed Rulemaking (NPRM) for the Drug and Alcohol Clearinghouse on April 22, 2014 (79 FR 9703). Changes to the published proposal are discussed in detail below.

V. Discussion of Comments Received on the Proposed Rule

The Agency received 165 comments. FMCSA's responses to those comments follow.

General Support/Opposition to the Clearinghouse

Comment. Ninety-seven commenters expressed general support for the proposal to establish the Clearinghouse. These commenters included 26 trade associations, 23 service agents, 13 employers, 3 safety advocacy organizations, 2 trade unions, the NTSB, a U.S. Congressman, a transportation consultant, and 27 individuals. Common reasons cited for general support of the proposal include that it will improve safety, deter drivers from job-hopping to evade the drug and alcohol violations, and provide employers with easy access to the information they need to hire safe, qualified drivers. Ten commenters expressed opposition to establishing the Clearinghouse. The majority of the commenters registering opposition were drivers who were concerned with overlapping reporting responsibilities and the lack of sufficient time for reporting information.

Compliance Date

Comment. SAPAA, NYAPT, First Advantage, WPCI and Quest Diagnostics requested that FMCSA give stakeholders enough time to restructure processes and systems before compliance is required. SAPAA requested at least a 1-year delay from the date of publication. First Advantage suggested that the compliance date coincide with the release of the HHS eCCF. National Ready Mixed Concrete Association and FE suggested a 2-year compliance period, while another commenter suggested a 3-year period.

Response. FMCSA notes that we did not propose a compliance date in the NPRM. This final rule includes a 3-year compliance period. FMCSA believes 3 years is necessary to provide the Agency time to design and implement the information technology (IT) systems needed to facilitate the reporting of results and violations of the drug and alcohol testing rules and the responses to queries from employers and prospective employers. Also, this period of time will ensure that stakeholders have sufficient time to prepare for this rule.

Applicability—Canadian and Mexican Employees, Employers, and Service Agents

Comment. Driver Check, Schneider, OOIDA and other commenters requested that the Agency clarify whether the proposed requirements apply to Canadian and Mexican commercial drivers, employers, C/TPAs, MROs, SAPs, and certified laboratories that are subject to the FMCSA testing regulations. Some of these commenters expressed concern that the proposal does not explain how the rule will be implemented and enforced against regulated entities in Canada and Mexico. One expressed concern that some of the proposed provisions would present privacy issues for Canadians because of a recent case involving an employer in the Province of Alberta. Driver Check asked whether the Clearinghouse data entry fields would be able to accommodate Canadian addresses and CDL numbers. The same commenter asked if the Clearinghouse would accommodate French, which is one of Canada's official languages.

Response. The Clearinghouse is designed to create an overlay onto FMCSA's drug and alcohol testing program to enhance compliance. As a result, all Clearinghouse requirements in this rule apply to employees, employers, and service agents that are otherwise subject to DOT and FMCSA drug and alcohol testing requirements as codified in 49 CFR parts 40 and 382. Therefore, all Mexican or Canadian employees, employers, or service agents that are currently required to comply with DOT and FMCSA drug and alcohol testing requirements must comply with this rule.

Canadian and Mexican motor carriers will follow the same procedures as U.S.-based motor carriers to query and report to the Clearinghouse. All Canadian and Mexican motor carriers engaged in cross-border trucking are required to obtain a USDOT number and maintain active registration. They will use those credentials to register with the Clearinghouse just as any U.S.-based carrier would. Similarly, FMCSA will enforce Clearinghouse requirements using the same tools it currently uses to enforce DOT and FMCSA drug and alcohol testing requirements against Canadian and Mexican motor carriers: Investigations, roadside inspections, and other enforcement mechanisms.

Currently, FMCSA is able to access information about Canadian CDL holders through the CDLIS pointer system. As a result, FMCSA does not anticipate having trouble accessing or accommodating Canadian information as a part of the Clearinghouse design. To the extent that issues arise that may affect the ability of Canadian carriers to comply with the requirements of this rule due to differences between Canadian and U.S. privacy laws and regulations, the Agency will work with Canadian authorities to resolve those issues. FMCSA intends to provide access to the Clearinghouse only in English, although parties will be able to enter French or Spanish words and names in the various data entry fields. Users with limited English proficiency may seek assistance with the Clearinghouse by contacting FMCSA's Office of Civil Rights at (202) 366–8810 to request a language accommodation.

Comment. Several commenters expressed concern that FMCSA's requirement that motor carriers implement a random drug testing program violates Canadian law. Specifically, they cite to *Communications, Energy and Paperworkers Union of Canada, Local 30* v. *Irving Paper & Pulp, Ltd.,* [2013] 2 S.C.R. 458, and a grievance arbitration between Uniform Local 707A and Suncor Energy, Inc. that set limitations on an employer's ability to require random alcohol testing for employees working under a collective bargaining agreement.

Response. The decisions in the referenced proceedings do not address the issue of Canadian motor carriers' compliance with FMCSA's random drug and alcohol testing requirements. Although this rule would require employers to report the results of positive or refused random tests to the Clearinghouse, it does not in and of itself establish the requirement that foreign motor carriers implement random testing programs. To the contrary, 20 years ago, FMCSA's predecessor made clear that the Agency's drug and alcohol requirements apply equally to foreign drivers. *See* ''Controlled Substances and Alcohol Use and Testing; Foreign-based Motor Carriers and Drivers,'' 60 FR 49322, Sept. 22, 1995. Moreover, in accordance with bilateral agreements between the United States and Canada, Canadian drivers are—and have been—subject to

all U.S. regulations when operating CMVs in the United States. Canadian motor carriers concerned about the effect of these recent cases on their cross-border transportation operations should consult with local legal counsel.

Applicability—Motor Carriers Operating Non-CDL CMVs

Comment. A number of commenters including J. B. Hunt Transport, Inc. and several trade associations requested that FMCSA also require motor carriers that operate non-CDL CMVs to query the Clearinghouse. Several commented that if this rule is implemented as proposed, CDL drivers with a drug or alcohol violation would seek employment with non-CDL motor carriers because the proposed rule does not require them to query the Clearinghouse. J.B. Hunt posited that ''many drivers who fail a test and can't 'job-hop' due to the Clearinghouse will downgrade to an operator's license and migrate to carriers not required to conduct testing or check for past test failures.'' Other commenters were also concerned that the rule, as proposed, would push unsafe drivers into the non-CDL segment of the motor carrier industry. Another commenter observed that 49 CFR 382.501(c) prohibits a driver with a drug or alcohol violation from operating CMVs that do not require a CDL, but under the proposed rule, non-CDL CMV employers would not know whether a driver is subject to this prohibition.

Response. The MAP–21 mandate underlying this rule applies only to individuals who hold a valid CDL and who are subject to drug and alcohol testing under Title 49 of the Code of Federal Regulations (including part 382) and to those who employ such individuals (49 U.S.C. 31306a(m)(4)(A)). The drug and alcohol testing and reporting requirements of part 382 apply to CDL holders who operate CMVs with GVWRs of 26,001 pounds or more, a vehicle that is designed to transport 16 or more passengers, including the driver, or a vehicle of any size used in the transport of hazardous materials, and to employers of such persons (§§ 382.103(a) and 383.5). The NPRM did not propose to change any underlying requirement of part 382.

FMCSA acknowledges, as one commenter noted, that § 382.501prohibits any driver from performing safety-sensitive functions, including operating CMVs that do not require a CDL, if the driver has violated part 382. We note, however, that the provision applies only to CDL holders. FHWA, in adopting § 382.501(c) in 1994, explained its intent: ''. . . a driver removed from performing safety-sensitive functions because of a rule violation occurring in a 26,001 pound or greater vehicle in inter- or intrastate commerce, also is prohibited from driving a 10,001 pound or greater vehicle in interstate commerce, until complying [with return-to-duty requirements].'' (59 FR 7484, 7501, February 15, 1994). Further, § 382.501(c) does not subject CDL holders operating CMVs with GVWRs between 10,001 and 26,000 pounds, or their employers, to the requirements of part 382.

FMCSA therefore concludes that, at this time, it would not be appropriate to require that motor carriers who employ individuals (either non-CDL holders or CDL holders) to operate CMVs with GVWRs between 10,001 and 26,000 pounds, to query the Clearinghouse. Such a requirement would expand the reach of this rulemaking to employers and drivers who are not required to participate in FMCSA's drug and alcohol testing program. Because those parties are not subject to part 382 requirements, they did not have sufficient notice that Clearinghouse requirements could become applicable to them and, accordingly, have not had a fair opportunity to participate in this proceeding. Should FMCSA, on the basis of demonstrable need, subsequently exercise its discretion under the 1984 Act (49 U.S.C. 31136(1) and (3)) to require that these employers query the Clearinghouse, we will provide notice and an opportunity for comment.

The Agency notes, however, that. ''non-CDL'' employers operating in interstate commerce remain subject to the investigation and inquiry requirements of § 391.23. Employers obtaining records related to an applicant's driving and safety performance history under § 391.23(a) would, for example, be able to discern whether the applicant had voluntarily downgraded a CDL to a motor vehicle operator's license and thus have a basis on which to question the applicant concerning the reason for the downgrade. ''Non-CDL'' employers must also request drug and alcohol testing information from ''all previous DOT regulated employers that employed the driver within the previous three years . . . in a safety-sensitive function that required alcohol and controlled substance testing specified by 49 CFR part 40'' (§ 391.23(e)). Section 391.23(f) requires that prospective employers provide previous employers with the driver's written consent, as required by § 40.321(b), to allow for the release of this privacy-protected information. Use of FMCSA's Pre-employment Screening Program (PSP) will also assist motor carrier employers in finding disqualifying drug and alcohol offenses and identifying prior DOT-regulated employers. The availability of this information will enable prospective employers to determine whether applicants who are CDL holders are subject to § 382.501.

Additionally, subject to applicable State requirements, ''non-CDL'' employers may conduct pre-employment and/or random non-DOT drug and alcohol testing (though the results of such tests would not be reportable to the Clearinghouse, as explained below).

Applicability—Non-DOT Tests

Comment. Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, Schneider, C.R. England and the ATA requested that FMCSA permit employers to report non-DOT tests to the Clearinghouse. OOIDA opposed including non-DOT tests in the Clearinghouse.

Response. Congress did not grant FMCSA the authority to require employers to report non-DOT tests to the Clearinghouse. Congress directed the Agency to establish the Clearinghouse as a repository of DOT drug and alcohol testing program violations. *See* 49 U.S.C. 31306a(a). This is consistent with the rules applicable to FMCSA's drug and alcohol testing program: All FMCSA-required tests must be conducted in accordance with DOT rules. *See* 49 U.S.C. 31306(c); 49 CFR 382.105. Although employers may conduct testing beyond that required by FMCSA and DOT rules, positive results for these non-DOT tests must be kept completely separate from DOT test results and do not constitute violations of FMCSA or DOT rules. *See* 49 CFR 382.105; 49 CFR 40.13. Accordingly, FMCSA will not expand the scope of the Clearinghouse to include non-DOT tests.

Applicability—Municipalities

Comment. A commenter asked whether this final rule would apply to municipalities.

Response. Generally speaking, municipalities are subject to FMCSA's drug and alcohol testing program to the extent they employ drivers who are required to hold a CDL to operate a CMV. *See* 49 U.S.C. 31301, 31306; 49 CFR 382.103. Because this rule applies to all employers and employees subject to FMCSA's drug and alcohol testing rules, it would also apply to any municipality subject to those rules.

Applicability—Fair Credit Reporting Act (FCRA)

Comment. Foley and C.R. England asked whether the information in the

Clearinghouse would be subject to the FCRA when it is used for pre-employment background checks. C.R. England asked that FMCSA issue guidance stating whether a prospective employer would be required to submit an adverse employment action letter to a prospective employee if he or she were not hired as a result of information disseminated from the Clearinghouse. OOIDA stated that FMCSA must comply with the FCRA.

Response. FMCSA will comply with applicable FCRA requirements; however, not all provisions in the FCRA apply to the Agency's administration of the Clearinghouse. Information that a prospective employer receives from the Clearinghouse during a pre-employment check is not subject to requirements on the use of ''consumer reports'' under the FCRA. While still subject to some FCRA requirements, as noted below, this type of ''pre-employment'' information on a prospective employee, solely considered for employment purposes and required by Federal regulation and law, qualifies as an ''excluded communication'' under 15 U.S.C. 1681a(d)(2)(D), 1681a(o), and 1681a(y) of the FCRA.

FMCSA, as the government agency communicating this information, is subject to disclosure requirements under section 1681a(o)(5)(C). FMCSA meets these disclosure requirements through the provisions of this final rule on driver notification and access to the Clearinghouse in 49 CFR 382.707 and 382.709. Under § 382.707, FMCSA must notify a driver when information concerning that driver has been added to, revised, or removed from the Clearinghouse. When information concerning that driver has been released from the Clearinghouse to an employer, the Agency must specify the reason for the release. Such notice will inform the driver how to access his or her information in the Clearinghouse and will comply with the disclosure requirements in section 1681a(o)(5)(C).

An employer that takes adverse action based in whole or in part on a communication from the Clearinghouse, whether that information indicates a current disqualification or a resolved violation, would be subject to the FCRA's ''subsequent disclosure'' requirement. This requirement provides that the employer shall disclose ''a summary containing the nature and substance of the communication upon which the adverse action is based.'' 15 U.S.C. 1681a(y)(2). Employers should consult with their own experts for more information on how to comply with the FCRA.

Federalism

Comment. Several commenters said that the Clearinghouse rule would have implications for Federalism under Executive Order (E.O.) 13132. A rule has implications for Federalism if it has a substantial direct effect on State or local governments. NPTC, Cahill-Swift and First Advantage observed that some States have their own reporting requirements for drug and alcohol violations and requested guidance on how those reporting requirements would be affected. First Advantage asked if the Clearinghouse could send notice directly to the SDLA, to eliminate double reporting. NYAPT said that pending legislation in New York would require an MRO or C/TPA to report positive results of a school bus driver's random drug or alcohol test to the New York Department of Motor Vehicles.

Response. Nothing in this final rule will change or otherwise affect State or local drug and alcohol violation reporting requirements so long as they are compatible with this final rule. *See* 49 U.S.C. 31306a(l). Incompatible State or local requirements are subject to preemption. Each State will have to evaluate its own requirements to determine whether they are compatible with this final rule.

With respect to the Clearinghouse reporting to States, at this time FMCSA is considering the most efficient way to share information with the SDLAs. There is a more complete discussion below of Agency efforts to coordinate information sharing with SDLAs.

Privacy Considerations

Comment. A commenter stated that the Clearinghouse would violate the requirements of HIPAA.

Response. The Drug and Alcohol Clearinghouse established in this final rule is not subject to HIPPA requirements. HIPAA, which governs the dissemination of protected health information, applies to all records generated or received by ''covered entities.'' 45 CFR 160.103; 45 CFR 164.104(a). HIPAA defines a covered entity as: ''(1) A health plan; (2) A health care clearinghouse; or (3) A health care provider that transmits any health information in electronic form.'' *Id.* The Drug and Alcohol Clearinghouse does not fall into any of these categories. Even if drug and alcohol testing is viewed as protected under HIPAA, where DOT requires the use or disclosure of such information, its release is mandated by Federal law, and would not violate the requirements of HIPAA. Further information on this topic is available at *www.transportation.gov/odapc/hipaa-statement.*

Comment. The Association of American Railroads and the American Short Line and Regional Railroad Association asked whether releasing information to the Clearinghouse would violate the Federal Railroad Administration's (FRA) drug and alcohol regulations.

Response. FMCSA consulted with FRA's drug and alcohol testing program, which concluded that the Clearinghouse would not create a conflict with FRA's regulations. Any CDL driver who is subject to and violates part 382, even if that driver is working in a different DOT agency's industry, would be reported to the Clearinghouse.

Motor Carrier Registration

Comment. OOIDA suggested that FMCSA query the Clearinghouse as a part of the motor carrier registration process to determine whether any company principals have unresolved drug or alcohol violations.

Response. Company principals who do not currently serve in a safety-sensitive function (*e.g.,* they do not operate CMVs), or have never served in a safety-sensitive function are not a focus of this rulemaking. OOIDA's comment relates to registration requirements and is beyond the scope of this rulemaking. FMCSA will, however, take this comment under advisement as it moves forward with implementation of the Unified Registration System, *see* ''Unified Registration System,'' 78 FR 52608, August 23, 2013, and, as appropriate, when further developing the registration processes in an NPRM concerning ''MAP–21 Enhancements and Other Updates to the Unified Registration System''. That said, nothing in this rule would prohibit FMCSA from querying the Clearinghouse during the registration process, as a part of its audit and enforcement functions.

Definition of Positive Alcohol Test (§ 382.107)

Comment. The American College of Occupational and Environmental Medicine, Cahill-Swift, and C.R. England suggested that FMCSA remove the proposed definition of ''positive alcohol test.'' Some of these commenters stated that the definition is confusing because it has not been used previously and does not appear in 49 CFR part 40. Others said it would create confusion between the different prohibitions that apply when a driver has a blood alcohol level of between 0.02–0.039 or 0.04 and higher. Conversely, SAPAA and NYAPT supported the proposed definition of ''positive alcohol test.''

Response. The FMCSRs prohibit a driver with a blood alcohol level of 0.02–0.039 from driving a CMV. But being on duty with this blood alcohol level does not constitute a violation and does not require a driver to complete the return-to-duty process before resuming safety-sensitive functions. 49 CFR 382.505(a). A driver who is on duty with a blood alcohol level of 0.04 or higher, however, is in violation of FMCSA's rules and must complete the return-to-duty process. 49 CFR 382.201.

FMCSA proposed to define a positive alcohol test to make it easier to differentiate between the consequences of results showing a blood alcohol level of 0.02–0.039 and 0.04 or higher. We understand, however, that this definition could be confusing given that it would be a violation of FMCSA's rules for a driver to operate a CMV with a blood alcohol level of either 0.02 or 0.04, but that different consequences would apply. As a result, we have removed the definition of positive alcohol test from the rule along with all references to it in the regulatory text. The final rule uses the term ''an alcohol confirmation test with a concentration of 0.04 or higher'' in all places where ''positive alcohol test result'' appeared in the proposal.

Definition of Owner-Operator

Comment. Foley suggested that FMCSA define the term ''owner-operator'' because it was not clear whether the term refers to one-person companies or includes companies owned by a driver.

Response. It is not necessary to define ''owner-operator'' because that term does not appear anywhere in the regulatory text of this final rule. That said, § 382.103(b) explains that part 382, which includes this final rule, is applicable to all driver-owned firms without differentiating between one-person companies and companies owned by drivers. The only differences are that § 382.103(b) also requires that one-person company owner-operators join a testing pool with at least one other person and new § 382.705(b)(6) requires that an employer who employs himself/herself as a driver must designate a C/TPA to comply with the employer reporting requirements in this rule.

Definition of Service Agent

Comment. A commenter requested that FMCSA define the term ''service agent.''

Response. Prior to the enactment of MAP–21, part 382 incorporated the definition of ''service agent'' set forth in 49 CFR 40.3, which applied to service agents providing services only in connection with the DOT-wide drug and alcohol testing requirements in part 40. MAP–21 included an expanded definition of ''service agent'' which, while functionally equivalent to the definition of ''service agent'' in § 40.3, applied the term to the Clearinghouse requirements. Accordingly, the NPRM proposed a definition of ''service agent'' consistent with that change. However, following publication of the NPRM, DOT amended its definition of ''service agent'' in § 40.3 to conform to MAP–21 so that it is clear the definition is not limited to those persons providing services only in connection with part 40 requirements (81 FR 52364, August 8, 2016). The revised definition in § 40.3 now encompasses service agents who provide services in connection with drug and alcohol testing requirements, including the Clearinghouse requirements. Consequently, no new definition of ''service agent'' is necessary in the final rule.

Driver Identification (§ 382.123)

Social Security Numbers

Comment. FMCSA proposed that drivers be identified by their CDL number and State of licensure rather than Social Security Number or other Employee ID Number on the alcohol testing form (ATF) and Federal Drug Testing Custody and Control Form (CCF). A number of commenters opposed this change. Driver Check, Driver IQ/CARCO, Schneider and an individual commenter objected to using CDL numbers in lieu of Social Security Numbers because they believed that when a driver moves to a new State his or her license number would change, complicating the Clearinghouse's ability to track the driver. NYAPT, MROCC, CVTA and an individual commenter supported using CDL numbers. Driver IQ/CARCO and CCTA suggested that FMCSA should use CDLIS to track a driver's previous CDLs in other States. First Advantage and another commenter interpreted FMCSA's proposal to require a change to the ATF and CCF. These commenters stated that FMCSA did not have the authority to propose a change to these forms, which come under the authority of HHS. The IBT stated that use of the CDL number and State of issuance in lieu of a Social Security Number would reduce the risk of identity theft in the event the Clearinghouse suffered a security breach. SAPAA, Foley and Quest Diagnostics asked what would happen if a collection site mistakenly used a Social Security Number or EIN on the ATF or CCF. First Advantage also asked how the system would track foreign CDL numbers.

Response. After careful consideration of the comments and evaluation of FMCSA's information technology systems, the Agency concluded that the most accurate and secure method to identify a driver in the Clearinghouse is by using his or her CDL number and State of issuance. This is consistent with Federal and DOT policies which strongly encourage agencies to avoid using Social Security Numbers as an identifier whenever possible. Moreover, by interfacing with the CDLIS driver record system, the Clearinghouse will be able to identify drivers quickly and easily using the driver's CDL number and State of issuance, including foreign drivers. Contrary to the concerns some commenters raised, the Clearinghouse will be able to identify both domestic and foreign drivers and track their drug and alcohol violation records regardless of the number of times the driver moves to a new State and obtains a new CDL.

Using a driver's CDL number and State of issuance to track drug and alcohol violations does not require a change to the CCF or ATF. These forms specifically permit the use of either the Social Security number or an employee identification number. Under this final rule, the person completing the form is required to use the driver's CDL number and State of issuance as the employee identification number.

Once laboratories are approved to use HHS's eCCF, the likelihood of a collection site mistakenly using an identification number other than the CDL number and State of issuance will drop significantly. But in those cases in which the CDL number and State of issuance is not entered, the parties will have an opportunity to input the correct number later in the process.

Driving Schools

Comment. C.R. England and CVTA wanted to know how this rule would be applied to driving school students and prospective employees taking pre-employment drug tests prior to obtaining a CDL. CVTA asked FMCSA to clarify that the rule would not require the reporting of non-CDL holder testing results.

Response. MAP–21 requires that certain records related to drug and alcohol testing of ''commercial motor vehicle operators'' be reported to the Clearinghouse. MAP–21 defines ''commercial motor vehicle operator'' as ''an individual who (A) possesses a valid commercial driver's license issued in accordance with section 31308; and (B) is subject to controlled substances and alcohol testing under [49 CFR part

382]'' (49 U.S.C. 31306a(m)(4)). The Agency believes that, in accordance with that definition, the drug and alcohol records for CLP holders are required to be reported to the Clearinghouse because the CLP is a valid commercial driver's license and CLP holders are subject to drug and alcohol testing. Non-CDL holders—that is, persons who hold neither a CLP nor a CDL—are not subject to the Clearinghouse reporting requirements. While employers may conduct non-DOT drug and alcohol tests on employees who do not hold CDLs or CLPs, those tests are not considered DOT tests under parts 40 and 382 and cannot be reported to the Clearinghouse.

USDOT Numbers

Comment. FMCSA proposed to require employers to provide their USDOT number or their Internal Revenue Service-issued EIN on the CCF. First Advantage and Quest Diagnostics said that laboratories currently use account numbers to identify clients and that they would have to create new data fields to record USDOT numbers or EINs. MROCC, AMRO and PTC stated that, in many States, intrastate employers do not need to have USDOT numbers and that obtaining EINs would be burdensome. Two commenters also observed that the CCF does not include information to remind the collection site to record the USDOT number.

Response. As discussed below, FMCSA decided to eliminate the requirement that laboratories submit annual summaries of employer testing data. As a result, there is no longer a need to include USDOT numbers or EINs on the CCF. Accordingly, FMCSA removed this requirement from § 382.123(b)(1).

Definition of ''Reasonable Time'' and ''Refuse to Submit''

Comment. OOIDA requested that FMCSA clarify that a driver has not refused to submit to a drug or alcohol test under § 40.191 or § 40.261 when certain circumstances cause a driver to be delayed in reaching a testing facility. OOIDA requested that FMCSA make this clarification through guidance or by creating definitions of the terms ''reasonable time'' and ''refuse to submit.''

Response. FMCSA cannot make this change as a part of this final rule. The comments are related to DOT-wide drug and alcohol testing program requirements that are beyond both the scope of the Agency's authority and the scope of the final rule.

Electronic Forms

Comment. One commenter wanted to know whether entities involved in drug testing could continue to use paper forms. The commenter stated that in some circumstances computer facilities are unavailable to complete electronic forms. SAPAA, Driver IQ/CARCO, National Association of Professional Background Screeners and ATA supported the use of electronic forms and stated that FMCSA should allow parties to use electronic signatures for required authorizations and consents.

Response. It is beyond the scope of this rulemaking to change how entities involved in drug testing exchange information that is not submitted to FMCSA. The SAMHSA, which administers the CCF, has issued guidance on the use of paper and electronic CCFs. You can access that guidance at *www.samhsa.gov/sites/default/files/guidance-2014-ccf.pdf.* Changes to the electronic CCF are beyond the scope of FMCSA's authority—and this rulemaking. Questions on that issue should be directed to SAMHSA. You may access more information on SAMHSA at *www.samhsa.gov.*

Under certain circumstances, electronic documents and signatures can be used to satisfy part 382 requirements. We note, as discussed below, that this rule permits drivers to provide electronic consent for limited queries. Consent related to full queries must be provided electronically through the Clearinghouse. The Agency's previously published guidance on electronic signatures and documents can be found at *https://www.gpo.gov/fdsys/pkg/FR-2011-01-04/pdf/2010-33238.pdf* (''Regulatory Guidance Concerning Electronic Signatures and Documents,'' 76 FR 411 (Jan. 4, 2011)).

It is important to be aware, however, that FMCSA's guidance applies only to those requirements that appear in 49 CFR parts 300–399. Except for use in the eCCF, the DOT Office of Drug and Alcohol Policy and Compliance (ODAPC) has not approved the use of electronic signatures or documents to satisfy the requirements of the DOT-wide drug and alcohol regulations, which are found at 49 CFR part 40.[2] Any questions about part 40 regulations should be directed to ODAPC. You can find ODAPC contact information at *https://www.transportation.gov/odapc.*

Further, we note that electronic documents and signatures fall within the scope of a separate NPRM that FMCSA published on April 28, 2014 (79 FR 23306), in which the Agency proposes to amend its regulations to allow the use of electronic records and signatures to satisfy its regulatory requirements. In addition, under section 5203 of the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94, 129 Stat. 1312, Dec. 4, 2015), FMCSA is required to take certain steps in addressing the Agency's Regulatory Guidance Program. Therefore, changes to regulatory guidance regarding electronic documents and signatures may also occur under this initiative.

Employer Responsibilities (§ 382.217)

Comment. FMCSA proposed a new section that would prohibit employers from allowing a driver to operate a CMV if the driver does not comply with the return-to-duty process after a refusal, a positive drug test, an alcohol confirmation test with a concentration of 0.04 or higher, or if the employer has actual knowledge that the driver has used alcohol or controlled substances as defined in § 382.107. NYAPT expressed support for this provision. FE suggested that a driver should be able to resume operating a CMV after being cleared by the SAP and passing a return-to-duty drug test regardless of whether the appropriate documentation had been updated in the Clearinghouse.

SAPAA and FE wanted to know whether § 382.217(d) requires employers to report actual knowledge of drug or alcohol use to the Clearinghouse when a driver voluntarily self-reports such use under § 382.121. SAPAA suggested that § 382.217 should include each violation under which a driver is not allowed to engage in a safety-sensitive function prior to complying with the return-to-duty process.

Response. The purpose of § 382.217 is to prohibit employers from allowing a driver to operate a CMV if that driver is subject to the prohibitions in 49 CFR part 382, subpart B, and has not completed the return-to-duty process as required by 49 CFR part 382. This section does not impose reporting obligations; those obligations are in part 382, subpart G. Nor does this section limit the types of actual knowledge violations that give rise to employer prohibitions.

After consideration of the above comments and further review of the proposed regulatory text, we conclude that, although this purpose was expressed in the preamble, the regulatory text does not clearly convey the intended result. Accordingly, this final rule revises the regulatory text to clarify that no employer may allow a driver to operate a CMV if he or she is

[2] See ''Use of Electronic Chain of Custody and Control Form in DOT-Regulated Drug Testing Programs,'' 80 FR 19551 (April 13, 2015).

subject to *any* of the prohibitions in 49 CFR part 382, subpart B. Among other things, these prohibitions specifically include drivers for whom the employer has actual knowledge (as defined in § 382.107) that the driver used controlled substances, engaged in on-duty or pre-duty alcohol use, or used alcohol prior to taking a post-accident test. *See* §§ 382.205, 382.207, 382.209, and 382.213.

Retention of Records (Section 382.401)

Comment. This section requires that employers retain documents related to the administration of employers' drug and alcohol testing programs for a minimum of 5 years. FMCSA proposed changes to clarify that this requirement includes records establishing that an employer has actual knowledge of a driver's traffic citation for driving a CMV while under the influence of alcohol or drugs. NYAPT stated that it was unnecessary to retain records of traffic citations. Towing and Recovery Association of America and Conference of Northeastern Towing Association stated that an employer's C/TPA should be able to maintain these records. SAPAA stated that employers keep records of citations in their safety department, not with their drug and alcohol program records. Similarly, FE said that records of citations are not maintained in drug and alcohol program records and it should not be the responsibility of employers to keep records of those citations.

Response. We believe that the commenters may have misunderstood the effect of the proposed change. Existing FMCSA regulations already require that employers maintain all records related to their drug and alcohol testing programs for at least 5 years. The purpose of the proposed change was to clarify that an employer must retain a DUI traffic citation only when it uses that citation as the basis for establishing that it had actual knowledge of a driver's use of drugs or alcohol in violation of FMCSA's drug and alcohol testing program. The proposed change was not intended to require employers to maintain copies of all traffic citations. In addition, it is left to the employer's discretion whether to use a C/TPA to administer and maintain records related to the employer's drug and alcohol program. Nothing in this proposed change would have affected that.

Regardless, it appears that the proposed change created more confusion than clarity. As a result, the final rule clarifies that employers must maintain drug and alcohol program records, including records of all part 382 drug and alcohol violations, for a minimum of 5 years.

Laboratories' Duty To Report Controlled Substances Test Results (§ 382.404)

Comment. FMCSA proposed to require each laboratory to report a summary of test results for each motor carrier using the laboratory to conduct controlled substances testing under FMCSA's requirements. A C/TPA commented that many owner-operators do not have independent accounts at laboratories; instead, their C/TPAs are the contact point with the laboratory. SAPAA and Quest Diagnostics said that the semi-annual statistical summary information laboratories provide to ODAPC is not required to be electronic and that creating an electronic format would be burdensome. First Advantage said that laboratories do not currently collect USDOT numbers and would have to create a new field in their IT systems to collect this information. Cahill-Swift commented that laboratories often indicate that a test is an FMCSA test when an employer has testing responsibilities for more than one mode and that it would be difficult for laboratories to separate them out. Several commenters said that the reporting requirement was duplicative and that FMCSA should use the information that is reported to ODAPC and Drug and Alcohol Management Information System (DAMIS). Along the same lines, a commenter suggested that if the laboratories are reporting this information, carriers should not have to submit summaries. On the other hand, commenters such as Schneider, IBT and an individual supported the proposed requirement.

Response. After considering the comments on this proposal, FMCSA decided to eliminate proposed § 382.404. The overwhelming majority of commenters indicated that the proposed laboratory reporting requirement would require changes to existing laboratory IT systems' information collection procedures and that the summaries would result in redundant reporting. In light of the burden on the industry and the fact that other less burdensome means of obtaining this information exist, FMCSA will not require laboratories to submit annual summary reports.

Access to Facilities and Records (§ 382.405)

Comment. FMCSA previously required employers to make records of their DOT drug and alcohol testing programs available to certain officials with regulatory authority over the employers. FMCSA proposed to extend that requirement to service agents as well. FMCSA also proposed to provide the NTSB access to a driver's record in the Clearinghouse when that driver is involved in a crash under investigation. One commenter misinterpreted this section to mean that FMCSA would disclose Clearinghouse information to officials with regulatory authority over employers and requested that FMCSA narrow the purposes for which these officials could request information. SAPAA said that C/TPAs were better able to comply with record requests than employers, as long as the employers provide C/TPAs with all of the relevant information. The NTSB requested that it be granted access to all information in the Clearinghouse that ''may be pertinent to its investigative mission.''

Response. Under 49 CFR 40.331(c), service agents are obligated to make drug and alcohol testing program records available to certain DOT officials as well as other officials with regulatory authority over employers. This final rule extends a requirement in § 382.405 that was previously limited to employers and now will include service agents as well. This change applies to records under the service agents' control and does not apply to information in the Clearinghouse. This change makes § 382.405 consistent with part 40.

Congress authorized FMCSA to grant the NTSB access to an individual's Clearinghouse record ''if the individual is involved in an accident that is under investigation by the National Transportation Safety Board.'' 49 U.S.C. 31306a(i). Based on this statutory language, FMCSA believes that Congress intended to limit the NTSB's access to individual records to instances when that particular individual is involved in an accident under NTSB investigation. Accordingly, § 382.405 remains as proposed.

Medical Review Officer or C/TPA Record Retention for Controlled Substances (§ 382.409)

Comment. FMCSA proposed to amend § 382.409(c) to add the Clearinghouse to the list of entities to which an MRO or C/TPA may release a driver's drug test results. SAPAA and NYAPT stated their support for this change. SAPAA also suggested that the MRO be required to tell the driver that the MRO must report violations to the Clearinghouse and that the MRO be required to notify the driver's employer when a verified result is entered into the Clearinghouse. Driver IQ/CARCO and DOT Right Hunters suggested adding SAPs, the NTSB, and consumer reporting agencies to the list of entities

to which MROs are permitted to release drug tests. One commenter stated that § 382.409(c) is confusing and could be in conflict with §§ 40.163(g) and 40.293(g), which permit the release of test information to SAPs.

Response. In this final rule, in accordance with § 382.601, employers must notify drivers that drug and alcohol testing program violations will be reported to the Clearinghouse. As a result, it is not necessary for MROs also to provide this notification. In addition, MROs have been and will continue to be required to notify employers of violations, in accordance with § 382.407. Since the employer will be made aware of the violation directly by the MRO, there is no reason for the MRO to provide additional notification when the result is entered in the Clearinghouse.

The purpose of the changes to § 382.409(c) in this final rule is to include the Clearinghouse in the category of entities to which MROs and C/TPAs may report test results. FMCSA did not intend, and did not propose, to expand the list of entities that are entitled to obtain drug test results beyond the Clearinghouse. Moreover, § 382.409(c), as proposed, is consistent with the parallel provisions authorizing the release of drug and alcohol information under the DOT-wide drug and alcohol testing program. *See* 49 CFR 40.331. FMCSA is not aware that the substantive language of § 382.409 has caused any confusion over an MRO's authorization to provide drug and alcohol test information to SAPs.

Further, it is unnecessary to add any language to allow for release of information to SAPs. The DOT-wide program expressly authorizes MROs to release drug-related violation information about a driver to the driver's SAP without additional consent. 49 CFR 40.163(g); 40.327(b); 40.293(g).

Finally, no statutory or regulatory authority permits the release of information to a consumer reporting agency without the driver's consent. To the contrary, such a release would be inconsistent with the fundamental privacy protections that parts 40 and 382 afford.

Notification to Employers of a Controlled Substances or Alcohol Testing Program Violation (§ 382.415)

Comment. FMCSA proposed to require drivers to notify all employers if they violate FMCSA's drug and alcohol testing regulations in 49 CFR part 40 or 382. Several commenters expressed general support for this provision. The Florida Trucking Association, SAPAA, MROCC, AMRO and PTC asked how FMCSA would enforce this requirement. Commenters also asked about the time frame in which the driver would have to report this information to employers. A commenter requested additional information about how notification would be delivered and what would happen if an employer claimed not to have received notification. IBT said that a driver with only one employer should not have to report the violation to that employer.

Response. The purpose of this provision is to require a driver to notify his or her employers if he or she has a drug or alcohol violation while working for a different employer or in connection with pre-employment testing with a new prospective employer. The text of the regulation specifically states that this notification must be made in writing before the end of the business day following the day the employee received notice of the violation or prior to performing any safety-sensitive function, whichever comes first. FMCSA recognizes that there is some confusion about whether drivers with only one employer must provide this notification and whether drivers with multiple employers must notify the employer that administered the test. To clarify this requirement, FMCSA has amended this provision to state expressly that drivers are not required to notify the employer who administered the test. Drivers who violate this provision are subject to the civil penalties authorized by 49 U.S.C. 521(b)(2)(C), and criminal penalties authorized by section 521(b)(6), with civil penalties adjusted for inflation as provided in § 382.507. FMCSA may enforce this provision against drivers in connection with any type of enforcement activity that it is currently authorized to conduct, including roadside inspections and compliance reviews.

Comment. SAPAA stated that it is possible for a C/TPA to represent several employers all of which employ the same driver. The commenter asked whether, when the driver has a violation with one employer, a C/TPA could notify the other employers it also represents.

Response. A service agent is prohibited from releasing information about a driver's violations to other employers that the C/TPA represents without the driver's specific consent. *See* 49 CFR 40.351(c). For purposes of FMCSA's drug and alcohol program, specific consent means a statement signed by the employee that he or she agrees to the release of a particular piece of information to an explicitly identified person or organization at a particular time. *Id.* The employee may not grant a ''blanket release,'' in which he or she agrees to a release of a category of information (*e.g.,* all test results) or to release information to a category of parties (*e.g.,* other employers who are members of a C/TPA or companies to which the employee may apply for employment).

Comment. One commenter observed that the NPRM stated that each employer must separately follow the return-to-duty requirements and asked whether a driver with multiple employers is required to have multiple SAP evaluations and follow-up testing plans.

Response. FMCSA apologizes for any confusion it may have caused in the NPRM. A driver with a drug or alcohol violation must complete the return-to-duty process. Each employer must be sure that the driver has completed those requirements before it allows the driver to resume safety-sensitive functions. But the driver need not complete multiple evaluations and testing plans simply because he or she has multiple employers.

Employer Obligation To Promulgate a Policy on the Misuse of Alcohol and Use of Controlled Substance (§ 382.601)

Comment. Existing regulations require employers to provide employees with educational materials about the FMCSA's drug and alcohol testing program requirements and the employer's policies for implementing those requirements. *See* § 382.601. FMCSA proposed to require that employers include notice in the educational materials that violations of FMCSA's drug and alcohol testing program would be reported to the Clearinghouse. A commenter suggested requiring employers to reference § 382.405, which governs access to driver records, in the employer's educational materials. The American Bus Association (ABA) objected to the burden it places on small and large passenger carriers to provide additional educational materials. The IBT suggested that employers be required to provide information to employees about virtually all aspects of how employers and employees can use the Clearinghouse. The commenter also suggested that employers make clear that a driver's self-report of the need for assistance with substance abuse in accordance with § 382.121 would not be reported to the Clearinghouse.

Response. The purpose of this change is to require employers, as a part of their educational materials, to notify drivers that drug and alcohol test information

will be reported to the Clearinghouse. As a part of implementing this rule, FMCSA will conduct driver outreach to help drivers understand their rights and responsibilities. Because FMCSA is cognizant of the burdens changes to mandated materials place on employers, the changes to § 382.601 in this final rule are limited to updating the requirements in that section to include the Clearinghouse. Sections 382.121 and 382.405 have been in existence for a number of years; we are unaware of any problem associated with employer-provided educational materials that requires additional regulatory intervention at this time.

Drug and Alcohol Clearinghouse (§ 382.701)

FMCSA proposed to require employers to conduct pre-employment and annual queries of the Clearinghouse.

Pre-Employment Investigations Under §§ 40.25, 382.413, and 391.23

Comment. ATA, Cahill-Swift, Driver IQ/CARCO, C.R. England, Boeing, NPTC, MROCC, AMRO, PTC, J.B. Hunt, and an individual commenter asked whether employers would have to do a background investigation on prospective employees' drug and alcohol testing history in accordance with §§ 40.25, 382.413, and 391.23 if the employer conducted a pre-employment query of the Clearinghouse. Many of these commenters observed that it would be redundant to complete a background investigation and *also* query the Clearinghouse. Accordingly, they suggested that FMCSA either eliminate the background investigation requirement or, alternatively, provide an exemption.

Response. FMCSA agrees that it would be redundant for employers to request information on an employee's drug and alcohol testing history *and* query the Clearinghouse. Under current regulations, employers are required to determine whether a prospective employee violated FMCSA's drug and alcohol testing program during the preceding 3 years and, if so, whether he or she has completed the return-to-duty process. In this final rule, FMCSA eliminates the requirement that employers both query the Clearinghouse and conduct a drug and alcohol history background investigation, with limited exceptions as discussed below.

Employers will be required to query the Clearinghouse and request drug and alcohol testing histories from previous employers until the Clearinghouse has been in operation for at least 3 years. After 3 years, employers subject to part 382 will no longer be required to request drug and alcohol testing histories from previous employers, except in the following situations. When an employer relies on the § 382.301(b) exception to the pre-employment testing requirement, the employer must meet all of the requirements, including verifying that the driver participated in the controlled substances testing specified in § 382.301(b)(2)(i) and (ii) and had no recorded violations of another DOT agency's controlled substances use rule within the previous 6 months.

In addition, for drivers subject to follow-up testing, an employer must request the follow-up testing plan from the previous employer if the driver's Clearinghouse record does not indicate that he/she successfully completed follow-up testing. Employers are required to obtain an employee's ongoing follow-up testing plan pursuant to § 40.25(b)(5). As discussed below, the duration of the follow-up testing and the number and type of follow-up tests prescribed by the SAP will not be reported to the Clearinghouse. Therefore employers will continue to be required to request this information directly from the previous employer. The need to request the follow-up testing plan will be apparent when the driver's Clearinghouse record indicates that he/she successfully completed the return-to-duty process, but there is no report, required under § 382.705(b)(1)(v), that the driver completed all follow-up tests as prescribed by the SAP. In cases where a driver who is subject to follow-up testing is not currently employed, the gaining employer may obtain the driver's follow-up testing plan from the SAP, whose contact information will be available in the Clearinghouse.

Finally, if a prospective employee was subject to drug and alcohol testing with a DOT mode other than FMCSA, employers must continue to request background information from those DOT-regulated employers, who are not subject to the Clearinghouse reporting requirements. The Clearinghouse therefore will not contain any non-FMCSA drug and alcohol information. FMCSA revised §§ 382.413 and 391.23 to implement these changes. These revisions will make clear that an employer that queries the Clearinghouse has satisfied the background investigation requirements of § 40.25(b), subject to the exceptions described above.

Frequency of Queries Permitted

Comment. ATA, FE, Cahill-Swift, J.B. Hunt, and Driver IQ/CARCO asked whether employers would be limited to just one query per employee per year and suggested that they should be able to query the database more frequently.

Response. Nothing in the rule prohibits employers from conducting queries on drivers more than once per year. The annual query requirement, which can be met by conducting either a full or limited query, merely sets the minimum frequency for conducting queries. FMCSA made minor changes to § 382.701(b) to make this clear.

Employers may conduct more frequent queries so long as they obtain employee consent in accordance with § 382.703. FMCSA envisions that employers would obtain one general consent to conduct a limited query (or queries) from drivers at the time they are hired. Employers should ensure that the general consent to query does not restrict them to one query per year if they intend to conduct limited queries on a more frequent basis.

Burden of Annual Queries

Comment. Boeing, ABA, and a number of other commenters said that the annual query requirement is unnecessary and burdensome. Boeing added that the time and resources associated with the annual query would be burdensome, especially for large employers.

Response. FMCSA disagrees that the annual query requirement is unnecessary or overly burdensome. The number of commenters interested in conducting queries more often than once a year points to the opposite conclusion: That employers believe Clearinghouse queries will be a useful tool for identifying problem employees. The purpose of this requirement is to ensure that drivers who commit a drug or alcohol violation while working for another employer or attempting to find work with another employer do not continue performing safety-sensitive functions without complying with the return-to-duty process. Without the annual query, employers have no way of knowing about violations with other employers that render a driver ineligible to drive. FMCSA envisions that employers would obtain one general consent to query from drivers at the time they are hired in order to conduct these annual or more frequent limited queries, reducing the burden on employers to obtain such consent on a yearly basis. As noted above, employers also have the option of conducting a full query in order to satisfy the annual query requirement; in such cases, specific consent must first be obtained from the driver.

Employer Alert of Positive Test Result

Comment. FMCSA proposed that an employer would be notified if new information about a driver is entered into the Clearinghouse within 7 days of an employer conducting a query. One commenter stated that the 7-day time period is too short. SAPAA, MROCC, AMRO and PTC, and several trucking associations requested that FMCSA extend the time from 7 days to 30 days to take into account hiring delays and the time it takes to process pre-employment drug tests.

Response. FMCSA believes that these comments have merit and, as a result, includes a 30-day notification period in this final rule. FMCSA interprets the statutory mandate that the Agency provide notification to an employer within 7 days as a minimum, not a maximum time period. This interpretation is consistent with the purposes of the Clearinghouse: To improve compliance and enhance safety. *See* 49 U.S.C. 31306a(a)(2). As the commenters observe, it could take more than 7 days after a drug test for a violation to be processed, verified, and entered into the Clearinghouse. This means that a driver submitting applications to more than one employer could have a positive pre-employment drug test without other employers' knowledge. By extending the notification period, employers are more likely to get the necessary information to determine whether a driver is in compliance with FMCSA's drug and alcohol testing program. Accordingly, FMCSA extends the notification period for employers to 30 days.

Full Query in Lieu of Limited Query

Comment. FMCSA proposed that the annual query requirement would be satisfied by conducting a limited query to determine whether any information about a particular driver existed in the Clearinghouse. If the limited query shows that information exists, the employer would be required to obtain consent to conduct a full query to gain access to the information. Schneider, the CCTA, and another commenter objected to conducting a limited query in advance of a full query and requested that the regulation provide for only full queries.

Response. An employer that conducts a limited query will receive a response that says that information either exists or does not exist in the Clearinghouse. If the response indicates that there is information, the employer must obtain specific consent from the driver to conduct a full query that releases the content of that information. Nothing prevents an employer from obtaining specific consent to conduct a full query each year. But to ease the burden associated with obtaining annual consent, FMCSA offers employers the option of doing a limited query, which may be conducted with a multi-year consent to query.

Comment. A commenter asked what kind of information would trigger a full query.

Response. If a limited query returns a response indicating that any information about that driver exists in the Clearinghouse, the employer must conduct a full query to find out whether the information shows that the driver is eligible to perform safety-sensitive functions.

Annual Queries—Miscellaneous

Comment. One commenter expressed support for the annual query requirement. Two commenters asked whether they would be able to conduct annual queries of all employees in a batch.

Response. Nothing in this rule would foreclose the possibility of batch-processing annual queries. Details on Clearinghouse functionality will be addressed during the design and development process. FMCSA will provide information to stakeholders on that functionality closer to the Clearinghouse compliance date.

Comment. A commenter asked whether the annual query could be conducted at the same time as other required annual checks.

Response. Nothing in the rule mandates when the annual checks be conducted except that they occur at least once per year. Employers are free to choose the time of year that best suits their operational needs. FMCSA anticipates that many employers will choose to conduct Clearinghouse queries at the same time they conduct other required annual verifications, but that decision is left entirely to the employer.

Comment. An individual wanted to know, in the event of multiple employers, which employer would be responsible for querying the Clearinghouse. CCTA asked if owner-operators are required to query themselves.

Response. Anyone who employs a driver, regardless of whether that driver has other employers, must query the Clearinghouse in accordance with § 382.701. This includes owner-operators who, as both employers and employees, are subject to *all* provisions of FMCSA's drug and alcohol regulations. *See* 49 CFR 382.103(b). A driver who owns a company, regardless of whether it has one or many drivers, must comply with all employer and employee Clearinghouse requirements.

Comment. Another commenter asked what FMCSA hopes to achieve through the annual query. The same commenter wanted to know what an employer is supposed to do if an annual query returns results showing that a driver violated FMCSA's drug and alcohol testing program with another employer.

Response. The goal of the annual query, which is mandated by Congress (*see* 49 U.S.C. 31306a(f)(4)), is to make employers aware of drug and alcohol violations a driver may have incurred while working for another employer or in connection with pre-employment testing with a prospective employer. If the annual search shows a drug or alcohol violation, the employer would be prohibited from allowing a driver to perform safety-sensitive functions until the driver complied with the return-to-duty requirements.

Comment. MROCC, AMRO and PTC asked about the time frame for an employer to conduct a full query after a limited query indicates that there is information about a particular driver in the Clearinghouse.

Response. When a limited query shows that there is information in the Clearinghouse about a particular driver, the employer making the query (or service agent making it on the employer's behalf) must conduct a full query within 24 hours. If the full query is not conducted within 24 hours, the driver in question is prohibited from performing safety-sensitive functions. The driver may resume safety-sensitive functions once a full query is conducted so long as it shows that the driver is not prohibited from performing those functions. FMCSA amended § 382.701(b) to make this requirement clear.

Driver Consent To Permit Access to Information in the Clearinghouse (§ 382.703)

FMCSA proposed that employers may not query the Clearinghouse without the affected driver's consent.

Consent Required

Comment. Several commenters suggested that FMCSA allow employers to query the Clearinghouse at will without driver consent.

Response. In authorizing FMCSA to establish the Clearinghouse, Congress specifically required that a driver grant consent before the Clearinghouse releases information in a driver's Clearinghouse record. 49 U.S.C. 31306a(h)(1). The Agency therefore has no discretion to permit employers to

query the Clearinghouse without the driver's consent and accordingly, § 382.703, prohibits employers from conducting either limited or full queries without obtaining the driver's consent. The issue of driver consent is addressed more fully below.

Electronic Consent

Comment. Schneider, WPCI, C.R. England, ATA and DrugPak, LLC (DrugPak) recommended that FMCSA allow the use of electronic signatures for driver consent.

Response. FMCSA anticipates that, for the full query, drivers will provide electronic consent through the Clearinghouse, as noted below. The Agency intends to include this functionality in the design of the Clearinghouse system. For limited queries, drivers and employers will have the option of using either paper or electronic methods to create and maintain documentation of driver consent. You may access FMCSA's guidance on how to create and maintain electronic signatures at ''Regulatory Guidance Concerning Electronic Signatures and Documents,'' 76 FR 411 (Jan. 4, 2011).

''Blanket'' Consent Forms

Comment. Several commenters suggested that employers should obtain driver consent to query the Clearinghouse as a part of the driver's employment application. Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, ABA and Schneider recommended blanket consents for both full and limited queries for as long as the driver is employed with that employer. Foley, C.R. England, MRROC, AMRO and PTC also expressed support for blanket consents for limited queries. Commenters suggested that limited consent be combined with the driver employment application or pre-employment screening program (PSP) consent, while another suggested that it should be solicited during the driver's annual review. SAPAA suggested that consent forms be valid for 3 years.

Response. Under existing regulations, employees may not grant blanket consent to release drug and alcohol testing program information. 49 CFR 40.321. Accordingly, FMCSA does not permit employees to grant blanket consent to conduct annual Clearinghouse queries. But nothing in this final rule prevents an employer from obtaining general consent for limited queries because limited queries do not release driver information. Employers and employees are free to work out the details for obtaining general consent for limited queries, such as when the consent is originally obtained, for how long it is effective, and whether is it is combined with other consent forms.

Standard Consent Form

Comment. One commenter suggested that FMCSA establish a standard consent form so that employees know what information they are consenting to release with each type of query. OOIDA suggested that FMCSA prescribe the exact language for the consent form, including details about the type of consent given and the driver's rights under Clearinghouse rules. OOIDA also suggested that consent forms have time limits, the full and limited query consent forms should be separate, and drivers should receive a copy of each form he or she signs.

Response. To preserve the maximum flexibility for employers and employees, FMCSA does not provide a standard consent form in this final rule. However, we will provide a sample consent form on the Clearinghouse Web site that employers may use or adapt. With respect to limited queries, employers and employees are free to structure the consent in the way that permits the most efficient use of their resources. For example, it may be combined with other documents and consents or it could be a stand-alone document. It could be subject to renewal each year, or be effective for the duration of employment. It could be limited to one query per year, or permit an unlimited number of queries. Employers are required to keep records of this consent for a minimum of 3 years after the last query and compliance with this requirement is subject to audit. Nothing prohibits employers from providing employees a copy of their consent.

FMCSA will not, however, compel employers to include detailed information about the Clearinghouse or an individual's rights on the consent form.

The Agency intends that consent for full queries will be managed electronically through the Clearinghouse. FMCSA envisions that an employer will make an electronic request for records through the Clearinghouse and, once FMCSA receives electronic confirmation of consent from the driver, records, if they exist, would be released to the requesting employer. Employers would not be required to obtain or keep any other written forms of consent for full queries. The Clearinghouse will provide notice to the driver each time his or her information is released in connection with a full query. In addition, a driver will be given the option to receive electronic notification each time someone conducts a limited query on that driver. The driver will be given the opportunity to provide electronic contact information when he or she registers with the Clearinghouse.

Consent for Service Agents To Query the Clearinghouse

Comment. First Advantage and CCTA suggested that service agents should be able to query the Clearinghouse on behalf of an employer.

Response. Employers may designate service agents to query the Clearinghouse on their behalf. Service agents accessing the Clearinghouse must be authorized by the employer and registered in accordance with § 382.711.

FMCSA Verification of Employee Consent

Comment. Two commenters wanted to know how FMCSA would verify driver consent for a full query.

Response. The driver would log into the Clearinghouse and authorize the release of his or her records to a particular employer. The driver would have to establish log-in credentials when registering with the Clearinghouse in order to verify his or her identity.

Reporting to the Clearinghouse (§ 382.705)

FMCSA proposed to require employers, MROs, and SAPs to report information about violations of FMCSA's drug and alcohol testing program to the Clearinghouse. Section 382.705 identified and assigned responsibility for these reporting requirements.

Harassment or Coercion

Comment. OOIDA stated that it was concerned that a motor carrier could misuse its role in the reporting process to coerce, harass, or retaliate against drivers.

Response. In response to concerns about employers submitting false allegations to the Clearinghouse in order to coerce, harass, or retaliate against drivers, FMCSA has established new requirements for reports of violations based on an employer's actual knowledge or on a driver's failure to appear for a test. These new requirements, codified in new § 382.705(b)(3) and (5), call for the employer to document the violation contemporaneously and/or to submit supporting information, under penalty of perjury, about the violation to the Clearinghouse. For more information on these procedures and the consequences for false reporting, see the discussion of § 382.705(b)(3) and (5) below. In

addition, drivers who believe that inaccurate information about them has been entered into the Clearinghouse may request correction of their record in accordance with § 382.717 or DOT's Privacy Act procedures (49 CFR part 10, subpart E) (*See also* discussion of the Privacy Act elsewhere in this preamble.)

Inaccurate Reporting

Comment. A number of commenters were concerned about how the reporting of inaccurate information to the Clearinghouse would affect drivers. OOIDA urged that every requirement be carefully considered to maximize accuracy and eliminate room for error. Another commenter recommended that no SAP reports or return-to-duty information should be reported to the Clearinghouse because there is a risk of inaccurate reporting.

Response. Minimizing the risk for error was an important consideration for the Agency while developing this rule. Entries to the Clearinghouse will be made electronically using pre-defined data fields to minimize incorrect entries. Anyone reporting information will not be able to make an entry without including all required information. In addition, each time an entry is made to a driver's record, that driver will be notified in accordance with § 382.707. In the event of an incorrect entry, drivers will be able to request corrections in accordance with the procedures in § 382.717.

Cancelled or Changed Tests

Comment. SAPAA asked what happens when a test is cancelled. Two commenters recommended that cancelled tests should be deleted and not kept for any purposes. Cahill-Swift asked whether a record is immediately expunged from the Clearinghouse when an MRO changes a reported positive or refusal.

Response. In accordance with part 40, a cancelled test may not be considered positive or used as a basis for prohibiting a driver from performing safety-sensitive functions or requiring the driver to complete the return-to-duty process. 49 CFR 40.207, 40.267. Accordingly, no cancelled test should be reported to the Clearinghouse. In the event an MRO cancels a test that he or she previously reported to the Clearinghouse, that MRO must report that change to the Clearinghouse within 1 business day (§ 382.705(a)(3)). FMCSA would then remove that test from the Clearinghouse. FMCSA would not, however, remove the information from its archives. Although this information would not be accessible to employers, it is important that FMCSA retain a record of all cancelled tests for auditing and enforcement purposes. If an MRO fails to report the cancelled test within the required time frame, the employee can submit a request for removal through the Clearinghouse data correction procedures in § 382.717.

Redundant Reporting Responsibilities

Comment. C.R. England, Greyhound Lines Inc. (Greyhound), OOIDA, CCTA and other commenters said that the proposed reporting requirements were redundant because different entities—for example, employers and MROs—were responsible for reporting the same information. These commenters requested less duplicative and burdensome requirements. One of the commenters suggested using chain of custody or other numbers to track specimens and prevent duplicate reporting of positive test results from different sources.

Response. FMCSA did not intend to include any redundant reporting requirements in the proposed rule. We believe that several commenters were confused because § 382.705 requires both employers and MROs to report refusals. FMCSA intended, however, for MROs to report only those refusals related to the portion of the testing process in which they are involved, as identified in § 40.191. Similarly, FMCSA intended for employers to report all other refusals identified in § 40.191. In other words, § 382.705 requires employers and MROs to report different kinds of refusals with no overlapping responsibilities.

To clarify that MROs and employers have mutually exclusive reporting requirements, this final rule distinguishes between those paragraphs of 49 CFR 40.191 that implicate MRO reporting and those that implicate employer reporting. The final rule now states that employers are required to report refusals to take drug tests pursuant to § 40.191(a)(1)–(4), (a)(6), (a)(8)–(10), or (d)(1) and to report situations in which the employee admits to the collector that he or she adulterated or substituted the specimen in accordance with § 40.191(a)(11). MROs, on the other hand, are required to report refusals that are determined pursuant to § 40.191(a)(5), (a)(7), (b), and (d)(2). MROs are also required to report refusals when the employee admits to the MRO that he or she adulterated or substituted the specimen in accordance with § 40.191(a)(11).

Additionally, we note that MROs and employers do not have overlapping reporting responsibilities related to positive test results. Consequently, duplicate reporting, in which the same test result is reported to the Clearinghouse by different sources, will not occur. However, to the extent that duplicate test results are inadvertently reported to the Clearinghouse by the same source as a result of administrative error, drivers may request that duplicate reports be removed through the data correction procedures established under § 382.717.

Who Should Report Information

Comment. Several commenters said that only employers should enter information to alleviate burdens on service agents and to promote accuracy. OOIDA suggested alternative regulatory text that would make employers responsible for reporting all refusals to test. Several commenters supported having MROs, not employers, report positive test information to eliminate opportunities for employers to report inaccurate information, both inadvertently and intentionally. One commenter supported having SAPs enter SAP information to ensure accurate data is entered. Commenters also suggested having blood alcohol technicians or screening test technicians instead of employers enter alcohol test results, also to improve accuracy. Other commenters stated that employers, MROs, and SAPs should be able to allow third parties or assistants to enter information into the Clearinghouse to alleviate their reporting burdens. Greyhound and another commenter supported having each party enter information related to their immediate firsthand knowledge as a way of ensuring checks and balances in the reporting process. Two commenters supported having MROs report positive test results because they believe some employers would choose not to report the positive tests so that their employees could continue driving. A number of commenters suggested that SDLAs report information on citations for DUI while driving a CMV. Other commenters expressed concern about the conflict of interest owner-operators have in self-reporting their own drug and alcohol violations.

Response. FMCSA considered permitting only employers to input information into the Clearinghouse and determined that the better option is to have service agents enter their own information. This minimizes the risk of error by preventing the information from passing through multiple hands before reporting and holds each actor responsible for the integrity of his or her own reportable information. Furthermore, consolidating reporting authority into the hands of employers could make it easier for unscrupulous

employers to misuse their reporting role either to coerce drivers or help them evade the consequences of receiving a positive test.

Nothing in the final rule prohibits an MRO or SAP from allowing authorized staff to enter information into the Clearinghouse. The MRO or SAP remains responsible, however, for the accuracy of any information entered by staff on their behalf.

The rule does not require SDLAs to report DUI citations to the Clearinghouse. FMCSA believes that some of the commenters misunderstood the requirement to report that an individual was cited for a DUI while driving a CMV. The rule proposed that it would be the employer's responsibility to report a violation of §§ 382.205, 382.207, or 382.213 that is based on the employer's actual knowledge of a citation for DUI while driving a CMV. The Clearinghouse was never intended to be a repository for all citations for DUI while driving a CMV. In accordance with § 382.107, it will only contain those citations that an employer uses to substantiate actual knowledge that an employee violated FMCSA's drug and alcohol program.

In this final rule, FMCSA will require employers to report and substantiate all violations of § 382.205, § 382.207, or § 382.213 based on the employer's actual knowledge of the circumstances. We discuss these provisions in more detail below.

In addition, this final rule mandates that any owner-operator, regardless of whether he or she operates solo or has other driver-employees, must use a C/TPA to comply with the employer reporting requirements established in this rule. FMCSA implements this requirement in response to commenters' concerns about the conflict of interest owner-operators have in self-reporting their own drug and alcohol violations. The Agency does not believe that this will cause any increased costs or burdens on owner-operators. In the case of owner-operators who employ only themselves, they are already required to participate in a testing pool managed by a C/TPA. *See* § 382.103(b). Similarly, FMCSA's experience has shown that most owner-operators with other employees tend to be very small motor carriers that find it more convenient to use C/TPAs to manage their drug and alcohol programs. Accordingly, adding the reporting function to the C/TPA's duties should not create new burdens; to the contrary, consolidating all reporting into the C/TPA's hands should achieve efficiencies.

Employers and Drivers Regulated by More Than One Mode

Comment. Two commenters stated that some drivers work for companies that are regulated by more than one mode and suggested that results of a test conducted under the authority of another mode be reported to the Clearinghouse.

Response. In accordance with Congress's mandate in MAP–21, this final rule applies to part 382 drug and alcohol violations only. *See* 49 U.S.C. 31306a(a)(3). FMCSA does not have the authority to require employers to report other modes' drug and alcohol violations to the Clearinghouse.

Reporting Truthfully and Accurately

Comment. FMCSA proposed that every person or entity with access to the Clearinghouse be required to report truthfully and accurately, and expressly prohibited them from knowingly reporting false or inaccurate information. OOIDA suggested that FMCSA remove the term ''knowingly'' from this requirement.

Response. FMCSA proposed using the term ''knowingly'' because the Agency does not intend to impose sanctions on inadvertent errors. That said, the Agency recognizes the serious consequences drivers could face as a result of parties who report inaccurate information. Accordingly, the Agency expanded the prohibition to provide sanctions when a person reports information he or she knows *or should know* is false or inaccurate. This holds those reporting information to the Clearinghouse to a higher standard of accountability.

Reporting Follow-Up Tests

Comment. Driver Check asked whether employers are required to report negative as well as positive follow-up tests. OOIDA suggested that the number of follow-up tests be reported to the Clearinghouse. SAPAA suggested that employers report aftercare information during the follow-up period.

Response. Although employers must report negative return-to-duty tests, they are not required to report negative follow-up tests. The reason for the distinction between the two is because reporting a negative return-to-duty test changes a driver's status from prohibited to eligible to perform safety-sensitive functions. A negative follow-up test does not cause a change in the driver's status until the employer reports successful completion of all follow-up tests. Employers and MROs must, however, report positive return-to-duty and follow-up tests just as they would for any other positive test. In addition, employers will report to the Clearinghouse that a driver has completed the return-to-duty process when he or she has successfully completed all required follow-up tests.

FMCSA does not believe that reporting aftercare information is appropriate at this time. The purpose of the Clearinghouse is to be a tool for employers to use to determine whether an employee or prospective employee is prohibited from performing a safety-sensitive function. While the details of aftercare are relevant to the driver's return-to-duty process, they do not, in and of themselves, indicate whether a driver is prohibited from driving.

Time Allowed for Reporting

Comment. FMCSA proposed to require MROs, employers, C/TPAs, and SAPs to report to the Clearinghouse within 1 day of the event triggering a reporting requirement. Many commenters said that this did not allow enough time. DrugPak said that this requirement was not consistent with FMCSA's statutory authority, which simply required ''timely'' reporting. WPCI said that the rule should have a more specific time frame such as 24 hours. Yet another commenter requested that the reporting period be extended to 2 days. A commenter said that there are no time limits applicable to C/TPAs and requested that FMCSA change the rule to include them. Several commenters suggested that SAPs have up to 72 hours to report information. A different commenter suggested that SAPs have 5 days to report information.

Response. After consideration of these comments, FMCSA changed the proposed provisions so that this final rule requires MROs to report within 2 days of verifying a drug test. FMCSA makes this change to allow MROs a little more time to comply with their reporting requirements. The 2-day time frame is consistent with current MRO requirements for transmitting a report of a verified test to the employer within 2 days of verification. *See* 49 CFR 40.167(c).

There is no comparable reporting period in part 40 for employers or SAPs, however. FMCSA appreciates the commenters' concerns about the short period of time required for reporting, but must also balance this requirement against the public safety interest in timely reporting and the driver's interest in returning to work as soon as he or she is eligible. Accordingly, this final rule requires SAPs to complete their reporting requirements by the close of

the business day after the event that triggered their reporting responsibility.

For employers, the reporting period has been extended to the end of the third business day following the event triggering the violation. This change was made to reflect the fact that, in the case of a violation substantiated by an employer's actual knowledge of drug or alcohol use, or in the case of an employer's report of a driver's failure to appear for a test, new reporting requirements apply. The final rule affords more time for employers to report violations because employers are now required to generate or gather documents in order to substantiate these types of reports. These reporting requirements are discussed in further detail below. In order to maintain a uniform reporting period applicable to employer reports, the reporting period in this rule applies to all reports made by employers, not just those requiring additional documentation.

We also note these reporting periods establish the maximum amount of time in which MROs, SAPs and employers can submit their reports to the Clearinghouse. Nothing in this rule prohibits the submission of reports at an earlier point within the reporting window.

C/TPAs who report information to the Clearinghouse stand in the shoes of the employer, when they are designated to take on that responsibility. Accordingly, any time frame applicable to an employer is equally applicable to the C/TPA acting on the employer's behalf.

Reporting Actual Knowledge of Drug or Alcohol Use

Comment. FMCSA's proposal to require employers to report violations based on their actual knowledge of an employee's drug or alcohol use *only* when substantiated by a citation for DUI in a CMV is narrower than the scope of actual knowledge violations defined in § 382.107. Twenty-three commenters objected to this limitation and recommended that FMCSA require employers to report all violations based on actual knowledge, as defined in § 382.107. They stated that limited reporting would leave the Clearinghouse incomplete and would be inconsistent with Congress's mandate in MAP–21 that *all* violations of the Agency's drug and alcohol program be reported to the Clearinghouse. Commenters also said that FMCSA's concerns about inadequate documentation for violations based on actual knowledge were inconsistent with existing regulations that require employers to report these types of violations in accordance with pre-employment background investigations.

Several commenters supported the proposal and said that reports to the Clearinghouse should not be based on undocumented information that could be used to coerce drivers. One of these commenters, OOIDA, said that employers should order a reasonable suspicion test when they have actual knowledge of a violation, but opposed permitting ''unverified'' actual knowledge violations to be reported to the Clearinghouse.

One commenter stated that no DUI information should be available.

Response. After considering the comments on this issue, FMCSA agrees that it is appropriate to include all actual knowledge violations of part 382 in the Clearinghouse. By including such violations, employers will be able to query the Clearinghouse to obtain a complete picture of a driver's drug and alcohol violations history. This change also allows employers to use a Clearinghouse query to satisfy the drug and alcohol background investigation requirements in §§ 382.413 and 391.23, as discussed above. We note that neither DOT nor non-DOT tests are included in the scope of reportable actual knowledge violations.

Any violation based on an employer's actual knowledge of a driver's drug or alcohol use requires detailed, contemporaneous documentation in the Clearinghouse. Employers are required to report the details of the violation and upload evidence documenting the violation by the end of the third business day following the triggering event. Employers must report the date of the violation, a detailed description of the event, including the approximate time the violation occurred, and the names and contact information for any corroborating witness. Employers must also provide evidence to support each fact alleged in its description of the violation. In the absence of any tangible written, video, or audio evidence, the employer must attest to each fact alleged in an affidavit. Finally, the employer must verify that it provided all of the evidence supporting the violation to the employee.

The Agency intends, during the implementation phase, to build technology into the Clearinghouse that allows an employer to report an actual knowledge violation *only* if the employer attests that the report contains the required evidentiary support, as described above, and that the employer has provided a copy of the report to the employee. In the event that an employer falsely certifies that either of those requirements for submission of the report have been met, the employee may request that the information be removed from the Clearinghouse under new § 382.717(a)(2)(ii). Additionally, the employer would be subject to criminal and civil penalties as discussed below.

Reporting an actual knowledge violation to the Clearinghouse will have the effect of prohibiting a driver from engaging in his or her occupation; however, it typically is not accompanied by the type of paperwork or documentation that accompanies a test result. Given the severity of the consequences for the employee, we do not believe that an employer should be able to report an actual knowledge violation without evidence substantiating each allegation. Accordingly, these requirements create objective standards for documenting actual knowledge violations and hold employers accountable for what they report to the Clearinghouse.

In addition, as a part of the system design and implementation process, FMCSA intends to build functionality into the Clearinghouse that requires the person submitting information to state that it is true and correct and that will warn the user that the submission of false or misleading information is subject to civil and criminal penalties under § 382.507. These requirements are implemented to address concerns about coercion and harassment. They are designed to ensure that no employer reports any violation based on actual knowledge without providing evidence to support the violation. Moreover, no employer will be able to report any violation based on actual knowledge after the window for reporting has closed, eliminating the possibility for after-the-fact harassment or coercion.

Although a full query will alert an employer or prospective employer when a driver has a prohibition based on an employer's actual knowledge, the Clearinghouse will not release the details of that violation to anyone other than the driver. The circumstances of the violation have no bearing on whether the employee is eligible to perform safety-sensitive functions. All that is relevant is whether the driver is prohibited from performing safety-sensitive functions.

The Agency believes that this reporting requirement does not impose an additional cost burden on employers because a prudent employer would compile such documentation to support the termination or transfer of an employee to a non-safety-sensitive function, pending the driver's completion of the return-to-duty process.

Reporting Refusals To Test

Comment. OOIDA expressed concern regarding a situation that exists under the current drug and alcohol testing program, in which a false allegation of a driver's refusal to test may be made by the motor carrier as a means of harassing, coercing, or retaliating against the driver. OOIDA cited a specific example in which an employer reported a test refusal for a driver who was no longer in the motor carrier's employ at the time of the alleged refusal. Among other things, OOIDA recommended that FMCSA require the employer to provide supporting documents to prevent the motor carrier's submission of false or inaccurate reports of driver refusals, and to provide for the timely removal of such reports if they do occur.

Response. The Agency understands the serious consequences to a driver whenever any violation is reported to the Clearinghouse. Consequently, it is incumbent upon FMCSA to ensure, to the extent feasible, that employers do not report violations to the Clearinghouse that are false or inaccurate, and that employers who do so will be subject to appropriate sanctions. FMCSA notes, however, that we have no basis on which to anticipate that widespread fraud by employers subject to the Clearinghouse reporting requirements will occur. On the other hand, we acknowledge that unscrupulous employers could, as the commenter described, attempt to use the Clearinghouse for purposes of coercion or harassment when reporting a test refusal.

Accordingly, we are adding new documentation requirements related to the reporting, by an employer, or a C/TPA acting as the employer's service agent, of a driver's failure to appear for an alcohol or drug test. Under 49 CFR 40.261(a)(1) and 49 CFR 40.191(a)(1), failure to appear at a testing site after being directed to do so by an employer constitutes a refusal. In submitting such reports to the Clearinghouse under § 382.705(b)(3), an employer must provide documentation, such as a contemporaneous record or an affidavit, of the time and date that the driver was notified to appear at a testing site, as well as the time and date the driver was directed to appear; documentation, such as electronic mail or an affidavit, of the date the employee was terminated or resigned (*if applicable*); and documentation, such as a certificate of service or other evidence, showing the employer provided the driver with all the information reported under this paragraph. C/TPAs who report ''failure to appear'' refusals by self-employed drivers pursuant to § 382.705(b)(6) would be required to document, by affidavit or other means, that they were designated as the service agent for that employer at the time the ''failure to appear'' refusal occurred. The Agency envisions that employers, or C/TPAs acting as their service agents, could rely on a single affidavit to fulfill these documentation requirements, as long as all the required information is included. Further, we presume that the documentation of test notifications, a driver's employment status, or the existence of a valid business relationship between self-employed drivers and C/TPAs, are records reasonably kept in the ordinary course of business and would not need to be created solely to comply with these reporting requirements.

The NPRM proposed, under § 382.705(b)(1), that employers report test refusals to the Clearinghouse by the close of the business day following the date on which they obtained the information. In recognition of the fact that additional time may be needed to comply with these new documentation requirements for ''failure to appear'' refusals, in this rule we extend the reporting period for all test refusals to the close of the third business day following the date on which the violation information was obtained. Further, we note that the 3-year implementation period for this rule will afford employers ample opportunity to make any necessary adjustments to their record keeping systems in order to comply with these requirements.

Similar to the reporting requirements for actual knowledge violations, FMCSA intends that the Clearinghouse functionality will allow ''failure to appear'' refusals to be reported only if the employer certifies that the report contains the required documentation, as described above, and a copy of the documentation has been provided to the employee. As noted above, FMCSA also intends that the Clearinghouse functionality will require the person submitting information to state that it is true and correct and will warn the user that the submission of false or misleading information is subject to civil and criminal penalties under § 382.507. These requirements are implemented to address concerns about coercion and harassment.

Finally, in the event that an employer falsely certifies either that the required documentation has been provided, or that the employee has received a copy of the documentation, the employee may request that FMCSA remove the report from the Clearinghouse pursuant to new § 382.717(a)(2)(iii).

Reporting Return-to-Duty Test Eligibility

Comment. FMCSA proposed to require SAPs to report the date they determined that a driver successfully completed the education and/or treatment process as defined in 49 CFR part 40, subpart O, and was eligible for return-to-duty testing under part 382. A commenter said that the language referencing eligibility for testing was unnecessary and that employers could confuse it with a statement of fitness-for-duty determination. The commenter suggested limiting the SAP's determination to successful compliance with the SAP's recommendation.

Response. Section 382.705(d)(1)(iv), as proposed, accurately reflects the state of the law: Once a SAP determines that a driver has successfully completed the education and/or treatment process as defined in subpart O, the driver is eligible to take a return-to-duty test. *See* 49 CFR 40.305. FMCSA is unaware that employers have been confusing eligibility to take the return-to-duty test with a fitness-for-duty determination. Accordingly, FMCSA does not see any reason to change the language in this section.

Notice to Drivers and Employers of Entry, Revision, Removal or Release of Information (§ 382.707)

Comment. FMCSA proposed to notify a driver when information about that driver is entered, changed, removed, or released. Everyone commenting on this issue supported driver notification. OOIDA requested that drivers be able to obtain information identifying the person to whom records are released. SAPAA and TTD requested that FMCSA establish a time frame in which the driver would be notified about activity in the Clearinghouse. Driver Check asked how drivers licensed outside of the United States would be notified of Clearinghouse activity. SAPAA asked whether C/TPAs could receive notification on behalf of owner-operators. A commenter disagreed with the proposal to send notification of Clearinghouse activity via U.S. Mail and suggested that the rule provide for electronic notification.

Response. FMCSA understands that commenters have many questions about how the Clearinghouse will operate. Many of the operational details will be developed during the implementation phase, and thus are not appropriate for codification in FMCSA's rules. That said, it is FMCSA's intention that drivers will have access to their

Clearinghouse records, including information on who submits information and to whom information is released. With respect to timing, as soon as there is activity in a driver's Clearinghouse record, FMCSA will initiate notification. If a driver takes no action to designate an address or method of notification, the default method is to send notification via U.S. Mail to the current address on file with the driver's State of licensure. All drivers will have the option to provide an alternate electronic method of notification when they register with the Clearinghouse. The time it takes the driver to receive the notification would vary depending on which notification method is selected.

Drivers' Access to Information in the Clearinghouse (§ 382.709)

Comment. FMCSA proposed to grant drivers access to any information in their Clearinghouse record, except as restricted by law. Two commenters recommended that FMCSA prohibit drivers from having access to their own follow-up testing plans and prohibit employers from sharing that information with drivers. One of those commenters said that many employers believe that they are not prohibited from sharing follow-up testing plans with drivers. Boeing was concerned that owner-operators would have access to their follow-up plans. Finally, a driver requested clarification about how often he would be required to check his own records in the Clearinghouse.

Response. Section 382.705(d)(1)(v) of the NPRM proposed that SAPs report to the Clearinghouse the frequency, number, and type of follow-up tests as well as the duration of the follow-up testing plan. Section 40.329 currently requires that SAPs redact the follow-up testing information from any reports provided to employees so that they will not be aware of either the number or type of follow-up tests or the duration of the testing period. When DOT adopted this requirement in 2001, it noted the concern that providing employees with access to their follow-up plans ''could lessen the deterrent effect of follow-up tests'' (66 FR 41949 (August 2001)). However, the Privacy Act generally requires that an employee be permitted, upon request, access to information about him/her in their Clearinghouse record that is retrievable by that employee's name or other identifying particular. Accordingly, in order to ensure compliance with current part 40 requirements, in this rule FMCSA removes the proposed requirement in § 382.705 that SAPs report the follow-up testing plan to the Clearinghouse. SAPs will thus continue to provide that information directly to the employer as part of the follow-up evaluation report required by § 40.311(d). Therefore, follow-up testing plans will not be included in a driver's Clearinghouse record. Subsequent employers will be required to obtain the follow-up testing plan from the previous employer, if the driver's Clearinghouse record does not indicate that follow-up testing has been completed. In cases where a driver who is subject to follow-up testing is not currently employed, the gaining employer may obtain the driver's follow-up testing plan from the SAP, whose contact information will be available in the Clearinghouse. (*See,* also, discussion of this issue under ''Pre-Employment Investigations Under §§ 40.25, 382.413 and 391.23'', above.) Finally, nothing in this rule requires drivers to query the Clearinghouse. Drivers are, however, free to query their own records at any time and as often as they choose.

Clearinghouse Registration (Section 382.711)

FMCSA proposed that each employer and designated service agent register with the Clearinghouse before accessing or reporting information to the Clearinghouse.

Consumer Reporting and Background Screening Agencies

Comment. Many commenters, including Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, Foley, NPTC, ABA, Schneider, C.R. England and several trucking associations, supported allowing consumer reporting and background screening agencies to access the Clearinghouse. A number of these commenters suggested that FMCSA expand the definition of ''service agent'' to include these third party service providers. OOIDA opposed third party service provider access to the Clearinghouse unless the service provider was acting specifically on behalf of an employer with a right to access the Clearinghouse. That commenter urged tight controls on Clearinghouse access.

Response. As noted previously, the final rule does not include a new definition of ''service agent,'' as proposed in the NPRM, because DOT recently expanded the definition of that term in 49 CFR 40.3 to apply to those persons who provide services in connection with the Clearinghouse. Accordingly, a consumer reporting or background screening agency acting on behalf of an employer in connection with fulfilling that employer's obligations under parts 40 and 382 may register to access the Clearinghouse, but those entities' use of the accessed information is limited. No third party service agent may disseminate, or make any other use of the information in the Clearinghouse except to communicate it directly to the specific employer that authorized the provider to query the Clearinghouse on its behalf. No third party service agent may publish or consolidate Clearinghouse information for commercial or other purposes.

SAP and MRO Access to Information in the Clearinghouse

Comment. SAPAA, American Substance Abuse Professionals, First Advantage and other commenters requested that SAPs and MROs have access to information in the Clearinghouse to help them assess return-to-duty treatment and education requirements.

Response. In FMCSA's judgment, Congress did not intend for anyone other than employers (or an employer's designated agent), SDLAs, the NTSB, and individual drivers to access the information in the Clearinghouse. (*See* 49 U.S.C. 31306a(h)–(j).) The statute limits employer use of the information to determine whether a driver has a drug or alcohol prohibition, while SDLAs may not use the information for any purpose other than determining the qualifications of a CDL applicant. The NTSB can use the information only in connection with a crash investigation. The statute does not contemplate using the information for MRO verifications and SAP assessment determinations. Moreover, we note that the DOT-wide drug and alcohol rules do not provide for MROs to use historical drug and alcohol information as a part of the verification process. Certainly, if a driver wishes to provide that information, he or she may. But it is not currently required as a part of the MRO's function. The Agency agrees that historical information may be relevant to the SAP's role in the return-to-duty process, and notes that nothing in this final rule prohibits SAPs from obtaining this information directly from the drivers under their care as a condition of providing an assessment.

Designation of Service Agents and Employees and Credentials Required for Registration

Comment. FMCSA proposed that employers must specifically designate those employees and service agents who are authorized to access the Clearinghouse on their behalf. FMCSA also proposed that MROs and SAPs must certify compliance with part 40 and provide evidence of the

professional credentials required by part 40. A commenter asked when the employer would designate its MRO and how it would make a change of designation. The same commenter said that some MROs are contracted with C/TPAs rather than individual employers. Several commenters asked what kind of evidence MROs and SAPs must provide concerning their professional credentials. First Advantage said that providing evidence of certification and licensing would be time consuming and expensive. An individual expressed concern about how FMCSA would verify or authenticate these credentials.

Several commenters asked whether an MRO working for several different organizations would need multiple registrations and whether different MROs working for one organization would need individual registrations. Finally, Driver IQ/CARCO suggested that employers and service agents should not have to verify their designated employees on an annual basis.

Response. An employer is not required to designate which MRO or MROs may report information to the Clearinghouse for that employer's employees. Furthermore, in an effort to eliminate the potential opportunity for employers to conceal violations of their own employees, FMCSA requires MROs, rather than employers, to report verified drug test results to the Clearinghouse. Requiring that MROs report verified drug test results independently will help preserve their impartiality while eliminating any potential for employers to exert pressure on the MRO during the verification process.

To register with the Clearinghouse, MROs and SAPs must upload documentation showing that they are qualified, in accordance with the requirements of 49 CFR 40.121 and 40.281, to act as an MRO or SAP. The type of documentation will vary depending on the individual MRO or SAP's professional qualifications. FMCSA does not consider this process to be time consuming. Under current rules, MROs and SAPs are otherwise required to maintain this documentation and provide it upon request to DOT agency representatives. (*See* 49 CFR 40.121(e) and 40.281(e).) Providing this information to the Clearinghouse as a condition of access is no different than responding to an agency request to produce the same information.

An MRO's registration will be personal to that individual and will depend on his or her credentials and other qualifications. Accordingly, each MRO must have his or her own personal registration regardless of the type of organization with which he or she is affiliated.

FMCSA did not make any changes to the requirement that employers annually verify the identity of employees who are authorized to access the Clearinghouse on their employer's behalf. All employers are obligated to keep their verifications updated, but in the event that an employer fails to do so, the annual verification procedure will ensure that unauthorized employees do not retain access to the Clearinghouse indefinitely.

Duration, Cancellation, and Revocation of Access (§ 382.713)

Comment. FMCSA proposed to make Clearinghouse registration effective for 5 years, cancel inactive registrations after 2 years, and revoke registration for failure to comply with applicable rules. Cahill-Swift asked whether non-payment of fees would result in revocation. OOIDA and another commenter stated that a registrant's access must be revoked if it fails to comply with the rules. OOIDA requested that a registrant's failure to comply with Clearinghouse rules be considered a pattern or practice of noncompliance under part 385, subpart K. Another commenter suggested that the Agency reconsider its proposal that FMCSA staff process Clearinghouse requests for motor carriers that have had their registrations revoked.

Response. While the details of payment options will be determined during the contract bidding process, FMCSA anticipates that payment would be made prior to an employer conducting a search or gaining access to information. Under this scenario, non-payment would simply result in the employer being unable to conduct a search.

In this final rule, FMCSA retains the right to revoke Clearinghouse registration for anyone who fails to comply with the applicable rules. However, an employer that had its registration revoked for failure to comply with the Clearinghouse rules would nonetheless have to ensure that its employees were not subject to prohibitions related to drug or alcohol violations. We anticipate that, in order to query or report violations, such employers would need to contact FMCSA's drug and alcohol program directly, so that program staff could conduct queries or enter violations into the Clearinghouse in a timely manner. The Agency recognizes that these alternative means of querying and reporting are not nearly as efficient as using the Clearinghouse directly and expects that revocation of an employer's access would occur only when an employer has egregiously violated the Clearinghouse's rules of use.

During the implementation phase, we will continue to explore more efficient means of querying and reporting for employers whose access has been revoked. We expect, however, that the civil and criminal penalties associated with an employer's failure to lawfully use the Clearinghouse (§§ 382.723(c) and 382.727) will provide, in most instances, an adequate deterrent to its misuse.

FMCSA's regulations governing patterns or practices of safety violations by motor carrier management are specifically limited to violations of safety regulations arising under 49 U.S.C. chapter 311, subchapter III. Authority for the Clearinghouse arises under 49 U.S.C. 31306a, which does not fall within chapter 311, subchapter III. Accordingly, instances of non-compliance with this final rule will not be considered for the purposes of establishing a pattern or practice of safety violations under part 385, subpart K.

Authorization To Enter Information Into the Clearinghouse (§ 382.715)

Comment. FMCSA proposed to require an employer to designate a C/TPA in the Clearinghouse before the C/TPA could enter information on the employer's behalf. A commenter asked whether this provision also applied to SAPs. Several commenters were confused by the section of the NPRM that proposed to require employers to designate SAPs for employees and requested that FMCSA clarify that employees, not employers, designate SAPs.

Response. As proposed, § 382.715 applied only to employer designations of C/TPAs. In the NPRM, FMCSA inadvertently stated that employers must designate SAPs in the Clearinghouse; that was not correct. In accordance with long-standing rules governing the selection of SAPs, the employer must provide the employee with the list of DOT-qualified SAPs and each employee is free to choose his or her own DOT-qualified SAP. (*See* 49 CFR 40.287, 40.289.) Accordingly, in this final rule, FMCSA amended § 382.715 to make clear that *employees* must designate SAPs to enter information about their own return-to-duty process. FMCSA makes this change to ensure that only the employee's selected SAP can report information to the Clearinghouse. FMCSA also made conforming changes to § 382.711 to make clear that service agents may

submit information on behalf of either an employer or an employee.

Procedures for Correcting Information in the Database (§ 382.717)

FMCSA proposed administrative procedures for correcting errors in a driver's Clearinghouse record.

FMCSA Review of Petitions for Correction

Comment. TTD, OOIDA and IBT stated that under the proposed process, it would take too long to resolve errors. TTD requested alternative ways to expedite the decision-making process. OOIDA requested that FMCSA respond to a petition within 14–21 days, depending on the nature of the correction. Yet another commenter requested a 5-day resolution period. CCTA stated that, if resolution of petitions were delayed, employers, MROs, and C/TPAs could face litigation. Another commenter recommended a simple appeals process, but did not include any specifics. An individual asked if it is the responsibility of the driver to update the Clearinghouse when a citation for a DUI in a CMV does not result in a conviction. Another seemed to have misunderstood this section, believing that drivers had only 30 days to submit a petition.

Response. In response to these comments, FMCSA decided to amend its proposal. This rule provides for a 14-day resolution period when a request for expedited treatment is granted in accordance with § 382.717(e). To be considered for expedited treatment, an inaccurate record, or a record not reported to the Clearinghouse in compliance with this section, must be preventing the petitioner from performing safety-sensitive functions. In addition, the petitioner must provide a complete petition including all documentation supporting his or her request. Failure to include all relevant information will impede the Agency's ability to resolve the petitioner's request in a timely manner.

The Agency also removed the proposed requirement in § 382.717(a) that petitions for review be submitted within 18 months of the date the allegedly erroneous information was reported to the Clearinghouse. Upon further consideration, we determined that drivers should have the option to request that inaccurate information be corrected for as long as the allegedly erroneous record is retained in the Clearinghouse. Finally, as further discussed below, FMCSA reduced the time in which it will resolve petitions for administrative review and notify the driver of its decision from 90 days, as proposed, to 45 days following the Agency's receipt of a complete petition. We also reduced the time in which we will complete an administrative review under § 382.717(f) from 60 days, as proposed, to 30 days.

Where an employer has reported a citation for DUI in a CMV to the Clearinghouse and that citation did not result in a conviction, the driver is responsible for submitting a request for removal under § 382.717(a)(2)(i).

Administrative Protections for Drivers

Comment. A commenter requested that the Clearinghouse contain contact information for those reporting information to the Clearinghouse. C.R. England, Foley, and other commenters requested complete, clear procedures for removing erroneous information. Some of those commenters also requested that FMCSA hold those who report erroneous information accountable. Other commenters were concerned with how FMCSA would handle false positives and identity theft. TTD stated that the credibility of the Clearinghouse depends on a fair and expeditious process for correcting errors. C.R. England wanted to ensure that the Clearinghouse would not prevent qualified drivers from working. IBT emphasized the need for accurate, up-to-date information.

Response. FMCSA believes that holding people who report to the Clearinghouse accountable for the accuracy of their submission is critical to the integrity of the Clearinghouse. When registering to access the Clearinghouse, all parties who have reporting obligations to the Clearinghouse will be required to provide identifying information, including name, address, telephone number and any other information needed to verify the registrant's identity (§ 382.711).

With respect to removing erroneous information, all procedures in part 40 continue to apply to the processing of drug and alcohol tests. A positive test that is reported but subsequently cancelled would not be a prohibition on driving and therefore would be removed from the Clearinghouse. If a positive test is incorrectly associated with a particular driver, regardless of whether the error results from identity theft, mistake, or administrative error, the affected driver would submit a petition under § 382.717 to correct the erroneously reported information. Additional remedies related to the correction or removal of violation reports submitted to the Clearinghouse are discussed below.

Privacy Act

Comment. OOIDA and another commenter requested that FMCSA include Privacy Act procedures in part 382, and one of those commenters requested FCRA procedures allowing an individual to submit a statement disputing or explaining their record. OOIDA stated that the Clearinghouse's authorizing statute requires FMCSA to comply with certain requirements for the release of information under the Privacy Act and the FCRA.

Response. MAP–21 requires that a ''release of information'' from the Clearinghouse comply with the applicable provisions of the Privacy Act and the FCRA (49 U.S.C. 31306a (d)(1) and (2)). The final rule complies with the ''release of information'' requirements of the Privacy Act, as defined in 5 U.S.C. 552(a)(b), which generally prohibit the disclosure of records ''except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.'' As noted above, an employer may not request access to an employee's Clearinghouse record without prior electronic consent of the driver, and the Agency must receive electronic consent from the driver before releasing a Clearinghouse record to the employer (§ 382.703(b) and (d)). Other Privacy Act procedures to which commenters refer are currently set forth in 49 CFR part 10, ''Maintenance Of and Access to Records Pertaining to Individuals,'' the DOT-wide rules implementing the Privacy Act. The part 10 regulations include, for example, procedures for individuals to request that their records be corrected (49 CFR 10.41) and to file a concise written statement of disagreement with an agency's refusal to amend that individual's record (49 CFR 10.45). Further, we note that the System of Records Notice (SORN), to be issued for public comment following publication of this final rule, will describe the specific means by which the Agency intends to implement the Privacy Act requirements as they pertain to the Clearinghouse, including how individuals can exercise their rights under the Privacy Act.

As discussed above, information disseminated through the Clearinghouse is considered ''excluded'' communications for the purposes of the FCRA. Accordingly, no FCRA procedures are necessary.

Challenges to Clearinghouse Data

Comment. Under proposed § 382.717(c), petitioners were limited to contesting the accuracy of information

reported to the Clearinghouse and could not challenge the accuracy of positive test results or refusals. CCTA said that FMCSA should permit challenges to the accuracy and correctness of Clearinghouse reports, including refusals. The same commenter requested that FMCSA create a clear dispute resolution process, clarifying what can be challenged through the process. C.R. England requested that FMCSA clearly define the rights of drivers with respect to correcting errors on their records, including placing the burden of proof on the reporting party. Finally, two commenters objected to removing a report of a citation for DUI in a CMV, even if that citation did not result in a conviction.

Response. Nothing in this final rule creates a new right under part 40 to challenge the substantive outcome of a drug or alcohol test or the accuracy of a driver's refusal to test at a collection site or a refusal to test when notified by an employer to submit to testing. Individuals wishing to challenge the accuracy of information in their Clearinghouse record that is not otherwise addressed under § 382.717 may follow the Privacy Act procedures set forth in 49 CFR part 10, subpart E (Correction of Records).

Section 382.717 does, however, contain data correction procedures to ensure accuracy in reporting. For example, a driver may use the procedures set forth in this rule to challenge an incorrect name or CDL number, or to remove duplicate test results (that is, a single test result reported more than once to the Clearinghouse), but may not challenge the outcome of a test. To make it clearer that the procedures in § 382.717 pertain primarily to the correction of data that is erroneously reported in the Clearinghouse record (except as otherwise provided in § 382.717(a)(2)) and not for substantive challenges to drug and alcohol violation determinations, we re-designated paragraph (c) as paragraph (a) in this section. FMCSA will consider each correction request on a case-by-case basis and assess the validity of information presented in determining whether correction is warranted.

FMCSA notes the importance of the difference between a citation for DUI in a CMV and a conviction. Although a driver must immediately discontinue safety-sensitive functions after being cited for a DUI in a CMV, he or she may resume safety-sensitive functions without completing the return-to-duty process if that citation does not result in a conviction. Prohibiting a driver from performing safety-sensitive functions when a citation does not result in a conviction contravenes fundamental principles of fairness. Using the expedited procedures in § 382.717, the driver is responsible for requesting that FMCSA remove from the Clearinghouse an employer's report related to a citation that did not result in a conviction.

Comment. OOIDA recommended that if a driver submits a ''substantive'' request for correction with complete supporting documentation, the challenged information should not be released in response to an employer query until a decision has been made on the request for correction.

Response. As explained above, resolution of a challenge to the substance of a drug or alcohol violation—as opposed to simple data correction or the employer's failure to comply with reporting requirements under § 382.705(b)(3) and (5)—is outside the scope of this rule. Accordingly, FMCSA will not process such a request under § 382.717. We note that the withholding of violation reports pending resolution of a request to challenge the substance of a violation would be inconsistent with DOT-wide drug and alcohol compliance rules. Section 40.331 of those rules requires an employer to release information with proper consent and does not provide an exception for information that a driver is challenging as inaccurate. That rule is applicable DOT-wide and FMCSA does not have the authority to change that provision.

Moreover, it would not be in the interest of safety to withhold violation reports during the review period. FMCSA believes that to do so would encourage drivers to file frivolous or baseless challenges to accurate reports solely for the purpose of extending their ability to continue performing safety-sensitive functions. Adopting the commenter's suggestion would thus delay necessary rehabilitation and keep drug and alcohol abusers on the road. Neither of these outcomes serves the best interests of the driver or the motoring public.

Notification to Employers of Corrections

Comment. One commenter suggested that, after correcting errors, FMCSA should require individuals to alert employers that queried the driver's record that inaccurate data has been corrected.

Response. FMCSA agrees that alerting employers that they have viewed inaccurate information about a driver significantly contributes to the accuracy and fairness of the Clearinghouse. Accordingly, this final rule includes new § 382.717(g), requiring that the Clearinghouse update employers when they have viewed information that was subsequently corrected or removed under § 382.717(a)(2) or in accordance with the Privacy Act.

Availability and Removal of Information (§ 382.719)

Comment. FMCSA proposed that information about a violation would remain available to employers for a term of either 3 or 5 years, or until the driver completed the return-to-duty process, whichever is longer. Many commenters were in favor of a 5-year term. Some of these commenters recommended 5 years because they were concerned that the record would otherwise be removed before the driver completed all follow-up tests. Others favored 5 years because it aligns with part 382 record keeping requirements. The Institute of Makers of Explosives stated that it would support an even longer retention period. Another commenter supported a 10-year retention period.

On the other hand, a number of individual commenters were in favor of a 3-year term. Yet others were in favor of removing information as soon as the driver completed the return-to-duty process. Some commenters suggested that information be retained for 3 years from the driver's completion of the return-to-duty process. Another commenter suggested that information be made available for at least 5 years after the driver's return-to-duty date.

Response. After carefully considering FMCSA's statutory authority and the safety implications of this proposed requirement, the Agency concluded that 5 years is the appropriate document retention period. We explain the rationale for our interpretation below.

The basis for a 3-year retention period was 49 U.S.C. 31306a(f)(3), which requires prospective employers to use the Clearinghouse to determine whether any employment prohibitions exist on new hires and prohibits employers from hiring anyone to drive a CMV if that person has had a drug or alcohol violation during the preceding 3 years. This requirement mirrors current FMCSA regulations that also direct employers to investigate prospective hires' compliance with DOT drug and alcohol programs during the preceding 3 years. (*See* 49 CFR 391.23(e); *see also* 49 CFR 40.25, 382.413.) FMCSA interprets section 31306a(f)(3) to codify the investigation requirement in § 391.23(e) and to mandate that employers use the Clearinghouse to conduct the investigation. We implement that statutory requirement by amending § 391.23(e) to state explicitly that conducting a pre-employment

search of the Clearinghouse, as required by § 382.701, satisfies the employer's obligation to investigate a prospective employee's drug and alcohol compliance history (with limited exceptions as previously noted). We do not interpret anything in section 31306a(f)(3) to require FMCSA to retire these records after 3 years. Nor do we interpret that provision to prohibit FMCSA from releasing information after 3 years have passed. In fact, nothing in this section directs FMCSA to take any action with respect to records retention. To the contrary, this section simply places an obligation on employers to conduct the background investigation already required in § 391.23 using the Clearinghouse.

Moreover, nothing in either FMCSA's existing regulations or section 31306a(f)(3) prohibits employers from requesting or obtaining drug and alcohol compliance histories going back more than 3 years. In FMCSA's judgment, the 3-year pre-employment look—back is intended to be the regulatory (and now statutory) *minimum.* Employers have an interest in obtaining information going back more than 3 years because a driver's drug or alcohol violation does not necessarily expire after 3 years; that violation continues to prohibit that driver from performing safety-sensitive functions until he or she completes the return-to-duty process. As long as the driver's consent to release records is not limited to a 3-year look back, employers can request and obtain information about drug and alcohol compliance going back at least 5 years because, under § 382.401, employers are required to keep records of drivers' drug and alcohol violations for a minimum of 5 years. Whether and to what extent employers seek records going back further than 3 years is a decision that individual employers make based on their particular business needs. For example, a company's safety or risk management policies may dictate a more extensive background investigation than the regulatory minimum. How an employer chooses to balance its hiring needs, risk management, and safety policies is a matter for private decision making. Nothing in this final rule would change this practice.

The basis for the 5-year retention period is section 31306a(g)(6), titled ''retention of records,'' which directs the Agency to hold records of driver violations in the Clearinghouse for 5 years, except where a driver has failed to complete the return-to-duty process. Assuming a driver completes the return-to-duty process within 5 years, the statute directs the Agency to archive the records in a separate location. We interpret this section to require the Agency to make all records of driver violations available to authorized employers for 5 years or until the driver completes the return-to-duty process, whichever is longer. After that, the Agency must move them to the archives.

There are fundamental differences between the 3-year and 5-year look—back provisions in section 31306a that direct us to require a 5-year retention period in this final rule. For example, while the 3-year look back in section 31306a(f)(3) focuses on the scope of an *employer's* pre-employment background investigation, the 5-year look back in section 31306a(g)(6) focuses on the *Agency's* recordkeeping requirements. As discussed above, FMCSA interprets section 31306a(f)(3) to codify the existing drug and alcohol investigation requirements and to direct employers to conduct those investigations using the Clearinghouse. We interpret section 31306a(g)(6), on the other hand, to be focused exclusively on the matter of how long FMCSA should make records available to employers and what to do with those records after they should no longer be made available.

Comparing the text of sections 31306a(f)(3) and (g)(6) provides additional support for this interpretation. Section 31306a(f)(3) provides no recordkeeping guidance at all; it does not address what happens if a prospective hire has an unresolved drug or alcohol violation dating back more than 3 years, or what should happen to the records after the time for release has expired. Nor does it make any mention of the look-back period for annual queries; it is focused exclusively on how an employer should conduct a pre-employment background investigation. Section 31306a(g)(6), on the other hand, addresses all of these other contingencies and is, in fact, titled ''retention of records.'' Based on all of the considerations discussed above, we interpret MAP–21 to mandate a 5-year record retention period.

But, even in the face of statutory ambiguity, we believe that safety interests dictate that the 5-year retention period is appropriate. Overwhelmingly, employers who submitted comments to the docket requested that they have access to 5 years' worth of drug and alcohol compliance histories so that they could make informed decisions about the risk they assume when they hire drivers. Moreover, FMCSA believes the fact that a driver's compliance history will follow him or her for a minimum of 5 years will act as a significant deterrent to illegal drug and alcohol use. As we continue to raise the severity of the consequences for unsafe conduct behind the wheel, drivers who wish to be productive participants in the industry should modify their behavior accordingly.

Comment. FMCSA proposed that information on a citation for a DUI in a CMV would be removed within 2 days of FMCSA granting a request for a determination that the citation did not result in a conviction. A commenter requested that this be shortened to 1 day.

Response. FMCSA believes that 2 days are required to verify the accuracy of the documentation supporting the request. Accordingly, this provision remains as proposed.

Comment. Cahill-Swift requested that the date FMCSA uses to determine whether sufficient time has passed to remove a violation from the Clearinghouse be the date the test was administered instead of the date of the violation determination. The commenter stated that, generally, part 40 uses the test date as the point of reference for future action and requested that FMCSA modify proposed § 382.719(a)(4) to conform.

Response. FMCSA concluded that the date a record is submitted to the Clearinghouse is the violation determination date, which will be used to calculate the date information will be removed from the Clearinghouse. This approach is consistent with MAP–21 requirements.

Fees (§ 382.721)

Comment. FMCSA proposed to collect a reasonable fee from employers querying the Clearinghouse, but to grant drivers access to their own records without assessing a fee. Most commenters were concerned about keeping the fees low or eliminating them altogether. At least one commenter asked the Agency to identify what the actual fees will be. Commenters such as First Advantage, ABA, C.R. England, ATA and several others requested that FMCSA establish subscription-based fees. ATA, Florida Trucking Association and other commenters stated that FMCSA had previously expressed preference for a subscription-based fee structure. SAPAA requested that there be only a one-time registration fee. NTPC, Ohio Trucking Association, Cahill-Swift, Driver IQ/CARCO, J.B. Hunt, and American Moving and Storage Association requested that FMCSA permit employers to choose between subscription- and transaction-based fees. One commenter suggested that FMCSA use the PSP program as a model. ATA suggested that it not be used as a model, stating that the

contractor would earn excessive and unreasonable profits based on the PSP fee structure. ATA and others stated that they did not want the fees to greatly exceed the contractor's costs to manage the Clearinghouse. Minnesota Trucking Association suggested that subscription-based fees should be limited to $10–$20 per employer. SAPAA asked for details regarding the procedure for paying the fees. OOIDA requested that the cost for the limited query be much lower than the cost for the full query. An individual requested that the fees be set at a more ''reasonable'' level.

Response. FMCSA proposed § 382.721 to establish its authority to collect fees from entities required to query the Clearinghouse; however, FMCSA does not set the specific dollar amounts for user fees as a part of this rulemaking. We note, however, that under § 382.721 no driver will be required to pay a fee to access his or her own records in the Clearinghouse.

FMCSA will contract with a third-party to operate and maintain the Clearinghouse. Accordingly, Clearinghouse user fees will be determined through that competitive bidding process. One of the criteria for selecting a contractor to design and operate the Clearinghouse will be the ability to provide reliable, accurate, and cost-effective service to stakeholders. In its request for proposal FMCSA will require batch processing of data, subscription fees and pre-population of recurring data. This should minimize transaction costs relative to the time per test, per driver and per entity costing methodology used to estimate the costs of queries.

The Regulatory Impact Analysis (RIA) acknowledges that annual queries to the Clearinghouse impose costs on employers not present under the current regulations. The annual query is a statutory requirement pursuant to 49 U.S.C. 31306a(f)(4). The RIA demonstrates that the rule produces net benefits based on a conservative estimate of the incremental cost of annual queries calculated on a per transaction basis (*e.g.,* cost per test, cost per driver, etc.). For purpose of the RIA, the Agency conceptualized fees for limited and full queries and pre-employment queries based on its experience with Pre-employment Screening Program (PSP) Database. The fee for requesting a driver's record through PSP is $10.[3] Employers' use of the PSP to screen prospective employees is voluntary. The Clearinghouse is a mandatory program with an expected number of transactions well in excess of the number of PSP voluntary transactions. As a result, FMCSA believes Clearinghouse fixed costs will be spread over a larger volume of transactions than the volume of PSP transactions. These costs include, but are not limited to, hardware, software, labor costs for systems analysts and contractor staff available to assist Clearinghouse users.

Unauthorized Access or Use Prohibited (Section 382.723)

Comment. FMCSA proposed rules that would prohibit unauthorized access to or misuse of information obtained from the Clearinghouse. One commenter was generally concerned that employers would misuse Clearinghouse information. TTD was concerned that prospective employers would query the Clearinghouse for information about a driver even if that driver were not applying for a position that mandated a Clearinghouse check. The same commenter requested that FMCSA include safeguards to ensure that people requesting information are legitimate employers and that the information goes to them directly. Another commenter recommended that FMCSA anonymize information before using it for research purposes.

Response. FMCSA takes its mandate to secure sensitive information and protect driver privacy very seriously. Accordingly, this final rule includes provisions that prohibit the release of information without affirmative driver consent and audit functions to verify compliance with these rules. Anyone who violates those provisions is subject to civil and criminal penalties. FMCSA appreciates all public comments on how to address driver privacy protections and will take all of them into consideration as it moves into the implementation process.

Access by State Licensing Authorities (§ 382.725)

Comment. FMCSA proposed to grant each SDLA access to the Clearinghouse to determine whether an applicant for a CDL is qualified to operate a CMV. ATA, J.B. Hunt and other commenters suggested that SDLAs be required to check the Clearinghouse before issuing a CDL. ATA suggested that SDLAs be required to check the Clearinghouse annually. ATA and the Florida Trucking Association recommended that SDLAs be required to revoke a CDL when violations are reported to the Clearinghouse. Another commenter pointed out that one provision of MAP–21 makes SDLA access to the Clearinghouse mandatory while another provision makes it permissive and asked FMCSA to reconcile this inconsistency. The same commenter also requested guidance on what an SDLA is supposed to do with Clearinghouse information. A number of commenters recommended that the Clearinghouse automatically notify SDLAs when there are changes to a driver's record. Schneider suggested that law enforcement have access to the Clearinghouse. A commenter suggested that FMCSA enter into agreements to obtain DUI information from SDLAs. Driver Check asked whether Canadian licensing agencies would have access to the Clearinghouse.

Response. After careful consideration of these comments, FMCSA decided to require that SDLAs access Clearinghouse information prior to issuing CDLs. While 49 U.S.C. 31306a(h)(2) requires that FMCSA only provide SDLAs with Clearinghouse access, section 31311(a)(24) requires that SDLAs use that access prior to issuing or renewing a CDL. Accordingly, FMCSA amended proposed § 382.725(a) to *require* SDLAs to access a driver's information in the Clearinghouse in order to determine whether the driver is qualified to operate a CMV prior to issuing, renewing, upgrading, or transferring a CDL. FMCSA also made conforming changes in existing § 383.73 to implement section 31311(a)(24) and make clear that Clearinghouse access is mandatory prior to the SDLA taking action on a CDL. To ease the burden on States, FMCSA intends to integrate this function into the CDLIS pointer system, which connects the records of CDL holders in all 50 States and the District of Columbia. FMCSA will work closely with AAMVA, which administers CDLIS, to provide for the most efficient and least burdensome method of granting SDLAs access to the Clearinghouse.

The information in the Clearinghouse may have a direct impact on the ability of the individual to hold or obtain a CDL. If information available to an SDLA shows that a CDL applicant is not qualified to operate a CMV, that driver should not be issued a CDL. FMCSA will provide more detailed guidance on this subject in conjunction with its implementation of SDLA access to the Clearinghouse.

At this time, FMCSA will not pursue agreements with law enforcement agencies to obtain information on DUI convictions. That information is currently available from other sources and need not be duplicated in the Clearinghouse. Further, because the Clearinghouse is limited to drug and alcohol violations under parts 40 and 382, inclusion of other disqualifying

[3] *https://www.psp.fmcsa.dot.gov/psp/default.aspx.*

offenses under part 383 is not appropriate.

Finally, Canadian and Mexican licensing agencies will not have access to the Clearinghouse because Congress authorized access for only the SDLAs in the 50 States and the District of Columbia (49 U.S.C. 31306a(h)(2)). However, in accordance with its authority under section 31306a(b)(5), FMCSA intends to explore alternative ways in which information about drug and alcohol violations for CMV drivers licensed in Canada and Mexico can be made available to their respective licensing authorities and to U.S. law enforcement, including using the Foreign Convictions and Withdrawal Database under § 384.209(a)(2).

Penalties (§ 382.727)

Comment. FMCSA proposed that employers, employees, and service agents be subject to penalties for violating new part 382, subpart G. An individual commenter asked how MROs would be held accountable for reporting positive tests. Another commenter said this provision should be worded the same as § 382.507, with the addition of the word ''alleged.'' Southern Company said that alleged violators should be issued a notice of claim or violation allowing the alleged violator to contest the charge. That commenter also requested that penalties be reserved for egregious violations. WPCI asked what the penalty would be for an employer that does not comply with the requirements.

Response. Any employer, employee, or service agent, including an MRO, that does not comply with his or her responsibilities under part 382, subpart G, is subject to civil or criminal penalties under 49 U.S.C. 521(b)(2)(C). The employer, employee, or service agent may be issued a notice of claim or violation and afforded the opportunity to contest those charges in accordance with existing procedures in 49 CFR part 386. The type and severity of the penalty would depend on the specific circumstances surrounding the violation.

Regulatory Impact Analysis

Comment. In the RIA, FMCSA provided an explanation of the costs and benefits associated with the proposed rule. A number of commenters expressed concern about the cost to employers and the burden those costs would place on the motor carrier industry. Two commenters noted that the additional costs incurred by laboratories, MROs and CTPAs will be passed on to the employer, thereby further increasing the cost to employers.

Response. FMCSA recognizes that various entities interacting with the Clearinghouse will incur new or incremental costs of conducting business under the rule. FMCSA estimates these costs for the first entity that incurs the cost, as opposed to the entity that is ultimately responsible for paying for the cost. The RIA estimates the societal benefits, not the distributional benefits resulting from the avoidance of crashes.

Motor carriers will benefit from this rule in a variety of ways. For example, the Clearinghouse will automate the pre-employment drug and alcohol background investigation process, which will save motor carriers time and conserve resources. In addition, closing the loopholes that allow job-hoppers to evade the consequences of drug and alcohol violations will increase employers' confidence in the pre-employment screening process, allowing them to more easily identify drivers who are not eligible to drive. While these are not the only benefits that will accrue to employers, they are some of the more tangible immediate benefits that will offset the costs of compliance.

Comment. One commenter also noted that many benefits discussed in the RIA are only speculative while the costs are real and extremely burdensome for the passenger motor carrier industry, which is largely made up of small businesses.

Response. The Agency disagrees that the benefits discussed in the RIA are speculative. As discussed above, motor carriers will see real benefits in terms of fewer resources being required to conduct investigations related to drivers' drug and alcohol violations, an increase in the quality of drivers hired, and a reduction in the liability costs associated with unsafe drivers.

Comment. A commenter said that the costs associated with this proposal, combined with the costs associated with a recent NPRM concerning vehicle leasing regulations, impose significant administrative costs on passenger motor carriers, and requests the Agency consider less burdensome alternatives.

Response. FMCSA is sensitive to the cumulative costs of industry compliance with the Agency's regulations. In responding to comments received in response to the NPRM, FMCSA considered the burden placed on stakeholders and made changes to alleviate those burdens where possible. But the Clearinghouse and many of its individual components are mandated by statute; the Agency's ability to find less burdensome alternatives is constrained by these limitations.

Comment. Two commenters said that FMCSA's cost estimate did not include the cost of training for service agents. A commenter estimated that implementing program changes for service agents may require up to 800 hours over a 3 to 5 month period, and a minimum of a year may be required for the effective implementation of the final program data requirements to allow for advanced planning and budgeting.

Response. FMCSA included the cost of training for service agents in the Final RIA Section 6.6, titled ''Registration, Rule Familiarization, and Verification'', which identifies costs associated with familiarizing service agents with use of the Clearinghouse. As discussed above, there will be a 3-year compliance period, which we believe will give stakeholders adequate time to conduct necessary training and otherwise prepare for implementation of this final rule.

Comment. A commenter said that the Agency also did not consider the full impact of entering data and creating a new laboratory report and the commenter estimated that the additional data entry would require an additional 15 seconds per specimen keyed. Some commenters also noted that implementing a new CCF containing the additional information that would be required under this proposal could result in significant cost to laboratories and those responsible for manufacturing and shipping forms. These commenters estimated that system modifications would require 750–910 hours per DHHS-certified laboratory conducting testing for FMCSA regulated employers, and at least 8 to 10 months for development, testing, implementation, and training.

Response. FMCSA removed the laboratory reporting requirement from the final rule; accordingly, there are no longer any costs associated with this provision.

Comment. A commenter challenged FMCSA's estimate of 20 minutes for registration and rule familiarization, asserting that first-time registration alone will take more than 10 minutes. Further, the commenter asserted the Agency did not account for the annual costs of verifying information entered in the database.

Response. The Agency does not agree that 20 minutes underestimates the time required for registration and rule familiarization. Much of the registration process will be automated and only a minimum amount of information is required to complete registration. All the information necessary for registration—name, address, phone number, authorized employees, USDOT

Number, and professional qualifications—is otherwise required under FMCSA or DOT rules and should, therefore, be readily available. Moreover, FMCSA intends that the Clearinghouse will be designed to be interactive and user-friendly to maximize efficiencies. Finally, the cost of annual verification of authorized users was accounted for in the regulatory analysis.

Comment. A commenter said that FMCSA underestimated the number of drivers subject to the rule by 1 million and provided an estimate of 5,240,740 drivers (based on commenter's own data and available data from other sources, such as laboratory reports submitted to DOT).

Response. The commenter estimated the number of FMCSA drivers as the difference between the total number of tests reported by all modes, including FMCSA,[4] to DOT in 2012, pursuant to part 40, Appendix C and the commenters' estimates of number random and pre-employment tests at a 25 percent testing rate applied to each mode's (other than FMCSA) estimate of the total number of safety-sensitive employees. The number of blind tests and ''all other tests'' are assumed to be 1 percent and 2 percent of safety-sensitive employees, respectively are also subtracted from the total number of tests. There are a number of flaws in this methodology. The commenter equates the number of employees to the number of tests. This is an apple to oranges comparison. The commenter ignores that drivers may change employers during the year, or are ''multiple-employer drivers'' as defined in 49 CFR 390.5 and as a result may be tested multiple times per year. The analysis estimates pre-employment tests as if they are random, by applying a 25 percent random testing rate to each modes total number of safety-sensitive employees.

FMCSA relies on the statistics it publishes to determine the number of drivers affected by this rule.[5] Although the number of drivers in operation at any given time is subject to change due to a variety of reasons, FMCSA believes this is the best estimate of the number of drivers currently subject to FMCSA's drug and alcohol regulations. In the Regulatory Impact Analysis (RIA), FMCSA used its estimate of the number of CDL-holder to the cost of annual queries. All other costs and benefits are estimated using the results of FMCSA's Annual Drug and Alcohol Surveys.

Comment. Several commenters stated that the cost of the proposed rule was overstated in the RIA. Commenters said that costs associated with completing the return-to-duty process should not be attributed to the Clearinghouse, claiming that they are attributed to the return-to-duty process under 49 CFR part 40, not part 382.

Response. The Agency made the best estimate of costs based on available data, but concluded that it was better to err on the side of over-estimating rather than under-estimating costs. That said, we disagree that the return-to-duty costs should not be included in the total cost of the rule. Although the return-to-duty requirement arises out of the DOT-wide drug and alcohol regulations in 49 CFR part 40, the costs of completing the process are attributable to each DOT mode's individual drug and alcohol program. One effect of the Clearinghouse is that drivers will improve their compliance with the return-to-duty requirements. Instead of job-hopping, we expect that drivers with violations will either complete the return-to-duty process or exit the industry. Accordingly, we take into account the increased costs—and benefits—of this improved compliance.

Comment. One commenter suggested the estimated cost of $2.50 for limited annual queries is too high.

Response. FMCSA agrees that the query cost estimates in the RIA were conservatively high. As discussed above, the dollar amount for the fees will ultimately be determined in connection with a competitive bidding process. The Agency expects that the per-transaction cost, whether structured on a per query or subscription basis, will be significantly lower than estimated in the RIA. In the absence of reliable data, we chose to base our estimate on the only comparable information available: The PSP user fees. We recognize, as commenters have stated, that the volume of Clearinghouse transactions will greatly exceed the number of PSP transactions, creating efficiencies that should result in significantly lower user costs.

Comment. Another commenter questioned why a query would take 10 minutes, and suggested the Agency could reduce the burden by allowing large carriers to submit a batch list of drivers.

Response. We agree that there is the potential for further cost savings through batch processing of queries. Among the options the Agency plans to explore is providing employers the opportunity to conduct annual queries in batches. Nothing in the rule would foreclose that possibility. FMCSA will provide information to stakeholders on Clearinghouse functionality closer to the rule's compliance date.

Comment. A commenter stated that the labor rate and fringe rates used in Table 15 and subsequent tables in the RIA are not appropriate. According to the commenter, more than 80 percent of carriers have one to five power units. These carriers do not have office staff; a driver's wage should be used for these carriers. The commenter questioned whether the assumption in the RIA that larger carriers will assign a sensitive task to a very low level staff person is reasonable. In addition, a commenter contended that the fringe rate used in the RIA is too high because the Bureau of Labor Statistics (BLS) fringe rate includes costs (leave, overtime, etc.) that BLS also includes in its wage rates, which are based on gross pay. The commenter alleged that combining the two results in double counting, and many drivers do not receive many of the fringe benefits.

Response. We disagree that the labor rates are inappropriate for carriers operating five or fewer power units. In the Agency's experience, many small motor carriers use C/TPAs, which employ office staff to administer drug and alcohol testing programs. We anticipate that C/TPAs will continue to administer the programs, including Clearinghouse requirements.

In addition, we believe that the appropriate wage rates were used for developing query and test reporting transaction costs. The wage rate used to calculate the cost incurred by SAPs to report to the Clearinghouse results of return-to-duty progress is the BLS estimate of the hourly wage for Occupational and Safety Workers. The BLS hourly wage for heavy truck drivers was used to estimate driver consent costs. These rates are directly applicable to the individuals responsible for performing these tasks. The remaining cost estimates for registration, familiarization with the rule, pre-employment queries, designation of C/TPAs, and reporting of test results are based on the BLS wage rate for Bookkeeping, Accounting and Audit Clerks.

The Agency has no information indicating that administrative functions performed by employees of C/TPAs, MROs, SAPs, and other service agents require a higher level sensitivity for personal information. Medical service and health care providers performing similar functions in other industries

[4] The other modes are Pipeline and Hazardous Materials and Safety Administration, Federal Railroad Administration, Federal Transit Administration, Federal Aviation Administration and the U.S. Coast Guard.

[5] *http://ntl.bts.gov/lib/54000/54800/54841/2015 Pocket-Guide-March-30-2015-ForWebPublishing-508c.pdf.*

have recordkeeping and reporting requirements comparable to the testing and reporting requirements of this rule. The commenter did not offer any information in support of the proposition that individuals responsible for administrative tasks associated with the rule fall under a BLS occupation other than for Bookkeeping, Accounting and Audit Clerks. Nevertheless, in the final Regulatory Impact Analysis, a wage rate of $33.27 per hour was used to estimate the cost for SAPs to report driver information to the Clearinghouse following an initial assessment. It is the median wage rate estimated by the BLS for Occupational Health and Safety Specialists.[6] This occupational description is more closely related to health care professionals whose responsibilities include reporting highly sensitive personal medical information.

Finally, the hourly wage rate and fringe benefits rate do not result in double counting of employment costs. Fringe benefits include paid leave, supplemental pay, insurance (health and life), retirement and savings, and legally required benefits (*i.e.,* Social Security and Medicare).

Comment. A commenter said the estimated benefits of the proposed rule were understated in the RIA. While the RIA mentioned benefits to drivers such as ''improved health, quality of life and increased life expectancy,'' these benefits were not included in the estimate. The commenter noted other benefits resulting from the rulemaking were not mentioned, including decreased drug and alcohol abuse by drivers, increased compliance with the regulations by employers, and the overall program benefits associated with improved drug and alcohol testing data. The commenter suggested expanding the discussion of non-quantifiable benefits.

Response. We agree with the commenter that there are residual benefits from the proposed rule. However, they are not ''direct'' primary benefits, but rather secondary or tertiary ones. Furthermore, since they are largely unquantifiable, such benefits are mentioned, but do not warrant extensive analysis in the RIA.

Changes From the Notice of Proposed Rulemaking

This final rule makes the following changes to the NPRM in response to comments.

In § 382.107, we removed the proposed definition of ''positive alcohol test.'' We eliminated proposed § 382.404, which would have required laboratories to report summary statistics on drug tests. As a result of that change, we will not collect employers' USDOT Numbers on the ATF and CCF and, accordingly, removed those proposed requirements from § 382.123. Section 382.705 now requires that employers report all violations of FMCSA's drug and alcohol testing program that are identified in part 382, subpart B, including violations based on any type of actual knowledge. We updated the text in other sections of the final rule to reflect these changes.

In § 382.413, we extended the drug and alcohol background investigation requirement to cover the previous 3 years, consistent with the requirement in § 391.23. In both §§ 382.413 and 391.23, we added provisions that require employers to query the Clearinghouse in lieu of conducting the background investigations required under §§ 40.25 and 391.23, as the query satisfies these requirements for employers subject to § 382.701(a), with specified exceptions. We added language to § 382.415 to make it clear that a driver need not report a violation to the employer that administered the test.

In § 382.701(a) and (b), we added language to make it more clear which type of query, full or limited, an employer is required to conduct, as well as a clearer explanation of the difference between full and limited queries. In paragraph (c) of that section we extended the employer notification period from 7 to 30 days after a Clearinghouse query. In paragraph (e), we clarified that, 3 years after the compliance date of this final rule, an employer who maintains a valid registration on the Clearinghouse system meets the recordkeeping requirement.

In § 382.705(a), we changed an MRO's reporting period to 2 business days. In paragraph (b), we changed the employer's reporting period to the close of the third business day. We added language distinguishing between the types of refusals employers and MROs must report. We also added the requirement that employers report all drug and alcohol violations based on an employer's actual knowledge and established evidentiary requirements for those reports. New paragraph (b)(3) identifies documentation requirements for the reporting of ''failure to appear'' test refusals. New paragraph (b)(6) requires owner-operators who employ themselves as drivers to designate a C/TPA to comply with all employer related reporting requirements with respect to the individual's drug and alcohol use. We provided new language for paragraph (c) that makes clear that C/TPAs are subject to the reporting requirements of the employers on whose behalf they report. Paragraph (c) also makes clear that the employer remains responsible for compliance regardless of whether it uses a C/TPA. We simplified the language in the introductory paragraph of paragraph (d) and amended paragraph (d)(2) to make clear that a SAP has until the close of the following business day to report his or her required information to the Clearinghouse. In paragraph (e), we expanded the responsibility for reporting information to the Clearinghouse truthfully and accurately by prohibiting anyone from reporting information he or she should know is false or inaccurate.

In § 382.711(b), we added the requirement that an employer update its service agent designation within 10 days of making a change. In paragraph (d), we extended the rules governing C/TPA registration to all service agents. We updated the text throughout the final rule to conform to this change.

In § 382.715, we updated the language to make clear that an employer must authorize a C/TPA or other service agent before they can enter any information into the Clearinghouse on the employer's behalf. In response to comments, FMCSA added paragraph (b) to make clear that it is the employee, not the employer, who designates a SAP to enter information about the employee.

We made changes to the procedures in § 382.717 for correcting information in the Clearinghouse. Any request for correction must be addressed to FMCSA's Drug and Alcohol Program Manager and must include the words ''Administrative Review of Drug and Alcohol Clearinghouse Decision.'' We shortened FMCSA's period for expedited treatment of a request for data correction from 30 days to 14 days and added a provision that requires the Agency to notify employers that previously accessed information was subsequently corrected or removed. We re-ordered the paragraphs, so that paragraph (a) clearly states that this section may only be used for data correction, with three exceptions related to a DUI citation that did not result in a conviction and reporting violations based on an employer's actual knowledge and a driver's refusal to appear for a test.

In § 382.725, we clarified that an SDLA's access to the Clearinghouse is solely for the purpose of determining whether the driver is qualified to operate a CMV. Finally, we amended part 383 to implement the statutory

[6] Bureau of Labor Statistics, ''Occupational Employment and Wages,'' May 2014, *http://www.bls.gov/oes/current/oes299011.htm#ind.*

requirement that SDLAs query the Clearinghouse in connection with the issuance, upgrade, transfer, or renewal of a CDL.

In § 383.73, we made changes to reflect the new requirement that SDLAs check the Clearinghouse before issuing, renewing, transferring or upgrading a CDL.

In § 391.23, we made changes to require employers subject to § 382.701(a) to use the Clearinghouse to conduct drug and alcohol background investigations.

VI. Section-by-Section Explanation of Changes From the Notice of Proposed Rulemaking

FMCSA amends parts 382, 383, 384, and 391 in the following ways.

A. Part 382

Section 382.103

In § 382.103, ''Applicability,'' this final rule makes clear that the requirements of part 382 apply to service agents; otherwise this section remains as proposed.

Section 382.107

In § 382.107, this final rule includes definitions of ''Clearinghouse'' and ''Negative return-to-duty test,'' which remain as proposed. ''Clearinghouse'' means the database implemented by this final rule that contains records of drug and alcohol program violations. A ''negative return-to-duty test'' is a negative drug test or an alcohol test showing an alcohol concentration of less than 0.02.

In response to comments, FMCSA removed the definition of ''positive alcohol test'' for the reasons explained in this final rule's response to comments.

Section 382.123

The Agency proposed to amend this section to require anyone filling out an ATF or CCF to record the employee's CDL number and State of issuance on the form. That requirement remains as proposed. FMCSA also proposed to require that the person filling out the form record the USDOT Number or EIN of the employer requesting the test. FMCSA requested that information so that laboratories could produce annual reports summarizing drug testing activity for specific employers. As discussed in the response to comments on this matter, the Agency eliminated the annual summary requirement. Without the annual summary requirement, it is not necessary to record USDOT Numbers or EINs on the ATF or CCF.

Section 382.217

FMCSA proposed a new § 382.217 that would prohibit an employer from allowing a driver to operate a CMV if the Clearinghouse has a record that shows that the driver has not successfully completed the return-to-duty process required by 49 CFR 40.305. The core function of this section remains as proposed, with several changes to conform to updates in other sections of the rule. The first change removes reference to a ''positive alcohol test'' and replaces it with the specific alcohol test result that constitutes a violation (0.04 BAC or higher). The remaining several changes update § 382.217 to prohibit an employer from allowing a driver to operate a CMV if the Clearinghouse shows any violation of part 382, subpart B, including violations based on actual knowledge of drug or alcohol use. This conforms to changes in § 382.701, discussed in the relevant response to comments section of this rule.

Section 382.401

Section 382.401, as proposed, was intended to require employers to keep records of all reportable drug and alcohol violations for a minimum of 5 years. As discussed in the response to comments on this issue, the proposed changes caused some confusion. Accordingly, this final rule makes clear that employers are required to keep records of all employee drug and alcohol violations for a minimum of 5 years.

Section 382.405

The changes to § 382.405 remain as proposed. Section 382.405(d) requires service agents who maintain records for an employer to make copies of all DOT drug and alcohol test results available to the Secretary, any DOT agency, or any State or local officials with regulatory authority over the employer. Paragraph (e) authorizes FMCSA to provide the NTSB access to a CDL driver's records in the Clearinghouse when that driver is involved in a crash under investigation by the NTSB and requires employers to disclose information related to the administration of post-accident testing following the crash under investigation.

Section 382.409

The changes to § 382.409 remain as proposed. The changes add the Clearinghouse to the list of entities to which an MRO or C/TPA is authorized to release a driver's drug test results. They also amend the title of § 382.409 to add the words ''or consortium/third party administrator'' so that it reads ''Medical review officer or consortium/third party administrator record retention for controlled substances'' to reflect more accurately the contents of the section.

Section 382.413

In response to comments, this final rule includes changes to § 382.413. That section previously required employers to request drug and alcohol testing information from an employee's employers during the preceding 2 years. First, we changed the scope of § 382.413 to cover drug and alcohol testing information during the preceding 3 years. This change reconciles § 382.413 with § 391.23(e), which currently requires employers to gather information going back 3 years. Second, § 382.413 now provides that an employer who queries the Clearinghouse does not have to make an additional request to previous FMCSA-regulated employers for this information once the Clearinghouse has been in effect for 3 years. In other words, querying the Clearinghouse will satisfy the § 382.413 background investigation requirement—but only with respect to FMCSA-regulated employers. Employers must continue to request information from previous employers if the employee was subject to drug and alcohol testing under an employer regulated by one of the other DOT modes.

For example, an FMCSA-regulated employer would have to request drug and alcohol information about employees who were subject to testing under Federal Railroad Administration, Federal Aviation Administration, or other modes' regulations. If an employee violates the drug or alcohol testing program with an employer regulated by another mode, that person may not perform safety-sensitive functions for motor carrier employers until he or she successfully complies with the part 40 return-to-duty process. Because records of violations with non-FMCSA-regulated employers will not be reported to the Clearinghouse, employers must continue to request those records directly from the previous employers.

In addition, we added an exception pertaining to drivers who are subject to follow-up testing who have not completed their follow-up testing plan. In such cases, the gaining employer is required to request that information from the previous employer since the number, type, and duration of follow-up tests will not be reported to the Clearinghouse.

Section 382.415

Section 382.415 remains largely as proposed. That section requires an employee to notify all current employers when he or she violates the drug and alcohol rules in part 382. FMCSA intends that employees notify all current employers, aside from the employer that administered the test. The purpose of this section is to place an obligation on an employee with multiple employers to notify all other employers when he or she has a drug or alcohol violation with one of them. As discussed above, there was some confusion about how this section should work. Accordingly, the Agency amended the proposal to make clear that the employee need not notify the employer that ordered the test or documented the violation.

Section 382.601

Section 382.601 remains largely as proposed. That section requires an employer to promulgate a policy on the misuse of drugs and alcohol and to provide educational materials on the subject to its new and current employees. This rule requires that materials required under this section put employees on notice that information on drug and alcohol violations will be reported to the Clearinghouse. FMCSA made several changes to the proposal to conform to other changes in this final rule. The first change removes reference to a ''positive alcohol test'' and replaces it with the specific result that constitutes a violation (0.04 BAC or higher). The remaining changes update the type of violations reportable to the Clearinghouse to include all violations in part 382, subpart B, including those based on actual knowledge of drug or alcohol use.

B. Part 382, Subpart G (§§ 382.701 Through 382.727)

Section 382.701

This section sets out the basic requirements for querying the Clearinghouse. Paragraph (a) requires employers to conduct a pre-employment query on all prospective drivers to determine if they have drug or alcohol program violations. We made two organizational changes to paragraph (a). First, we added a paragraph title, ''Pre-employment query required'' to alert the reader to the subject of the paragraph. Second, to provide better organization for the reader, we separated paragraph (a) into two subparagraphs. In paragraph (a)(1), we establish the employer's requirement to conduct a pre-employment query and identify the different types of drug and alcohol violations that will be searched in the query. We updated the language in that paragraph to remove reference to a positive alcohol test, as discussed above. Also as discussed above, we updated the language in this section to include all of the prohibitions in part 382, subpart B, that constitute violations of FMCSA's drug and alcohol program, including all violations based on an employer's actual knowledge, as defined at § 382.107.

In paragraph (a)(2), we added new language to state explicitly that an employer must have a prospective employee's specific consent for a full release of information before it can conduct a pre-employment query. We refer to this type of query as a full query, meaning that the consent obtained grants the employer access to information about that driver. This is distinguished from a limited query, described in § 382.701(b)(2), which tells the employer whether there is any information in the Clearinghouse about that driver, but does not provide access to the information without further consent.

For paragraph (b), we added a title, ''Annual query required,'' and separated the paragraph into three subparagraphs for organizational reasons. Paragraph (b)(1) requires employers to conduct a Clearinghouse query for all employees at least once a year to find out whether there is any information in the Clearinghouse about those employees. Paragraph (b)(2) explains that an employer may, but is not required, to conduct a full query. The employer may choose, instead, to conduct a limited query, which alerts the employer to whether information exists in the Clearinghouse about a particular employee, but does not release the substance of the information without additional specific consent from the employee. Paragraph (b)(3) tells the employer that if it conducts a limited query and the Clearinghouse reports back that it contains information about a particular employee, the employer must conduct a full query within 24 hours to determine whether that information shows that the employee is prohibited from performing safety-sensitive functions. Once 24 hours pass, the employer may not allow the employee to perform safety-sensitive functions until it has completed the full query and the results show that the driver does not have any violations prohibiting him or her from performing safety-sensitive functions. We added language making this last point more clear.

As proposed, paragraph (c) provided that the Clearinghouse would notify employers if new information appeared in the Clearinghouse within 7 days of conducting a query. We include two changes to this paragraph in this final rule. First, similar to changes made to paragraphs (a) and (b), FMCSA added the following title for organizational purposes: ''Employer notification.'' Second, as discussed in the response to comments on this matter, FMCSA extended the new information notification period to 30 days.

Paragraph (d) prohibits an employer from allowing an employee to drive if its Clearinghouse query shows that the employee has committed one of the part 382, subpart B, drug and alcohol violations without completing the return-to-duty process. We made two changes to this paragraph as a part of this final rule. First, like changes we made in the preceding paragraphs, we added a title for organizational purposes: ''Prohibition.'' Second, we updated the language in this section to include all of the prohibitions in part 382, subpart B, that constitute violations of FMCSA's drug and alcohol program, including those based on an employer's actual knowledge.

Paragraph (e) remains substantively as proposed. It requires employers to maintain records of all Clearinghouse queries. FMCSA amended this section to clarify that the employer can maintain those records on the Clearinghouse system so long as its Clearinghouse registration is valid. Regardless, nothing prohibits an employer from maintaining the records as a part of its own recordkeeping system. FMCSA made only one change to proposed paragraph (e): It now includes a title, ''Recordkeeping required,'' for organizational purposes.

Section 382.703

Section 382.703 remains largely as proposed. This section provides that no employer may obtain information about an individual from the Clearinghouse without that individual's express consent. It also provides that an employee cannot perform safety-sensitive functions if he or she refuses to give this consent. We updated the language in this section to make clear that the employee grants consent for the employer to view information about all of the driver's part 382, subpart B drug and alcohol violations, including those based on the employer's actual knowledge, as well as return-to-duty information. We also make clear, in new paragraph (d), that the driver must provide electronic consent to FMCSA before the Agency releases

Clearinghouse records to the employer. Paragraph (d), as it appeared in the NPRM, pertained to a driver's consent for FMCSA to release information under § 382.701(c). The text of that paragraph is unchanged and is now new paragraph (e).

Section 382.705

Section 382.705 describes who is responsible for reporting information to the Clearinghouse. This paragraph contains several key changes and additions. Paragraph (a) lays out MRO reporting responsibilities, which include reporting verified positive, adulterated, or substituted test results and those results the MRO determines to be a refusal. This paragraph explains what information the MRO will report, including information identifying the driver and test results. The MRO is required to report this information within 2 business days of reaching a determination. But if the MRO subsequently makes a change to its determination, it must report that change by the close of the next business day.

In response to comments, the Agency changed the initial MRO reporting period from 1 day to 2 days. Second, FMCSA simplified the instructions for recording a driver's CDL number and State of issuance. Finally, the Agency eliminated the requirement that MROs report the requesting employer's USDOT Number or EIN. As discussed above, FMCSA will no longer be collecting USDOT Numbers or EINs.

Paragraph (b) lays out employer responsibilities for reporting an alcohol confirmation test with a concentration of 0.04 or higher, alcohol refusals, drug refusals that do not involve an MRO determination, negative return-to-duty tests, and successful completion of follow-up tests. The NPRM required the employer to report this information by the close of business the day after having received notice of the determination. In order to accommodate the employer's need to comply with new documentation requirements for reporting certain violations, described below, we changed the reporting period to the end of the third business day following the date on which the employer obtained the violation information.

When an employer has actual knowledge, as defined at § 382.107, that an employee has used alcohol on duty, before duty, or prior to taking a post-accident test, or that an employee used drugs in violation of FMCSA's drug and alcohol regulations, the employer must report that use to the Clearinghouse. The employer must report *all* instances of actual knowledge of prohibited drug or alcohol use by the close of the third business day following the day the employer became aware of the use. As discussed in the response to comments, paragraph (b) requires the employer to report detailed information on its knowledge of the drug or alcohol use and further requires the employer to provide evidence to substantiate the employee's violation, and to demonstrate that this evidence was provided to the employee. No employer may report actual knowledge of drug or alcohol use after the close of the third business day following the day the employer became aware of the use.

Paragraph (b)(3) also identifies employer responsibilities for reporting ''failure to appear'' test refusals to the Clearinghouse. As explained in the response to comments, paragraph (b) identifies the types of documentation that employers, and the C/TPAs' designated as their service agents, must submit each time they report a ''failure to appear'' refusal and requires the employer to demonstrate that the documentation was provided to the employee.

New paragraph (b)(6) requires owner-operators who employ themselves as drivers to designate a C/TPA to comply with all employer-related reporting requirements with respect to the individual's drug and alcohol use.

Paragraph (c) lays out a C/TPA's Clearinghouse reporting responsibilities. In the NPRM, we provided a detailed list of all of the information an employer could ask a C/TPA to report. The comments we received indicated, however, that this approach caused confusion about how a C/TPA reports to the Clearinghouse. To eliminate this confusion, this final rule simply states that when a C/TPA acts on behalf of an employer, that C/TPA stands in the shoes of the employer with respect to all of the rights and responsibilities the employer delegated to it. Accordingly, a properly authorized C/TPA can fulfill any of an employer's responsibilities under paragraph (b). That said, an employer does not discharge its responsibilities under paragraph (b) when it delegates compliance to a C/TPA; the employer remains responsible for compliance with paragraph (b) regardless of whom it assigns to interact with the Clearinghouse on its behalf.

Paragraph (d) requires a SAP to report to the Clearinghouse when he or she conducts an initial assessment of an employee and when an employee completes the return-to-duty process. The NPRM proposed that the SAP make these reports within 1 business day following the day of the event or determination that triggered the reporting obligation. After consideration of comments, we changed the reporting period to require SAPs to complete their reporting requirements by the close of the business day after the event that triggered their reporting responsibility. In addition, as discussed above in the response to comments, we no longer require that the SAP report the follow-up testing plan to the Clearinghouse. SAPs will continue to provide that information directly to employers in accordance with 49 CFR 40.311.

Paragraph (e) obligates anyone reporting to the Clearinghouse to do so truthfully and accurately. As discussed in the Response to Comments section, we changed this final rule to prohibit anyone from reporting anything he or she knows or *should know* to be untruthful or inaccurate.

Section 382.707

Section 382.707 remains as proposed. This section requires FMCSA to notify a driver when information about that driver is entered in, revised, or removed from the Clearinghouse. It also requires FMCSA to notify a driver when information from the Clearinghouse is released to an employer and to state the reason for the release. The Agency will send a letter by U.S. Mail to the address on record with the SDLA that issued the driver's CDL unless drivers provide an alternate address or method of communication, such as electronic mail (email).

Section 382.709

Section 382.709 remains essentially as proposed. This section grants a driver the right to review information in the Clearinghouse about himself or herself. This section now makes clear that, in order to access such information, a driver must register with the Clearinghouse.

Section 382.711

Under § 382.711(a), all users must register with the Clearinghouse before querying or reporting any information. In the proposal, this paragraph stated that only employers and their service agents had to register. This language inadvertently excluded service agents that work for employees, *i.e.* SAPs, who also must register. We corrected this oversight by changing the language in this section to provide that each employer and each service agent must register with the Clearinghouse.

Paragraph (b) explains what an employer must do to register with the Clearinghouse. The employer must provide contact information, USDOT

Number, names of authorized users, and authorizations for service agents, if the employer uses them. The employer must keep its list of authorized users current, but at a minimum, will be required to re-authorize them annually. With respect to service agents, FMCSA added the requirement that employers must update their designations within 10 days of a change.

Paragraph (b) is different from the proposal in three ways. First, with respect to the contact information an employer must provide, we removed reference to the EIN. FMCSA will not allow a motor carrier to use an EIN in lieu of a USDOT Number for identification purposes. All motor carriers must use their USDOT Numbers to register. If an employer does not have a USDOT Number, it will leave this field blank. Second, we updated the language in paragraph (b)(3) to include service agents (other than C/TPAs) as entities that can act on an employer's behalf for querying and reporting to the Clearinghouse. Finally, to eliminate any confusion about an employer's obligation to update service agent designations, we included the 10-day period for reporting a change in service agent designation.

Paragraph (c) is the same as was proposed in the NPRM. It explains what MROs and SAPs must do to register with the Clearinghouse. MROs and SAPs must provide contact information, certification that the MRO or SAP meets the minimum requirements in part 40 for MROs or SAPs, and documentation that shows that the MRO or SAP meets those minimum qualifications or training requirements. For example, an MRO would be required to provide documentation showing that he or she is a licensed physician, as required by § 40.121(a), and has completed the required training or re-training requirements in § 40.121(c). He or she would also be required to certify that he or she has the basic knowledge and experience related to drug testing and DOT regulations, as required by § 40.121(b). A SAP would be required to provide documentation showing that he or she is licensed or certified to provide substance abuse counseling in accordance with the requirements of § 40.281(a), has completed the qualification training in § 40.281(c), and has completed the continuing education requirements in § 40.281(d). He or she would also be required to certify that he or she has the basic knowledge and experience related to substance abuse diagnosis and treatment, SAP functions, and DOT drug and alcohol testing regulations required by § 40.281(b).

Paragraph (d) remains largely as proposed. It explains what C/TPAs and other service agents must do to register with the Clearinghouse. They must provide contact information and names of authorized users. Similar to employer requirements in paragraph (b), C/TPAs and other service agents must verify their authorized users annually. The Agency made some changes to the text to make clear that these registration requirements apply to C/TPAs as well as other service agents acting on an employer's behalf.

Section 382.713

Section 382.713 remains as proposed. It explains the terms under which Clearinghouse registrations remain active, or are revoked or cancelled. The initial Clearinghouse registration term is 5 years unless the Agency takes action to revoke or cancel it. The Agency will cancel any registrant that does not use the Clearinghouse for 2 years. The Agency also has the authority to revoke the Clearinghouse registration of anyone who does not comply with Clearinghouse regulations.

Section 382.715

Section 382.715(a) requires employers to authorize C/TPAs or other service agents to access the Clearinghouse on their behalf before the C/TPA or other service agent can enter information on their behalf into the Clearinghouse. Similarly, paragraph (b) requires employees to authorize a SAP before the SAP can enter information about the employee's return-to-duty process.

The final rule differs from the proposal in several respects. Originally, this section had only one paragraph that required employers to designate C/TPAs acting on their behalf. Changes implemented in this final rule require employers to designate any other service agents authorized to enter information on the employer's behalf as well. That original paragraph is now paragraph (a). In response to comments, FMCSA added paragraph (b) to make clear that it is the employee, not the employer, who designates a SAP to enter information about the employee.

Section 382.717

Section 382.717 explains the procedures for a driver to request that FMCSA change information reported incorrectly to the Clearinghouse. We reordered the paragraphs in the final rule to highlight that the procedures in this section may be used primarily to request data correction. Accordingly, paragraph (a), which was proposed as paragraph (c), explains that no driver may use the procedures in § 382.717 to challenge a particular test result. The procedures are for challenging information that was not accurately reported. Paragraph (a) contains two exceptions related to reporting violations based on an employer's actual knowledge of drug or alcohol use and one exception related to reporting a driver's failure to appear for a test. The first remains as proposed: A driver may petition the Agency to remove a violation when it is based on the driver receiving a citation for DUI in a CMV and the citation does not result in a conviction. The second is new: A driver may petition the Agency to remove a report of a violation that does not meet the minimum reporting requirements, including evidentiary requirements, provided in § 382.705(b)(5). The third exception is also new: A driver may petition for removal of a report of a ''failure to appear'' refusal that does not meet the reporting requirements in new § 382.705(b)(3).

Paragraph (b), which was proposed as paragraph (a), provides that the petition must include information identifying the driver and the information he or she wants to be corrected, the reasons he or she believes the information is inaccurate, and evidence supporting his or her challenge. As noted above, we removed the proposed requirement that petitions be submitted within 18 months of the date the allegedly incorrect information was reported to the Clearinghouse.

The address for submitting the petition is in paragraph (c), which was originally proposed as paragraph (b). FMCSA added ''Attention: Drug and Alcohol Program Manager'' to the address as a part of this final rule. In addition, we added the option for electronic submission of petitions through the Clearinghouse system; the precise means by which electronic submission is accomplished will be addressed during the implementation process. In order to reflect the addition of an electronic submittal option, we changed the title of the paragraph from ''Address'' to ''Submission of Petition''.

Paragraph (d) provides that FMCSA will inform the driver of its decision to remove, retain, or correct the driver's information in the Clearinghouse and will explain the basis for its decision. The Agency reduced, from 90 days (as proposed) to 45 days, the time in which it will respond to petitions submitted under this section. We believe that the electronic submission of petitions will allow us to process those requests more efficiently.

Paragraph (e) provides an option for drivers to request expedited treatment. A driver may request expedited

treatment only if the driver is prohibited from performing safety-sensitive functions because of the information incorrectly reported under paragraph (a)(1) or (2). If the request is granted, FMCSA will subsequently issue a decision within 14 days of receiving a complete petition. Submission of a petition for correction does not authorize a driver to resume safety-sensitive functions or otherwise stay the effective date of the driver's prohibition on performing safety-sensitive functions. Paragraph (e) remains as proposed with one exception. This final rule shortens the time for FMCSA to consider an expedited request from 30 to 14 days. The reasons for this change are discussed in the response to comments discussion.

Paragraph (f) explains that a driver may seek administrative review if FMCSA does not grant his or her petition for correction. The driver must submit a request, with the words ''Administrative Review of Drug and Alcohol Clearinghouse Decision'' conspicuously noted at the top of the document, to FMCSA's Associate Administrator for Enforcement. The request must explain the basis for administrative review and provide all supporting explanations and documents. FMCSA will issue a decision within 30 days and that decision will constitute the final agency order on the matter. Paragraph (f) remains largely as proposed, except that this final rule added the requirement for prominent display of ''Administrative Review of Drug and Alcohol Clearinghouse Decision'' at the top of the request and the option to submit the request electronically through the Clearinghouse. We reduced the time in which the Agency will complete its administrative review from 60 days (as proposed) to 30 days because we believe the electronic submission of requests for review will allow for a speedier resolution. The 30-day time frame is also consistent with the administrative review provisions of the Privacy Act.

In response to comments, we added a new paragraph (g). That paragraph explains that after FMCSA corrects or removes information in response to a petition, it will notify any employer that viewed the incorrect information that a correction has been made.

Section 382.719

Under § 382.719, the Clearinghouse will stop releasing information about a driver's drug and alcohol violations under the following conditions: (1) The SAP reports all of the required information about the initial assessment and driver completion of the return-to-duty process; (2) the employer reports that the driver had a negative return-to-duty test; (3) the employer reports that the driver completed all of the prescribed follow-up tests; and (4) 5 years have passed since the date of the violation determination, which is the date the violation was submitted to the Clearinghouse. Unless all of these conditions are satisfied, information in the Clearinghouse will remain available to employers with authorized access. As previously noted, exceptions apply to records otherwise removed from the Clearinghouse, such as a DUI citation not resulting in a conviction or records removed in accordance with § 382.717. Once these conditions are satisfied and the information is removed, FMCSA will maintain an archived record of this information—not available to employers—for internal use such as research into the effectiveness of the drug and alcohol program, auditing for compliance with this rule, and identifying non-compliant employers or employees for enforcement action.

This final rule differs from the proposal in one critical aspect: How long the Clearinghouse will make records available to employers before moving them to the archives. In the NPRM, FMCSA announced a dual proposal concerning the searchable records retention period. Based on the language of MAP–21, the Agency concluded that there was a basis for making the minimum period for which employers could search records either 3 or 5 years. After considering comments, we conclude that the statutory provisions in MAP–21, as well as over-arching safety considerations, compel the Agency to implement the 5-year retention period. A full discussion of the Agency's analysis is in the response to comments.

Section 382.721

Section 382.721 remains as proposed. It authorizes FMCSA to collect fees from entities that are required to query the Clearinghouse. The Agency is prohibited, however, from collecting fees from drivers accessing their own records.

Section 382.723

Section 382.723 remains as proposed. It prohibits unauthorized access to the Clearinghouse, inaccurate or misleading reporting to the Clearinghouse, and unauthorized disclosure of information obtained from the Clearinghouse. Employers are limited to using information from the Clearinghouse for determining whether a driver is prohibited from operating a CMV. And employers may not divulge any information to anyone not directly involved in that determination. Anyone who violates the requirements of this section is subject to the civil and criminal penalties in § 382.507. This section would not prohibit FMCSA from accessing information in the Clearinghouse for research, auditing, or enforcement purposes. For example, FMCSA could use the information in the database to identify trends in testing data that could help the Agency focus its oversight activities.

Section 382.725

Section 382.725 requires each State chief commercial driver's license official to obtain information in the Clearinghouse about an applicant for a CDL for the purpose of determining whether that applicant is qualified to operate a CMV. The applicant is not required to grant prior consent; an applicant is deemed to have granted consent by virtue of applying for a CDL. The chief commercial driver's license officials are required to protect the privacy and confidentiality of the information they receive. Failure to comply will result in the official losing his or her right of access.

As proposed, this section authorized, but did not require, States to access the Clearinghouse. As discussed in the response to comments, section 31306a(h)(2) makes access permissive, but MAP–21 amendments to section 31311(a) make it mandatory. To implement the amendments to section 31311(a), this final rule will require that States query the Clearinghouse to determine whether an applicant is qualified under FMCSA's regulations to operate a CMV.

FMCSA is aware that some States have licensing standards that prohibit applicants from obtaining CDLs if they failed or refused a drug or alcohol test, or have other drug and alcohol program violations. This rule also will permit those States to use the information in the driver's record, obtained from the Clearinghouse, to determine whether the individual is qualified to operate a commercial motor vehicle in accordance with applicable State laws and regulations. This implements the permissive access requirements of section 31306a(h)(2) and reconciles the two different types of access referenced in that section and the amendments to section 31311(a).

Section 382.727

Section 382.727 remains as proposed. It explains that there are civil and criminal penalties for violations of the Clearinghouse regulations. As stated above, 49 CFR 382.507 already

establishes civil and criminal liability for employers and drivers who violate any provision of 49 CFR part 382; however, § 382.727 extends civil and criminal liability to all employees, medical review officers, and service agents for violations of 49 CFR part 382, subpart G.

C. Part 383

Section 383.73

This final rule includes changes to the CDL standards in part 383 that were not proposed in the NPRM. As discussed above and in the response to comments, these changes implement the statutory requirement that SDLAs obtain driver information from the Clearinghouse before issuing a CDL. Accordingly, new paragraphs (b)(10), (c)(10), (d)(9), and (e)(8) require the States to query the Clearinghouse before issuing a new, renewed, upgraded, or transferred CDL. FMCSA will work with the States to provide for an automatic, electronic query system to minimize costs and maximize efficiencies.

D. Part 384

Section 384.235

This final rule includes a conforming change to part 384. FMCSA recognizes the need to hold States accountable to request information from the Clearinghouse in accordance with the new changes to § 383.73.

E. Part 391

Section 391.23

This final rule includes changes to § 391.23(e) and (f) that were not proposed in the NPRM. Section 391.23(e) requires employers to investigate a prospective employee's drug and alcohol compliance history during the preceding 3 years. Section 391.23(f) prohibits employers from allowing a driver to operate a CMV if he or she refuses to grant consent for the release of his or her information. As discussed above and in the response to comments, section 31306a(f)(3) requires employers to use the Clearinghouse to conduct this background investigation. Once the Clearinghouse has been in operation for 3 years, any pre-employment query will provide the employee's 3-year compliance history. To implement the requirement in section 31306a(f)(3) and to avoid redundant searches and investigations, the Agency amended § 391.23(e) to state that an employer subject to § 382.701(a) must query the Clearinghouse, after it has been in operation for 3 years, to satisfy the drug and alcohol background investigation requirement. Similarly, the Agency amended § 391.23(f) to prohibit an employer from allowing a driver to operate a CMV if he or she refuses to grant consent for the query.

As explained in § 382.413, however, employers must continue to request information from previous employers if the employee was subject to drug and alcohol testing under an employer regulated by one of the other DOT modes. For employees subject to follow-up testing who have not completed their follow-up testing plan prescribed by the SAP, gaining employers must continue to request the follow-up plan from the previous employer because that information will not be reported to the Clearinghouse.

VII. Regulatory Analyses and Notices

Executive Order (E.O.) 12866 (Regulatory Planning and Review and DOT Regulatory Policies and Procedures as Supplemented by E.O. 13563 (Improving Regulation and Regulatory Review)

FMCSA has determined that this rulemaking is an economically significant regulatory action under section 3(f) of Executive Order (E.O.) 12866, Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, January 21, 2011). It also is significant under Department of Transportation regulatory policies and procedures because the economic costs and benefits of the rule exceed the $100 million annual threshold and because of the substantial congressional and public interest concerning the crash risks associated with CMV drivers operating while under the influence of drugs or alcohol. FMCSA has prepared a Regulatory Impact Assessment (RIA) of the benefits and costs of the rule. The summary of the RIA follows.

RIA Estimates of Benefits and Costs

In the Initial RIA, the Agency estimated the annual benefit of the proposed rule at $187 million and the annual cost at $186 million. The present value of the proposed rule was $9 million at a 7 percent discount rate. The Final RIA estimates the annual benefit of the final rule at $196 million and the annual cost at $154 million. The present value of the final rule is estimated at $42 million at a 7 percent discount rate.

The principal factor causing the reduction in costs is the analytical change necessary to account for the recent program concerning the testing rate for annual random drug tests. Effective January 1, 2016, the random drug testing rate is now 25 percent of drivers employed by a carrier, as opposed to 50 percent. This change was made pursuant to 49 CFR 382.305, and is unrelated to the Clearinghouse or the final rule. The industry has been in operation for less than a year at the lower testing rate. Therefore, no drug survey data is available that indicates that the random positive drug test rate has, or will, materially diverge from the three-year average of positive test rates used to estimate the number of positive random drug tests for the forecast period. This change reduces the estimate of the number of annual random positive drug tests from 28,000 in the Initial Regulatory Impact Analysis to 10,000 in the Final Regulatory Impact Analysis. The principal effect of this change is a reduction in return-to-duty costs from the $101 million estimated in the Initial Regulatory Impact Analysis to $56 million. The final analysis also includes updates of drug and alcohol survey data through 2013 and crash statistic. These changes had a modest impact on estimated benefits and estimated costs other than return-to-duty costs.

All employers subject to the drug and alcohol testing regulations are required to query the Clearinghouse (1) on an annual basis to determine whether their employees have drug or alcohol violations that would prohibit them from performing safety-sensitive function and (2) as part of a prospective driver's pre-employment screening process.

Given the established, sizeable success of mandatory testing programs on crash reduction,[7] concrete improvements in the process of disseminating positive-test results and making them accessible to employers are expected to bring substantial benefits.

The Agency estimates about $196 million in annual crash reduction benefits from the rule, which consists of $55 million from the annual queries and $141 million from the pre-employment queries. FMCSA estimates about $154 million in total annual costs, which include costs for:

- $29 million that is the estimated monetized value of employees' time to prepare annual employer queries;
- $11 million that is the estimated monetized value of employees' time to prepare pre-employment queries;

[7] Jacobson, Mireille, ''Drug Testing in the Trucking Industry: The Effect on Highway Safety,'' The Journal of Law and Economics, April 2003, Vol. 46, pp.130–156.

Brady, Joanne E., Susan P. Baker, Charles DiMaggio, Melissa McCarthy, George W. Rebok, and Guohua Li, ''Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes,'' American Journal of Epidemiology, Vol. 170, No. 6, pp.775–782 (Advance Access Publication 19-August-2009).

- $3 million for employers to designate service agents, and $1 million for SAPs to report initiation of the return-to-duty Initial Assessment;
- $5 million incurred by various reporting entities to register with the Clearinghouse, verify authorization, and become familiar with the rule, plus an additional $700,000 for these entities to report positive tests;
- $35 million of fees and consent and verification costs consisting of $24 million in Clearinghouse access fees incurred by employers for pre-employment queries, limited annual queries and full annual queries, plus $11 million of the monetized value of drivers' time to provide consents to employers and verification to FMCSA to allow employers access to drivers' records.;
- $2.2 million for development of the Clearinghouse and management of records;
- $56 million incurred by drivers to go through the return-to-duty process, including $7 million of opportunity costs incurred by drivers for those hours in which they are in substance abuse education and treatment programs; and
- $11.5 million of opportunity costs incurred by employers due to lost on-duty hours of drivers suspended from safety-sensitive functions until successful completion of the return-duty-process.

The annual net benefit of the rule is $42 million. The 10-year projection of net benefits is $316 million when discounted at 7 percent and $369 million when discounted at 3 percent. Estimated benefits include only those associated with reductions in CMV crashes.

FMCSA could not precisely quantify improved health, quality-of-life improvements, and increased life expectancy for CMV drivers. The Agency believes these non-quantified benefits are significant, and, if they were included in the benefits estimates, would clearly result in net benefits in excess of the estimated $38 million annual benefit. The net benefit of the final rule is summarized in the table below.

TOTAL NET BENEFIT PROJECTION OVER A 10-YEAR PERIOD

Total	Annual	10-year	10-year
Discount rate		7%	3%
Total Benefits	$196,000,000	$1,472,985,521	$1,722,077,349
Total Costs	154,000,000	1,157,345,7665	1,353,060,774
Total Net Benefits	42,000,000	315,639,0754	369,016,575

Benefit Analysis

The benefits of the rule derive from reductions in crashes due to the additional information on employee-failed and -refused drug and alcohol tests disseminated through the annual and pre-employment queries. The rationale is that drivers who fail or refuse drug and alcohol tests are assumed to be more crash-prone than drivers who take and pass these tests. Further, queries of the Clearinghouse provide the information on positive tests that prevents these identified drivers from operating until they successfully complete the return-to-duty process. Given this, the benefits of the rule are the reduction in crashes by drivers kept off the road by queries of the Clearinghouse. The Clearinghouse makes available information that employers would not otherwise obtain or be able to act on.

A major study on the effectiveness of mandatory *alcohol-testing* programs in reducing alcohol involvement in fatal motor carrier crashes was published in 2009.[8] The research analyzed data [9] on about 69,000 motor carrier drivers (and about 83,000 non-motor carrier drivers) involved in about 66,000 fatal multi-vehicle crashes over the 25 years from 1982 through 2006. Given that mandatory alcohol testing programs for motor carrier drivers began in 1995, this provides 13 years of data before the program was implemented and 12 years of data after implementation, which allows for a robust examination of the effectiveness of the program. The authors also controlled for age, gender, recent-past driving-while intoxicated (DWI) convictions, whether or not the driver survived, and other characteristics. These controls allowed for the specific isolation of whether (1995–2006) or not (1982–1994) the existence of a mandatory alcohol-testing program affected whether or not the fatal crash involved alcohol.

The authors performed multivariate logistic-regression analyses that estimated the effects of the above-listed factors on whether or not alcohol was involved in the fatal crash. Whether or not alcohol was involved in the crash was defined by a blood-alcohol-level (BAC) greater than or equal to 0.01 grams per deciliter (g/DL) for the driver involved in the fatal crash. With the controls for driver age, gender, history of driving while intoxicated, and survival status, ''implementation of the mandatory alcohol testing programs was found to be associated with a *23 percent reduced risk* of alcohol involvement in fatal crashes by motor-carrier drivers.'' [10] The authors concluded that the ''results from this study indicate that mandatory alcohol-testing programs may have contributed to a significant reduction in alcohol involvement in fatal motor carrier crashes.'' [11] Given the authors' estimate that the program reduces the risk by 23 percent, the Agency applies this percentage reduction to fatal crashes involving drivers for whom post-crash alcohol tests are positive.

A major study on the effectiveness of *drug-testing* programs in reducing fatal motor carrier crashes was published in 2003.[12] The research analyzed data [13] from all States (except Hawaii) for the 16 years from 1983 through 1998, generating 784 annual observations of fatal crashes (784 years = 49 States × 16 years per State). Federal drug-testing legislation passed in 1990, and 13 states passed drug-testing legislation between 1987–89,[14] so this provides many years of data both before and after the program implementation, allowing for a robust analysis of the effectiveness of

[8] Brady, JE, Baker SP, DiMaggio C, McCarthy ML, Rebok GW, Li G, ''Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes.'' *American Journal of Epidemiology*. 2009; 170(6): 775–783.

[9] From the Fatality Analysis Reporting System (FARS).

[10] Brady, et al., page 775.

[11] Ibid.

[12] Jacobson, Mireille, ''Drug Testing in the Trucking Industry: The Effect on Highway Safety,'' The Journal of Law and Economics, April 2003, Vol. 46, pp.130–156.

[13] Data is from the Fatality Analysis Reporting System (FARS).

[14] Connecticut, Iowa, Louisiana, Minnesota, Montana, Rhode Island, and Vermont in 1987, Utah, Nebraska, Kansas, Tennessee in 1988, and Florida and Maine in 1989.

the drug-testing program. The authors controlled for mandatory seat belt laws, speed-limit laws, the unemployment rate, miles driven and other factors. These controls allowed for the specific isolation of whether the fact that a State had standing drug-testing legislation or not (all States did after 1990) affected the number of traffic fatalities in the State.

The authors employed a negative binomial model that estimated the effects of the above-listed factors on the number of fatalities in a given State in a given year. With controls for seat-belt laws, speed-limit laws, and other factors, drug-testing legislation is estimated to have led to about a *9–10 percent reduction* in truck-accident fatalities.[15] Given this estimation, the Agency applies this percentage reduction to fatal crashes involving drivers testing positive for drugs.

The current drug-testing program is estimated to generate $152 million in annual crash-reduction benefits from 29,590 annual positive tests, which averages to approximately $5,100 per positive drug test ($152 million/29,590 positive tests, rounded to the nearest hundred). The *mandatory annual query* in the final rule would result in 6,100 instances of employer alerts to positive drug tests of their drivers that current employers would not otherwise have known about.[16] A requirement that disseminates additional information on 6,100 other positive testing drivers can be estimated to generate the same proportion of benefits that the 29,590 from the current program generates. If 29,950 positive tests and consequent alerts generate $152 million in benefits, then 6,100 additional alerts would generate *$31 million of benefits* (($152 million/29,520) = ($31.1 million/6,100), rounded to the nearest million).

The current alcohol testing program is estimated to generate $95 million in annual crash-reduction benefits from 3,135 annual positive alcohol tests, which averages to approximately $30,300 per positive alcohol test ($95 million/3,135 positive tests, rounded to nearest hundred). The *mandatory annual query* in the final rule would result in 800 instances of employer alerts to positive tests of their drivers that current employers would not otherwise have known about. A requirement that disseminates additional information on 800 other positive testing drivers can be estimated to generate the same proportion of benefits that the 3,135 from the current program generates. If 3,135 positive tests and consequent alerts generate $95 million in benefits, then 800 additional alerts would generate about *$24 million of benefits* (($95 million/3,135) = ($24.2 million/800), rounded to the nearest million).

The annual drug and alcohol queries required by the rule are estimated to generate $55 million in benefits. Annual drug testing is estimated to produce benefits totaling $31 million. Annual alcohol testing is estimated to produce benefits totaling $24 million. The *mandatory pre-employment query* required by the final rule results in 15,100 instances of employer alerts to positive drug tests that prospective employers would not otherwise have known about. A requirement that disseminates additional information on 15,100 other positive drug testing drivers can be estimated to generate the same proportion of benefits that the 29,590 from the current program generates. If 29,590 positive tests and consequent alerts generate $152 million in benefits, then 15,100 additional alerts would generate $77 million in benefits (($152 million/29,590) = ($77.0 million/15,100)), rounded to the nearest million.

The *mandatory pre-employment query* results in 2,100 instances where employers are alerted to positive alcohol tests of their drivers. Prospective employers of these drivers would not otherwise have known about these test results, in the absence of this rule. A requirement that disseminates additional information on 2,100 other positive testing drivers can be estimated to generate the same proportion of benefits that the 3,135 from the current program generates. If 3,135 positive tests and consequent alerts generate $95 million in benefits, then 2,100 additional alerts would generate $64 million in benefits (($95 million/3,135) = ($63.6 million/2,100), rounded to the nearest million).

With annual benefits to the drug-testing side of the pre-employment queries estimated at $77 million and the alcohol-testing side at $64 million, total annual benefits realized from pre-employment queries are estimated at $141 million ($77 million + $64 million).

Given the $55 million in annual benefits from the information on positive drug and alcohol tests disseminated because of the mandatory annual queries ($31 million drug and $24 million alcohol) and the $141 million in annual benefits from the information on positive tests disseminated because of the mandatory pre-employment queries ($77 million drug and $64 million alcohol), the total annual benefits of rule are *$196 million annually.* The table below presents these benefit totals.

TOTAL ANNUAL BENEFITS OF THE RULE

Queries	Drug	Alcohol	Total
Annual	$31,000,000	$24,000,000	$55,000,000
Pre-Employment	77,000,000	64,000,000	141,000,000
Total	108,000,000	88,000,000	196,000,000

Based on the annual benefits of $196 million, the *10-year benefit projection* is $1.472 billion when discounted at 7 percent and $1,722 billion when discounted at 3 percent.

By reducing drug and alcohol abuse by drivers, this rule could also lead to improved health, quality-of-life improvements, and increased life expectancy for drivers beyond those associated with reductions in vehicle crashes.

Cost Analysis

FMCSA estimates that the total annual cost of this action comes in at $154 million, which can be separated into several categories. The rule defines a number of entities with specific roles related to reporting to, or making queries of, the Clearinghouse. Therefore, the annual costs of the rule are organized by categories consistent with the role of each entity.

[15] Jacobson, M., p. 131.

[16] The Agency estimates that 6,100 drivers with multiple employers are job-hoppers that have multiple employers as defined in 49 CFR 391.63 and 49 CFR 391.65. That is, 30 percent of the sum of positive random survey tests (4,500), reasonable suspicion tests (405) and pre-employment tests (14,440) [6100 = ((4,500 + 405 + 14,440) × 30 percent).].

- $29 million that is the estimated monetized value of employees' time to prepare annual employer queries;
- $11 million that is the estimated monetized value of employees' time to prepare pre-employment queries;
- $3 million for employers to designate service agents, and $1 million for SAPs to report initiation of the return-to-duty Initial Assessment;
- $5 million incurred by various reporting entities to register with the Clearinghouse, verify authorization, and become familiar with the rule, plus an additional $700,000 for these entities to report positive tests;
- $35 million of fees and consent and verification costs consisting of $24 million in Clearinghouse access fees incurred by employers for pre-employment queries, limited annual queries and full annual queries, plus $11 million of the monetized value of drivers' time to provide consents to employers and verification to FMCSA to allow employers access to drivers' records.;
- $2.2 million for development of the Clearinghouse and management of records;
- $56 million incurred by drivers to go through the return-to-duty process, including $7 million of opportunity cost associates with the hours spent in substance abuse education and treatment programs in lieu of hours that could be spent in non-safety-sensitive in positions; and
- $11 million of opportunity costs incurred by employers due to lost on-duty hours associated with drivers suspended from safety-sensitive functions until successful completion of the return-duty-process.

Annual costs by cost category are summarized in the table below.

SUMMARY OF THE TOTAL ANNUAL COSTS OF THE RULE

Cost category	Entity	Annual cost
Annual Queries	Employers	$29,000,000
Pre-Employment Queries	Employers	11,000,000
Designate Service Agents/Report Driver Info	Employers	4,000,000
Report Positive Tests	Various	700,000
Register, Rule Familiarize, Verify Authorization	Various	5,000,000
Access Fees to Employers and Drivers' Cost to Provide Consent and Verification to FMCSA	Employers/Drivers	35,000,000
Clearinghouse IT Costs	FMCSA	2.2000,000
Return-to-Duty Process	Drivers	56,000,000
Employers Opportunity Cost Due to Return-to-Duty	Employer	11,490,000
New-CDL and CDL-Renewal Queries	SDLAs	0
Grand Total		154,000,000

Based on the annual cost of $154 million, the 10-year cost projection is $1,157 billion when discounted at 7 percent and $1.353 billion when discounted at 3 percent.

Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354, 94 Stat. 1164 (codified at 5 U.S.C. 601)) requires Federal agencies to ''. . . endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation.'' The Act requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term ''small entities'' comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations (or proposals) on small entities, and mandates that agencies shall strive to lessen any adverse effects on these businesses.

A Final Regulatory Flexibility Analysis (RFA) must address the following topics:

(1) A statement of the reasons why action by the Agency is being considered;

FMCSA is issuing this final rule pursuant to a statutory mandate and recommendations of the National Transportation Safety Board (NTSB) and the General Accountability Office (GAO).

Section 32402 of the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141, 126 Stat. 405), codified at 49 U.S.C. 31306a, directs the Secretary of Transportation (Secretary) to establish a national clearinghouse containing commercial motor vehicle operators' violations of FMCSA's drug and alcohol testing program. In addition, FMCSA has general authority to promulgate safety standards, including those governing drivers' use of drugs or alcohol while operating a CMV. The Motor Carrier Safety Act of 1984 (Pub. L. 98–554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act), as amended, provides authority to regulate drivers, motor carriers, and vehicle equipment and requires the Secretary to prescribe minimum safety standards for CMVs. FMCSA has been delegated authority under 49 CFR 1.87(e) and (f) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 313 and 49 U.S.C. chapter 311, subchapters I and III, relating to CMV programs and safety regulation.

The NTSB recommendation arose from its investigation of 1999 bus crash in New Orleans resulted in 22 passenger fatalities. The driver of the motor-coach had failed pre-employment drug testing when applying for previous positions. He had also failed to disclose on his employment application that a previous employer had fired him after he tested positive for a controlled substance. Therefore, his employer at the time of the crash was unaware of the driver's history of positive tests because of his failure to provide a complete employment history. Without that history, his employer was unable to contact prior employers to obtain his drug and alcohol test history.[17]

The NTSB made recommendations to the Agency pertaining to the reporting of CMV driver drug and alcohol testing results. Specifically, the NTSB recommended that FMCSA ''develop a system that records all positive drug and

[17] ''Motor-coach Run-off-the-Road in New Orleans, Louisiana-May 9, 1999,'' National Transportation Safety Board, HAR 01/01, August 28, 2001, p. 66.

alcohol test results and refusal determinations that are conducted under the DOT testing requirements, require prospective employers to query the system before making a hiring decision, and require certifying authorities to query the system before making a certification decision.'' [18] This final rule addresses the NTSB's recommendation.

The GAO issued two reports discussing its observations of drivers ''job-hopping'' under FMCSA's current regulations. When CDL holders fail, or refuse to submit to, a drug or alcohol test, some quit that job and—after a brief delay to ensure that drugs or alcohol are no longer detectable—pass the pre-employment test at another carrier and resume driving without having a completed the return-to-duty process. Obviously, job-hopping defeats the purpose of the drug and alcohol testing program. The GAO identified and verified 43 cases (based on insider information supplied by a third party to a Congressman).[19] The GAO recommended that Congress provide FMCSA the authority to establish a national database for reporting positive test results and that FMCSA undertake this rulemaking to create a national database of positive and refusal-to-test drug and alcohol test results to prevent CDL holders from job-hopping.[20]

(2) A statement of the significant issues raised by the public comments in response to the initial RFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

In response to the NPRM and Initial RFA, public comments were submitted by 165 individuals including national trucking and motor coach industry associations, regional trucking associations, trade unions, SDLA's and the NTSB.[21] There were no comments specific to the Initial RFA.

The final rule revises 49 CFR part 382, Controlled Substances and Alcohol Use and Testing, to establish a database, identified as the ''Commercial Driver's License Drug and Alcohol Clearinghouse,'' for reporting of drug and alcohol violations. Upon implementation, the final rule also requires employers to query the Clearinghouse for drug and alcohol test result information on employees and prospective employees. This rule is intended to increase compliance with FMCSA's drug and alcohol testing program.

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

The Chief Counsel for Advocacy of the Small Business Administration (SBA) did not submit comments in response to the NPRM.

(4) Description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

Because FMCSA does not have direct revenue figures for all carriers, power units serve as a proxy to determine the carrier size that will qualify as a small business given the SBA's revenue threshold. In order to produce this estimate, it is necessary to determine the average revenue generated by a power unit.

With regard to truck power units, the Agency has estimated that a power unit produces about $189,000 in revenue annually (in 2014 dollars).[22] According to the SBA, motor carriers with annual revenue of $27.5 million [23] are considered small businesses.[24] This equates to 146 power units (145.503 = $27,500,000/$189,000). Thus, FMCSA considers motor carriers of property with 146 PUs or fewer to be small businesses for purposes of this analysis. The Agency then looked at the number and percentage of property carriers with recent activity that will fall under that definition (of having 146 power units or fewer). The results show that over 99 percent of all interstate property carriers with recent activity have 146 power units or fewer.

This amounts to 515,000 carriers (514,800 = 99 percent × 520,000 active motor carriers, rounded to the nearest thousand). Therefore, an overwhelming majority of interstate carriers of property are small entities.

(5) A description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

The final rule requires additional reporting, recordkeeping and compliance requirements beyond what is required by FMCSA's current drug and alcohol testing regulations. The entities required to report to, or make queries of, the Clearinghouse are employers, MROs, C/TPAs and SAPs.

There are an estimated 58,500 annual positive drug and alcohol tests consisting of 52,000 positive drug tests and 6,500 positive alcohol tests at full participation (including refusals). Each positive drug test will be reported to the Clearinghouse by an MRO. Each positive alcohol test will be reported by an employer or a C/TPA. Each driver's subsequent return-to-duty process for positive test results and test refusals will be reported by an SAP. Ninety-nine percent of motor carriers, MROs, C/TPAs, and SAPs are most likely small entities. With regard to SAPs submitting driver information, FMCSA estimates that drivers, bookkeepers, audit clerks accounting clerks, and occupational health and safety specialists, will perform reporting functions under the final rule.

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected;

The Agency did not identify any significant alternatives to the rule that could lessen the burden on small entities without compromising its goals or the Agency's statutory mandate to implement the Clearinghouse. Because small businesses are such a large part of the demographic the Agency regulates, providing alternatives to small business to permit noncompliance with FMCSA

[18] Ibid., p. 74.

[19] Government Accountability Office, ''Examples of Job-hopping by Commercial Drivers after Failing Drug Tests,'' GAO 08–829R, (Washington, DC, June 30, 2008, p. 3.

[20] Government Accountability Office, ''Motor Carrier Safety: Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them off the Road,'' GAO–08–600 (Washington, DC: May 15, 2008), pp. 44–45.

[21] See Regulation.gov at *http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=FMCSA-2011-0031;dct=O%252BPS.*

[22] ''The 2000 TTS Blue Book of Trucking Companies,'' number adjusted to 2014 dollars for inflation. $172,000 estimate in 2008 indexed for inflation to 2014 dollars: (236.736/215.303) × $172,000 = $189,000, rounded to nearest thousand) using the annual CPI. See *http://www.bls.gov/data/inflation_calculator.htm.* Accessed December 22, 2015.

[23] Subsector 484 on page 26 of SBA guidelines (July 14, 2014) See *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.* Accessed December 22, 2015.

[24] U.S. Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification (NAIC) System codes, effective August 22, 2008. See NAIC subsector 484, Truck Transportation.

regulations is neither feasible nor consistent with sound public policy.

(7) A description of the steps taken by the covered agency to minimize any additional cost of credit for small entities.

FMCSA is not a covered agency as defined in 5 U.S.C. 609(d)(2) of the Regulatory Flexibility Act. Therefore, it is not required to take steps to minimize any additional cost of credit for small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to assess the effect of their discretionary regulatory actions (2 U.S.C. 1531–1538). An assessment under UMRA is not required for regulations that incorporate requirements specifically set forth in law (2 U.S.C. 1531). Because MAP–21 mandated that DOT establish, operate, and maintain a clearinghouse for records related to alcohol and drug testing of CMV operators, an assessment was not prepared.

Federalism (E.O. 13132)

A rule has implications for Federalism under E.O. 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. FMCSA recognized that, as a practical matter, this rule may have an impact on the States. Accordingly, by letters sent March 28, 2011, the Agency sought advice from the National Governors Association (NGA), National Conference of State Legislators (NCSL), and the AAMVA on the topic of developing a database that the Agency believed would increase the effectiveness of its drug and alcohol testing program. (Copies of the letters are available in the docket for this rulemaking.) FMCSA offered NGA, NCSL, and AAMVA officials the opportunity to meet and discuss issues of concern to the States. FMCSA did not receive any responses to this letter. Nevertheless, during the public comment period several commenters indicated that the Clearinghouse rule would have implications for Federalism under this executive order.

At this time, section 32402 of MAP–21 preempts State and local laws inconsistent with the Clearinghouse. Preemption specifically applies to the reporting of drug and alcohol tests, refusals, and any other violation of FMCSA's drug and alcohol testing program. MAP–21 does not preempt State laws related to a driver's CDL or driving record. Each State must review its current requirements to determine whether they are compatible with this final rule.

Civil Justice Reform (E.O. 12988)

This action meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children (E.O. 13045)

FMCSA has analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. FMCSA determined that this final rule will not create an environmental risk to health or safety that may disproportionately affect children.

Taking of Private Property (E.O. 12630)

FMCSA reviewed this action in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it would not effect a taking of private property or otherwise have taking implications.

Privacy Impact Assessment

FMCSA conducted a privacy impact assessment of this action as required by section 522(a)(5) of division H of the FY 2005 Omnibus Appropriations Act, Pub. L. 108–447, 118 Stat. 3268 (Dec. 8, 2004) [set out as a note to 5 U.S.C. 552a]. The assessment considers any impacts of the final rule on the privacy of information in an identifiable form and related matters. FMCSA has determined that this action would impact the handling of personally identifiable information (PII). FMCSA has also determined the risks and effects the rulemaking might have on collecting, storing, and sharing PII and has examined and evaluated protections and alternative information handling processes in developing the rule in order to mitigate potential privacy risks. The Privacy Impact Assessment for the Clearinghouse is available for review in the docket for this rulemaking.

Intergovernmental Review (E.O. 12372)

The regulations implementing E.O. 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rule.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), a Federal agency must obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. FMCSA analyzed this action and preliminarily determined that its implementation would create a new information collection burden on CDL holders, motor carriers, and entities that provide services as part of FMCSA's mandatory alcohol and controlled substances testing process under 49 CFR part 382. FMCSA will seek approval of the information collection requirements in a new information collection entitled ''Commercial Driver's License Drug and Alcohol Clearinghouse.''

The collected information encompasses information that is generated, maintained, retained, disclosed, and provided to, or for, the Agency for a database that will be entitled the ''Commercial Driver's License Drug and Alcohol Clearinghouse'' or Clearinghouse.

DOT currently has approval for two information collections for its alcohol and controlled substances testing programs: (1) The Federal Chain of Custody and Control Form, OMB control number 0930–0158, and (2) the U.S. Department of Transportation Alcohol and Controlled Substances Testing Program, OMB control number 2105–0529. Although the Clearinghouse obtains information from the forms covered by the two information collections, this action does not create any revisions or additional burden under those collections.

This rule will create a new information collection to cover the requirements set forth in the amendments to 49 CFR part 382. These amendments will create new requirements for CDL drivers, employers of CDL drivers, MROs, SAPs, and C/TPAs to register with the new database, which will be created and administered by FMCSA. Clearinghouse registration will be a prerequisite to both placing information in the database and obtaining information from the database. Access to information in the database will be strictly limited and controlled, and available only with the consent of the CDL holders about whom information is sought.

Prospective employers of CDL drivers are required to query the Clearinghouse to determine if job applicants have controlled substance or alcohol testing violations that preclude them, under existing FMCSA regulations in part 382, from carrying out safety-sensitive functions. Employers will also be required to query the database once annually for information about drivers whom they currently employ. Employers, C/TPAs that perform testing and other services for carriers, MROs, and SAPs will place information into the database about alcohol and controlled substances testing violations.

This final rule contains procedures for correcting information in the database and specifies that most interactions with the database will be carried out using electronic media.

The total burden to respondents for queries, designations, registration, familiarization, reporting, and recordkeeping to the Clearinghouse is estimated at about 1.86 million hours annually. The hours attributed to each activity are presented in the table below.

TOTAL ANNUAL NUMBER OF BURDEN HOURS

Submissions	Responsible	Performed by	Instances	Minutes	Total hours
Annual Queries	Employer	Bookkeeping Clerk	5,200,000	10	867,000
Pre-Employment Queries	Employer	Bookkeeping Clerk	1,996,328	10	333,000
Designate C/TPAs	Employer	Bookkeeping Clerk	520,000	10	87,000
SAPs Report Driver Information Following Initial Assessment.	SAPs	Occupational Health Specialist.	55,580	10	9,000
Report/Notify Positive Tests	Various	Bookkeeping Clerk	117,000	10	20,000
Register/Familiarize/Verify	Various	Bookkeeping Clerk	793,000	20; 10	155,000
Driver Consent and Verifications	Drivers	Drivers	2,357,328	10	393,000
New-CDL and CDL-Renewal Queries	SDLAs	SDLAs	0	0	0
Total Instances/Hours			11,039,655		1,864,000

FMCSA prepared an information collection request and supporting statement that was submitted to the Office of Management and Budget and that is available for viewing pursuant to a notice to be published in the **Federal Register**.

National Environmental Policy Act and Clean Air Act

When FMCSA drafted the NPRM, the Agency prepared a draft environmental assessment (EA) under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). The EA evaluated a range of proposed alternatives considered by FMCSA and determined that, if the NPRM reduces CMV crashes as estimated, there would be a small net benefit to the environment. The benefits include: Lives saved and injuries prevented from reducing CMV crashes, the reduction of fuel consumed and prevention of greenhouse gas and criteria pollutant emissions from traffic congestion caused by a CMV crash, the reduction of solid waste generated in CMV crashes from damaged vehicles, infrastructure and goods, and hazardous materials spilled during a CMV crash. (See section 3.2.1 of the draft EA for details.)

However, after reviewing FMCSA's NEPA Implementing Procedures and Policy for Considering Environmental Impacts, Order 5610.1 (FMCSA Order), March 1, 2004 (69 FR 9680), FMCSA determined that this final rule is excluded from further environmental review and documentation because it falls under a categorical exclusion (CE). The CE in paragraph 6(r) applies to regulations implementing employer controlled substances and alcohol use and testing procedures. As FMCSA received no comments on the draft EA, and does not expect the environmental impacts listed above to be considered significant under NEPA, the Agency has prepared a statement of Categorical Exclusion Determination for this final rule and does not find it necessary to issue a final EA or prepare an Environmental Impact Statement.

FMCSA also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and general conformity regulations (40 CFR part 51, subpart W, and part 93, subpart B) promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it does not affect direct or indirect emissions of criteria pollutants.

Environmental Justice (E.O. 12898)

FMCSA evaluated the environmental effects of this final rule in accordance with E.O. 12898 and determined that there are no environmental justice issues associated with its provisions nor any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on minority or low-income populations.

Energy Supply, Distribution, or Use (E.O. 13211)

FMCSA has analyzed this rule under E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. While FMCSA's analysis shows a small reduction in fuel used due to eliminating traffic idling caused by CMV crashes, we have determined that it would not be a ''significant energy action'' under that Executive Order because it would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

Indian Tribal Governments (E.O. 13175)

This rule does not have tribal implications under E.O. 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

National Technology Transfer and Advancement Act (Technical Standards)

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

FAST Act Waiver of Advance Notice of Proposed Rulemaking/Negotiated Rulemaking

FMCSA is aware of the regulatory reform requirements imposed by the FAST Act concerning public participation in rulemaking (49 U.S.C.

31136(g)). In the Agency's judgment, these requirements, which pertain to certain major rules, are not applicable to this final rule. In any event, the Agency finds that, for the reasons stated below, publication of an advance notice of proposed rulemaking under 49 U.S.C. 31136(g)(1)(A), or a negotiated rulemaking under 49 U.S.C. 31136(g)(1)(B), is unnecessary and contrary to the public interest in accordance with the waiver provision in 49 U.S.C. 31136(g)(3).

This final rule implements the MAP–21 mandate that DOT establish and maintain a national clearinghouse for records related to alcohol and controlled substances testing. The public had ample opportunity to comment on the Agency's February 20, 2014 NPRM proposing the establishment of the Clearinghouse (79 FR 9703). The Agency received 165 comments to the 2014 NPRM and made significant changes, reflected in this rule, in response to the commentary. Further, the final rule is the product of years of study and deliberation concerning an important public safety issue. As previously noted, this rule implements the NTSB's recommendation, included in its August 2001 report on the 1999 New Orleans bus crash resulting in multiple fatalities, that FMCSA establish a system to record positive DOT drug and alcohol test results and require prospective employers to query the system before hiring a driver. The rule also incorporates many of the findings and recommendations contained in FMCSA's March 2004 report to Congress, ''A Report to Congress on the Feasibility and Merits of Reporting Verified Positive Federal Controlled Substance Test Results to the States and Requiring FMCSA-Regulated Employers to Query the State Databases Before Hiring a Commercial Drivers License (CDL) Holder''. In addition, this rule implements a key recommendation of the GAO's May 2008 Report to Congress, ''Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them off the Road'' (GAO–08–600) and responds to concerns identified in GAO's June 2008 report to Congress, ''Examples of Job-hopping by Commercial Drivers after Failing Drug Tests'' (GAO–08–0829R). In view of the extensive record of public input, study and oversight that informs this final rule, any further public participation measures would be unnecessary. Because the Agency strongly believes that establishment of the Clearinghouse will improve highway safety, the public interest is best served by the publication of this rule.

List of Subjects

49 CFR Part 382

Administrative practice and procedure, Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Penalties, Safety, Transportation.

49 CFR Part 383

Administrative practice and procedure, Commercial driver's license, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 391

Driver qualification, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons discussed in the preamble, the Federal Motor Carrier Safety Administration amends 49 CFR parts 382, 383, 384, and 391 as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

■ 1. The authority citation for part 382 continues to read as follows:

Authority: 49 U.S.C. 31133, 31136, 31301 *et seq.,* 31502; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; and 49 CFR 1.87.

■ 2. Amend § 382.103 by revising the introductory text of paragraph (a) to read as follows:

§ 382.103 Applicability.

(a) This part applies to service agents and to every person and to all employers of such persons who operate a commercial motor vehicle in commerce in any State and are subject to:

* * * * *

■ 3. Amend § 382.107 by adding the definitions ''Commercial Driver's License Drug and Alcohol Clearinghouse'' and ''Negative return-to-duty test result'' in alphabetical order to read as follows:

§ 382.107 Definitions.

* * * * *

Commercial Driver's License Drug and Alcohol Clearinghouse (Clearinghouse) means the FMCSA database that subpart G of this part requires employers and service agents to report information to and to query regarding drivers who are subject to the DOT controlled substance and alcohol testing regulations.

* * * * *

Negative return-to-duty test result means a return-to-duty test with a negative drug result and/or an alcohol test with an alcohol concentration of less than 0.02, as described in § 40.305 of this title.

* * * * *

■ 4. Add § 382.123 to read as follows:

§ 382.123 Driver identification.

(a) *Identification information on the Alcohol Testing Form (ATF).* For each alcohol test performed under this part, the employer shall provide the driver's commercial driver's license number and State of issuance in Step 1, Section B of the ATF.

(b) *Identification information on the Federal Drug Testing Custody and Control Form (CCF).* For each controlled substance test performed under this part, the employer shall provide the following information, which must be recorded as follows:

(1) The driver's commercial driver's license number and State of issuance in Step 1, section C of the CCF.

(2) The employer's name and other identifying information required in Step 1, section A of the ATF.

■ 5. Add § 382.217 to read as follows:

§ 382.217 Employer responsibilities.

No employer may allow, require, permit or authorize a driver to operate a commercial motor vehicle during any period in which an employer determines that a driver is not in compliance with the return-to-duty requirements in 49 CFR part 40, subpart O, after the occurrence of any of the following events:

(a) The driver receives a positive, adulterated, or substituted drug test result conducted under part 40 of this title.

(b) The driver receives an alcohol confirmation test result of 0.04 or higher alcohol concentration conducted under part 40 of this title.

(c) The driver refused to submit to a test for drugs or alcohol required under this part.

(d) The driver used alcohol prior to a post-accident alcohol test in violation of § 382.209.

(e) An employer has actual knowledge, as defined at § 382.107, that a driver has:

(1) Used alcohol while performing safety-sensitive functions in violation of § 382.205;

(2) Used alcohol within four hours of performing safety-sensitive functions in violation of § 382.207; or

(3) Used a controlled substance.

■ 6. Amend § 382.401 by revising paragraph (b)(1)(vi) to read as follows:

§ 382.401 Retention of records.

* * * * *

(b) * * *

(1) * * *

(vi) Records related to the administration of the alcohol and controlled substances testing program, including records of all driver violations, and

* * * * *

■ 7. Amend § 382.405 by revising paragraphs (d) and (e) to read as follows:

§ 382.405 Access to facilities and records.

* * * * *

(d) Each employer, and each service agent who maintains records for an employer, must make available copies of all results for DOT alcohol and/or controlled substances testing conducted by the employer under this part and any other information pertaining to the employer's alcohol misuse and/or controlled substances use prevention program when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

(e) When requested by the National Transportation Safety Board as a part of a crash investigation:

(1) Employers must disclose information related to the employer's administration of a post-accident alcohol and/or a controlled substances test administered following the crash under investigation; and

(2) FMCSA will provide access to information in the Clearinghouse concerning drivers who are involved with the crash under investigation.

* * * * *

■ 8. Amend § 382.409 by revising the section heading and paragraph (c) to read as follows:

§ 382.409 Medical review officer or consortium/third party administrator record retention for controlled substances.

* * * * *

(c) No person may obtain the individual controlled substances test results retained by a medical review officer (MRO as defined in § 40.3 of this title) or a consortium/third party administrator (C/TPA as defined in § 382.107), and no MRO or C/TPA may release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph (c) shall prohibit a MRO or a C/TPA from releasing to the employer, the Clearinghouse, or to the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances and alcohol testing program under this part, the information delineated in part 40, subpart G, of this title.

■ 9. Revise § 382.413 to read as follows:

§ 382.413 Inquiries for alcohol and controlled substances information from previous employers.

(a) Employers must request alcohol and controlled substances information from previous employers in accordance with the requirements of § 40.25 of this title, except that the employer must request information from all DOT-regulated employers that employed the driver within the previous 3 years and the scope of the information requested must date back 3 years.

(b) As of January 6, 2023, employers must use the Drug and Alcohol Clearinghouse in accordance with § 382.701(a) to comply with the requirements of § 40.25 of this title with respect to FMCSA-regulated employers. Exception: When an employee who is subject to follow-up testing has not successfully completed all follow-up tests, employers must request the employee's follow-up testing plan directly from the previous employer in accordance with § 40.25(b)(5) of this title.

(c) If an applicant was subject to an alcohol and controlled substance testing program under the requirements of a DOT Agency other than FMCSA, the employer must request the alcohol and controlled substances information required under this section and § 40.25 of this title directly from those employers regulated by a DOT Agency other than FMCSA.

■ 10. Add § 382.415 to read as follows:

§ 382.415 Notification to employers of a controlled substances or alcohol testing program violation.

Each person holding a commercial driver's license and subject to the DOT controlled substances and alcohol testing requirements in this part who has violated the alcohol and controlled substances prohibitions under part 40 of this title or this part without complying with the requirements of part 40, subpart O, must notify in writing all current employers of such violation(s). The driver is not required to provide notification to the employer that administered the test or documented the circumstances that gave rise to the violation. The notification must be made before the end of the business day following the day the employee received notice of the violation, or prior to performing any safety-sensitive function, whichever comes first.

■ 11. Amend § 382.601 by:

■ a. Removing the period at the end of paragraph (b)(11) and adding ''; and'' in its place; and

■ b. Adding paragraph (b)(12).

The addition reads as follows:

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

* * * * *

(b) * * *

(12) The requirement that the following personal information collected and maintained under this part shall be reported to the Clearinghouse:

(i) A verified positive, adulterated, or substituted drug test result;

(ii) An alcohol confirmation test with a concentration of 0.04 or higher;

(iii) A refusal to submit to any test required by subpart C of this part;

(iv) An employer's report of actual knowledge, as defined at § 382.107:

(A) On duty alcohol use pursuant to § 382.205;

(B) Pre-duty alcohol use pursuant to § 382.207;

(C) Alcohol use following an accident pursuant to § 382.209; and

(D) Controlled substance use pursuant to § 382.213;

(v) A substance abuse professional (SAP as defined in § 40.3 of this title) report of the successful completion of the return-to-duty process;

(vi) A negative return-to-duty test; and

(vii) An employer's report of completion of follow-up testing.

* * * * *

■ 12. Add subpart G to part 382 to read as follows:

Subpart G—Requirements and Procedures for Implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse

Sec.

382.701 Drug and Alcohol Clearinghouse.
382.703 Driver consent to permit access to information in the Clearinghouse.
382.705 Reporting to the Clearinghouse.
382.707 Notice to drivers of entry, revision, removal, or release of information.
382.709 Drivers' access to information in the Clearinghouse.
382.711 Clearinghouse registration.
382.713 Duration, cancellation, and revocation of access.
382.715 Authorization to enter information into the Clearinghouse.
382.717 Procedures for correcting information in the database.
382.719 Availability and removal of information.
382.721 Fees.
382.723 Unauthorized access or use prohibited.

382.725 Access by State licensing authorities.
382.727 Penalties.

Subpart G—Requirements and Procedures for Implementation of the Commercial Driver's License Drug and Alcohol Clearinghouse

§ 382.701 Drug and Alcohol Clearinghouse.

(a) *Pre-employment query required.* (1) Employers must not employ a driver subject to controlled substances and alcohol testing under this part to perform a safety-sensitive function without first conducting a pre-employment query of the Clearinghouse to obtain information about whether the driver has a verified positive, adulterated, or substituted controlled substances test result; has an alcohol confirmation test with a concentration of 0.04 or higher; has refused to submit to a test in violation of § 382.211; or that an employer has reported actual knowledge, as defined at § 382.107, that the driver used alcohol on duty in violation of § 382.205, used alcohol before duty in violation of § 382.207, used alcohol following an accident in violation of § 382.209, or used a controlled substance, in violation of § 382.213.

(2) The employer must conduct a full query under this section, which releases information in the Clearinghouse to an employer and requires that the individual driver give specific consent.

(b) *Annual query required.* (1) Employers must conduct a query of the Clearinghouse at least once per year for information for all employees subject to controlled substance and alcohol testing under this part to determine whether information exists in the Clearinghouse about those employees.

(2) In lieu of a full query, as described in paragraph (a)(2) of this section, an employer may obtain the individual driver's consent to conduct a limited query to satisfy the annual query requirement in paragraph (b)(1) of this section. The limited query will tell the employer whether there is information about the individual driver in the Clearinghouse, but will not release that information to the employer. The individual driver may give consent to conduct limited queries that is effective for more than one year.

(3) If the limited query shows that information exists in the Clearinghouse about the individual driver, the employer must conduct a full query, in accordance with paragraph (a)(2) of this section, within 24 hours of conducting the limited query. If the employer fails to conduct a full query within 24 hours, the employer must not allow the driver to continue to perform any safety-sensitive function until the employer conducts the full query and the results confirm that the driver's Clearinghouse record contains no prohibitions as defined in paragraph (d) of this section.

(c) *Employer notification.* If any information described in paragraph (a) of this section is entered into the Clearinghouse about a driver during the 30-day period immediately following an employer conducting a query of that driver's records, FMCSA will notify the employer.

(d) *Prohibition.* No employer may allow a driver to perform any safety-sensitive function if the results of a Clearinghouse query demonstrate that the driver has a verified positive, adulterated, or substituted controlled substances test result; has an alcohol confirmation test with a concentration of 0.04 or higher; has refused to submit to a test in violation of § 382.211; or that an employer has reported actual knowledge, as defined at § 382.107, that the driver used alcohol on duty in violation of § 382.205, used alcohol before duty in violation of § 382.207, used alcohol following an accident in violation of § 382.209, or used a controlled substance in violation of § 382.213, except where a query of the Clearinghouse demonstrates:

(1) That the driver has successfully completed the SAP evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title; achieves a negative return-to-duty test result; and completes the follow-up testing plan prescribed by the SAP.

(2) That, if the driver has not completed all follow-up tests as prescribed by the SAP in accordance with § 40.307 of this title and specified in the SAP report required by § 40.311 of this title, the driver has completed the SAP evaluation, referral, and education/treatment process set forth in part 40, subpart O, of this title and achieves a negative return-to-duty test result, and the employer assumes the responsibility for managing the follow-up testing process associated with the testing violation.

(e) *Recordkeeping required.* Employers must retain for 3 years a record of each query and all information received in response to each query made under this section. As of January 6, 2023, an employer who maintains a valid registration fulfills this requirement.

§ 382.703 Driver consent to permit access to information in the Clearinghouse.

(a) No employer may query the Clearinghouse to determine whether a record exists for any particular driver without first obtaining that driver's written or electronic consent. The employer conducting the search must retain the consent for 3 years from the date of the last query.

(b) Before the employer may access information contained in the driver's Clearinghouse record, the driver must submit electronic consent through the Clearinghouse granting the employer access to the following specific records:

(1) A verified positive, adulterated, or substituted controlled substances test result;

(2) An alcohol confirmation test with a concentration of 0.04 or higher;

(3) A refusal to submit to a test in violation of § 382.211;

(4) An employer's report of actual knowledge, as defined at § 382.107, of:

(i) On duty alcohol use pursuant to § 382.205;

(ii) Pre-duty alcohol use pursuant to § 382.207;

(iii) Alcohol use following an accident pursuant to § 382.209; and

(iv) Controlled substance use pursuant to § 382.213;

(5) A SAP report of the successful completion of the return-to-duty process;

(6) A negative return-to-duty test; and

(7) An employer's report of completion of follow-up testing.

(c) No employer may permit a driver to perform a safety-sensitive function if the driver refuses to grant the consent required by paragraphs (a) and (b) of this section.

(d) A driver granting consent under this section must provide consent electronically to the Agency through the Clearinghouse prior to release of information to an employer in accordance with § 382.701(a)(2) or (b)(3).

(e) A driver granting consent under this section grants consent for the Agency to release information to an employer in accordance with § 382.701(c).

§ 382.705 Reporting to the Clearinghouse.

(a) *MROs.* (1) Within 2 business days of making a determination or verification, MROs must report the following information about a driver to the Clearinghouse:

(i) Verified positive, adulterated, or substituted controlled substances test results;

(ii) Refusal-to-test determination by the MRO in accordance with 49 CFR 40.191(a)(5), (7), and (11), (b), and (d)(2).

(2) MROs must provide the following information for each controlled substances test result specified in paragraph (a)(1) of this section:

(i) Reason for the test;

(ii) Federal Drug Testing Custody and Control Form specimen ID number;

(iii) Driver's name, date of birth, and CDL number and State of issuance;

(iv) Employer's name, address, and USDOT number, if applicable;

(v) Date of the test;

(vi) Date of the verified result; and

(vii) Test result. The test result must be one of the following:

(A) Positive (including the controlled substance(s) identified);

(B) Refusal to test: Adulterated;

(C) Refusal to test: Substituted; or

(D) Refusal to provide a sufficient specimen after the MRO makes a determination, in accordance with § 40.193 of this title, that the employee does not have a medical condition that has, or with a high degree of probability could have, precluded the employee from providing a sufficient amount of urine. Under this subpart a refusal would also include a refusal to undergo a medical examination or evaluation to substantiate a qualifying medical condition.

(3) Within 1 business day of making any change to the results report in accordance with paragraph (a)(1) of this section, a MRO must report that changed result to the Clearinghouse.

(b) *Employers.* (1) Employers must report the following information about a driver to the Clearinghouse by the close of the third business day following the date on which they obtained that information:

(i) An alcohol confirmation test result with an alcohol concentration of 0.04 or greater;

(ii) A negative return-to-duty test result;

(iii) A refusal to take an alcohol test pursuant to 49 CFR 40.261;

(iv) A refusal to test determination made in accordance with 49 CFR 40.191(a)(1) through (4), (a)(6), (a)(8) through (11), or (d)(1), but in the case of a refusal to test under (a)(11), the employer may report only those admissions made to the specimen collector; and

(v) A report that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with §§ 40.307, 40.309, and 40.311 of this title.

(2) The information required to be reported under paragraph (b)(1) of this section must include, as applicable:

(i) Reason for the test;

(ii) Driver's name, date of birth, and CDL number and State of issuance;

(iii) Employer name, address, and USDOT number;

(iv) Date of the test;

(v) Date the result was reported; and

(vi) Test result. The test result must be one of the following:

(A) Negative (only required for return-to-duty tests administered in accordance with § 382.309);

(B) Positive; or

(C) Refusal to take a test.

(3) For each report of a violation of 49 CFR 40.261(a)(1) or 40.191(a)(1), the employer must report the following information:

(i) Documentation, including, but not limited to, electronic mail or other contemporaneous record of the time and date the driver was notified to appear at a testing site; and the time, date and testing site location at which the employee was directed to appear, or an affidavit providing evidence of such notification;

(ii) Documentation, including, but not limited to, electronic mail or other correspondence, or an affidavit, indicating the date the employee was terminated or resigned (if applicable);

(iii) Documentation, including, but not limited to, electronic mail or other correspondence, or an affidavit, showing that the C/TPA reporting the violation was designated as a service agent for an employer who employs himself/herself as a driver pursuant to paragraph (b)(6) of this section when the reported refusal occurred (if applicable); and

(iv) Documentation, including a certificate of service or other evidence, showing that the employer provided the employee with all documentation reported under paragraph (b)(3) of this section.

(4) Employers must report the following violations by the close of the third business day following the date on which the employer obtains actual knowledge, as defined at § 382.107, of:

(i) On-duty alcohol use pursuant to § 382.205;

(ii) Pre-duty alcohol use pursuant to § 382.207;

(iii) Alcohol use following an accident pursuant to § 382.209; and

(iv) Controlled substance use pursuant to § 382.213.

(5) For each violation in paragraph (b)(4) of this section, the employer must report the following information:

(i) Driver's name, date of birth, CDL number and State of issuance;

(ii) Employer name, address, and USDOT number, if applicable;

(iii) Date the employer obtained actual knowledge of the violation;

(iv) Witnesses to the violation, if any, including contact information;

(v) Description of the violation;

(vi) Evidence supporting each fact alleged in the description of the violation required under paragraph (b)(4) of this section, which may include, but is not limited to, affidavits, photographs, video or audio recordings, employee statements (other than admissions pursuant to § 382.121), correspondence, or other documentation; and

(vii) A certificate of service or other evidence showing that the employer provided the employee with all information reported under paragraph (b)(4) of this section.

(6) An employer who employs himself/herself as a driver must designate a C/TPA to comply with the employer requirements in paragraph (b) of this section related to his or her own alcohol and controlled substances use.

(c) *C/TPAs.* Any employer may designate a C/TPA to perform the employer requirements in paragraph (b) of this section. Regardless of whether it uses a C/TPA to perform its requirements, the employer retains ultimate responsibility for compliance with this section. Exception: An employer does not retain responsibility where the C/TPA is designated to comply with employer requirements as described in paragraph (b)(6) of this section.

(d) *SAPs.* (1) SAPs must report to the Clearinghouse for each driver who has completed the return-to-duty process in accordance with 49 CFR part 40, subpart O, the following information:

(i) SAPs name, address, and telephone number;

(ii) Driver's name, date of birth, and CDL number and State of issuance;

(iii) Date of the initial substance-abuse-professional assessment; and

(iv) Date the SAP determined that the driver demonstrated successful compliance as defined in 49 CFR part 40, subpart O, and was eligible for return-to-duty testing under this part.

(2) SAP must report the information required by paragraphs (d)(1)(i) through (iii) of this section by the close of the business day following the date of the initial substance abuse assessment, and must report the information required by paragraph (d)(1)(iv) of this section by the close of the business day following the determination that the driver has completed the return-to-duty process.

(e) *Reporting truthfully and accurately.* Every person or entity with access must report truthfully and accurately to the Clearinghouse and is expressly prohibited from reporting information he or she knows or should know is false or inaccurate.

REPORTING ENTITIES AND CIRCUMSTANCES

Reporting entity	When information will be reported to clearinghouse
Prospective/Current Employer of CDL Driver.	—An alcohol confirmation test with a concentration of 0.04 or higher. —Refusal to test (alcohol) as specified in 49 CFR 40.261. —Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191. —Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. —Negative return-to-duty test results (drug and alcohol testing, as applicable) —Completion of follow-up testing.
Service Agent acting on behalf of Current Employer of CDL Driver.	—An alcohol confirmation test with a concentration of 0.04 or higher. —Refusal to test (alcohol) as specified in 49 CFR 40.261. —Refusal to test (drug) not requiring a determination by the MRO as specified in 49 CFR 40.191. —Actual knowledge, as defined in 49 CFR 382.107, that a driver has used alcohol on duty, used alcohol within four hours of coming on duty, used alcohol prior to post-accident testing, or has used a controlled substance. —Negative return-to-duty test results (drug and alcohol testing, as applicable) —Completion of follow-up testing.
MRO	—Verified positive, adulterated, or substituted drug test result. —Refusal to test (drug) requiring a determination by the MRO as specified in 49 CFR 40.191.
SAP	—Identification of driver and date the initial assessment was initiated. —Successful completion of treatment and/or education and the determination of eligibility for return-to-duty testing.

§ 382.707 Notice to drivers of entry, revision, removal, or release of information.

(a) FMCSA must notify a driver when information concerning that driver has been added to, revised, or removed from the Clearinghouse.

(b) FMCSA must notify a driver when information concerning that driver has been released from the Clearinghouse to an employer and specify the reason for the release.

(c) Drivers will be notified by letter sent by U.S. Mail to the address on record with the State Driver Licensing Agency that issued the driver's commercial driver's license. Exception: A driver may provide the Clearinghouse with an alternative means or address for notification, including electronic mail.

§ 382.709 Drivers' access to information in the Clearinghouse.

A driver may review information in the Clearinghouse about himself or herself, except as otherwise restricted by law or regulation. A driver must register with the Clearinghouse before accessing his or her information.

§ 382.711 Clearinghouse registration.

(a) *Clearinghouse registration required.* Each employer and service agent must register with the Clearinghouse before accessing or reporting information in the Clearinghouse.

(b) *Employers.* (1) Employer Clearinghouse registration must include:

(i) Name, address, and telephone number;

(ii) USDOT number, except if the registrant does not have a USDOT Number, it may be requested to provide other information to verify identity; and

(iii) Name of the person(s) the employer authorizes to report information to or obtain information from the Clearinghouse and any additional information FMCSA needs to validate his or her identity.

(2) Employers must verify the names of the person(s) authorized under paragraph (b)(1)(iii) of this section annually.

(3) Identification of the C/TPA or other service agent used to comply with the requirements of this part, if applicable, and authorization for the C/TPA to query or report information to the Clearinghouse. Employers must update any changes to this information within 10 days.

(c) *MROs and SAPs.* Each MRO or SAP must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity;

(2) A certification that the applicant's access to the Clearinghouse is conditioned on his or her compliance with the applicable qualification and/or training requirements in 49 CFR part 40; and

(3) Evidence of required professional credentials to verify that the applicant currently meets the applicable qualification and/or training requirements in 49 CFR part 40.

(d) *C/TPAs and other service agents.* Each consortium/third party administrator or other service agent must provide the following to apply for Clearinghouse registration:

(1) Name, address, telephone number, and any additional information FMCSA needs to validate the applicant's identity; and

(2) Name, title, and telephone number of the person(s) authorized to report information to and obtain information from the Clearinghouse.

(3) Each C/TPA or other service agent must verify the names of the person(s) authorized under paragraph (d)(2) of this section annually.

§ 382.713 Duration, cancellation, and revocation of access.

(a) *Term.* Clearinghouse registration is valid for 5 years, unless cancelled or revoked.

(b) *Cancellation.* FMCSA will cancel Clearinghouse registrations for anyone who has not queried or reported to the Clearinghouse for 2 years.

(c) *Revocation.* FMCSA has the right to revoke the Clearinghouse registration of anyone who fails to comply with any of the prescribed rights and restrictions on access to the Clearinghouse, including but not limited to, submission of inaccurate or false information and misuse or misappropriation of access rights or protected information from the Clearinghouse and failure to maintain the requisite qualifications, certifications and/or training requirements as set forth in part 40 of this title.

§ 382.715 Authorization to enter information into the Clearinghouse.

(a) *C/TPAs.* No C/TPA or other service agent may enter information into the Clearinghouse on an employer's behalf unless the employer designates the C/TPA or other service agent.

(b) *SAPs.* A driver must designate a SAP before that SAP can enter any

information about the driver's return-to-duty process into the Clearinghouse.

§ 382.717 Procedures for correcting information in the database.

(a) *Petitions limited to inaccurately reported information.* (1) Under this section, petitioners may challenge only the accuracy of information reporting, not the accuracy of test results or refusals.

(2) *Exceptions.* (i) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substances if the citation did not result in a conviction. For the purposes of this section, conviction has the same meaning as used in 49 CFR part 383.

(ii) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of actual knowledge (other than as provided for in paragraph (a)(2)(i) of this section) if that report does not comply with the reporting requirements in § 382.705(b)(5).

(iii) Petitioners may request that FMCSA remove from the Clearinghouse an employer's report of a violation under 49 CFR 40.261(a)(1) or 40.191(a)(1) if that report does not comply with the reporting requirements in § 382.705(b)(3).

(b) *Petition.* Any driver or authorized representative of the driver may submit a petition to the FMCSA contesting the accuracy of information in the Clearinghouse. The petition must include:

(1) The petitioner's name, address, telephone number, and CDL number and State of issuance;

(2) Detailed description of the basis for the allegation that the information is not accurate; and

(3) Evidence supporting the allegation that the information is not accurate. Failure to submit evidence is cause for dismissing the petition.

(c) *Submission of petition.* The petitioner may submit his/her petition electronically through the Clearinghouse or in writing to: Federal Motor Carrier Safety Administration, Office of Enforcement and Compliance, Attention: Drug and Alcohol Program Manager, 1200 New Jersey Avenue SE., Washington, DC 20590.

(d) *Notice of decision.* Within 45 days of receiving a complete petition, FMCSA will inform the driver in writing of its decision to remove, retain, or correct the information in the database and provide the basis for the decision.

(e) *Request for expedited treatment.* (1) A driver may request expedited treatment to correct inaccurate information in his or her Clearinghouse record under paragraph (a)(1) of this section if the inaccuracy is currently preventing him or her from performing safety-sensitive functions, or to remove employer reports under paragraph (a)(2) of this section if such reports are currently preventing him or her from performing safety-sensitive functions. This request may be included in the original petition or as a separate document.

(2) If FMCSA grants expedited treatment, it will subsequently inform the driver of its decision in writing within 14 days of receipt of a complete petition.

(f) *Administrative review.* (1) A driver may request FMCSA to conduct an administrative review if he or she believes that a decision made in accordance with paragraph (d) or (e) of this section was in error.

(2) The request must prominently state at the top of the document: ''Administrative Review of Drug and Alcohol Clearinghouse Decision'' and the driver may submit his/her request electronically through the Clearinghouse or in writing to the Associate Administrator for Enforcement (MC–E), Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE., Washington, DC 20590.

(3) The driver's request must explain the error he or she believes FMCSA committed and provide information and/or documents to support his or her argument.

(4) FMCSA will complete its administrative review no later than 30 days after receiving the driver's request for review. The Associate Administrator's decision will constitute the final Agency action.

(g) *Subsequent notification to employers.* When information is corrected or removed in accordance with this section, or in accordance with 49 CFR part 10, FMCSA will notify any employer that accessed the incorrect information that a correction or removal was made.

§ 382.719 Availability and removal of information.

(a) *Driver information not available.* Information about a driver's drug or alcohol violation will not be available to an employer conducting a query of the Clearinghouse after all of the following conditions relating to the violation are satisfied:

(1) The SAP reports to the Clearinghouse the information required in § 382.705(d);

(2) The employer reports to the Clearinghouse that the driver's return-to-duty test results are negative;

(3) The driver's current employer reports that the driver has successfully completed all follow-up tests as prescribed in the SAP report in accordance with §§ 40.307, 40.309, and 40.311 of this title; and

(4) Five years have passed since the date of the violation determination.

(b) *Driver information remains available.* Information about a particular driver's drug or alcohol violation will remain available to employers conducting a query until all requirements in paragraph (a) of this section have been met.

(c) *Exceptions.* (1) Within 2 business days of granting a request for removal pursuant to § 382.717(a)(2)(i), FMCSA will remove information from the Clearinghouse.

(2) Information about a particular driver's drug or alcohol violation may be removed in accordance with § 382.717(a)(2)(ii) and (iii) or in accordance with 49 CFR part 10.

(d) *Driver information remains available.* Nothing in this part shall prevent FMCSA from using information removed under this section for research, auditing, or enforcement purposes.

§ 382.721 Fees.

FMCSA may collect a reasonable fee from entities required to query the Clearinghouse. Exception: No driver may be required to pay a fee to access his or her own information in the Clearinghouse.

§ 382.723 Unauthorized access or use prohibited.

(a) Except as expressly authorized in this subpart, no person or entity may access the Clearinghouse. No person or entity may share, distribute, publish, or otherwise release any information in the Clearinghouse except as specifically authorized by law. No person may report inaccurate or misleading information to the Clearinghouse.

(b) An employer's use of information received from the Clearinghouse is limited to determining whether a prohibition applies to a driver performing a safety-sensitive function with respect to a commercial motor vehicle. No employer may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in determining whether a prohibition applies to a driver performing a safety-sensitive function

with respect to a commercial motor vehicle.

(c) Violations of this section are subject to civil and criminal penalties in accordance with applicable law, including those set forth at § 382.507.

(d) Nothing in this part shall prohibit FMCSA from accessing information about individual drivers in the Clearinghouse for research, auditing, or enforcement purposes.

§ 382.725 Access by State licensing authorities.

(a) In order to determine whether a driver is qualified to operate a commercial motor vehicle, the chief commercial driver's licensing official of a State must obtain the driver's record from the Clearinghouse if the driver has applied for a commercial driver's license from that State.

(b) By applying for a commercial driver's license, a driver is deemed to have consented to the release of information from the Clearinghouse in accordance with this section.

(c) The chief commercial driver's licensing official's use of information received from the Clearinghouse is limited to determining an individual's qualifications to operate a commercial motor vehicle. No chief driver's licensing official may divulge or permit any other person or entity to divulge any information from the Clearinghouse to any person or entity not directly involved in determining an individual's qualifications to operate a commercial motor vehicle.

(d) A chief commercial driver's licensing official who does not take appropriate safeguards to protect the privacy and confidentiality of information obtained under this section is subject to revocation of his or her right of access under this section.

§ 382.727 Penalties.

An employer, employee, MRO, or service agent who violates any provision of this subpart shall be subject to the civil and/or criminal penalty provisions of 49 U.S.C. 521(b)(2)(C).

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

■ 13. The authority citation for part 383 is revised to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.,* and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1748, 1766, 1767; sec. 1012(b) of Pub. L. 107–56, 115 Stat. 272, 297; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1746; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 7208 of Pub. L. 114–94, 129 Stat. 1312, 1593; and 49 CFR 1.87.

■ 14. Amend § 383.73 by:

■ a. Removing the word ''and'' at the end of paragraph (b)(8);

■ b. Removing the period at the end of paragraph (b)(9) and adding ''; and'' in its place;

■ c. Adding paragraph (b)(10);

■ d. Removing ''and:'' at the end of paragraph (c)(8) and adding a semicolon in its place;

■ e. Removing the period at the end of paragraph (c)(9) and adding ''; and'' in its place;

■ f. Adding paragraph (c)(10);

■ g. Removing the word ''and'' at the end of paragraph (d)(7);

■ h. Removing the period at the end of paragraph (d)(8) and adding ''; and'' in its place;

■ i. Adding paragraph (d)(9);

■ j. Removing ''and:'' at the end of paragraph (e)(6) and adding a semicolon in its place;

■ k. Removing the period at the end of paragraph (e)(7) and adding ''; and'' in its place;

■ l. Adding paragraphs (e)(8) and (f)(4).

The additions read as follows:

§ 383.73 State procedures.

* * * * *

(b) * * *

(10) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(c) * * *

(10) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(d) * * *

(9) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(e) * * *

(8) Beginning January 6, 2020, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

(f) * * *

(4) Beginning January 6, 2020, for drivers seeking issuance, renewal, upgrade or transfer of a non-domiciled CDL, request information from the Drug and Alcohol Clearinghouse in accordance with § 382.725 of this chapter.

* * * * *

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

■ 15. The authority citation for this part is revised to read as follows:

Authority: 49 U.S.C. 31136, 31301, *et seq.,* and 31502; secs. 103 and 215 of Pub. L. 106–59, 113 Stat. 1753, 1767; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; sec. 5524 of Pub. L. 114–94, 129 Stat. 1312, 1560; and 49 CFR 1.87.

■ 16. Add § 384.235 to read as follows:

§ 384.235 Commercial driver's license Drug and Alcohol Clearinghouse.

Beginning January 6, 2020, the State must request information from the Clearinghouse in accordance with § 383.73 of this chapter.

PART 391—QUALIFICATIONS OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTORS

■ 17. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 504, 508, 31133, 31136, 31149, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 1914, 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1748, 1767; sec. 32934 of Pub. L. 112–141, 126 Stat. 405, 830; and 49 CFR 1.87.

■ 18. Amend § 391.23 by adding paragraph (e)(4) and revising paragraph (f) to read as follows:

§ 391.23 Investigation and inquiries.

* * * * *

(e) * * *

(4) As of January 6, 2023, employers subject to § 382.701(a) of this chapter must use the Drug and Alcohol Clearinghouse to comply with the requirements of this section with respect to FMCSA-regulated employers.

(i) *Exceptions.* (A) If an applicant who is subject to follow-up testing has not successfully completed all follow-up tests, the employer must request the applicant's follow-up testing plan directly from the previous employer in accordance with § 40.25(b)(5) of this title.

(B) If an applicant was subject to an alcohol and controlled substance testing program under the requirements of a DOT mode other than FMCSA, the employer must request alcohol and controlled substances information required under this section directly from those employers regulated by a DOT mode other than FMCSA.

(ii) [Reserved]

(f)(1) A prospective motor carrier employer must provide to the previous employer the driver's consent meeting the requirements of § 40.321(b) of this title for the release of the information in paragraph (e) of this section. If the driver refuses to provide this consent, the prospective motor carrier employer must not permit the driver to operate a commercial motor vehicle for that motor carrier.

(2) If a driver refuses to grant consent for the prospective motor carrier

employer to query the Drug and Alcohol Clearinghouse in accordance with paragraph (e)(4) of this section, the prospective motor carrier employer must not permit the driver to operate a commercial motor vehicle.

* * * * *

Issued under the authority delegated in 49 CFR 1.87 on: November 8, 2016.

T.F. Scott Darling, III,

Administrator.

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