



COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION of the

DEPARTMENT OF TRANSPORTATION

Commercial Driver’s License Drug and Alcohol Clearinghouse

49 CFR Part 382

[Docket No. FMCSA – 2001-0031]

RIN 2126-AB18

Notice of Proposed Rulemaking

May 21, 2014

By notice published on April 22, 2014, the Federal Motor Carrier Safety Administration (“FMCSA”) of the Department of Transportation (“DOT”) has requested public comment by means of a notice of proposed rulemaking (“NPRM”) concerning the establishment of a Commercial Driver’s License Drug and Alcohol Clearinghouse (“Clearinghouse”).¹ As described below, portions of FMCSA’s proposal contravene Congress’s mandate that DOT protect personal privacy in implementing the Clearinghouse. Pursuant to the notice, the Electronic Privacy Information Center (“EPIC”) submits these comments to urge FMCSA to revise its proposals and comply

¹ Commercial Driver’s License Drug and Alcohol Clearinghouse, 79 Fed. Reg. 22,467 (Apr. 22, 2014) (to be codified at 49 C.F.R part 382).

with the Moving Ahead for Progress in the 21st Century (“MAP-21”) privacy protections. Specifically, FMCSA should: (1) require anyone reporting to the Clearinghouse to immediately correct errors and notify employers and potential employers of the inaccurate data; (2) revoke Clearinghouse registration and access for those who fail to comply with Clearinghouse rules; (3) clarify that in addition to the administration petition process, individuals may still amend their records pursuant to the Privacy Act; and (4) implement privacy enhancing techniques like data deletion and anonymization.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values.² EPIC has a particular interest in preserving privacy safeguards established by Congress, including the Privacy Act of 1974, and routinely comments in public rulemakings on agency proposals.³ EPIC is also a leading advocate for workplace privacy.⁴

(I) Congress Directed the Department of Transportation to Protect Privacy in Implementing the Drug and Alcohol Clearinghouse

The Moving Ahead for Progress in the 21st Century Act (“MAP-21”) mandates that the Secretary of Transportation “establish, operate, and maintain a national

² *About EPIC*, EPIC, <http://epic.org/epic/about.html> (last visited May 21, 2014).

³ *See, e.g., EPIC et al., Comments Urging the Department of Homeland Security To (A) Suspend the “Automated Targeting System” As Applied To Individuals, Or In the Alternative, (B) Fully Apply All Privacy Act Safeguards To Any Person Subject To the Automated Targeting System* (Dec. 4, 2006), available at http://epic.org/privacy/pdf/ats_comments.pdf; EPIC, *Comments on Automated Targeting System Notice of Privacy Act System of Records and Notice of Proposed Rulemaking, Docket Nos. DHS-2007-0042 AND DHS-2007-0043* (Sept. 5, 2007), available at http://epic.org/privacy/travel/ats/epic_090507.pdf. See also, EPIC: Automated Targeting System, <https://epic.org/privacy/travel/ats/>.

⁴ *Workplace Privacy*, EPIC, <http://epic.org/privacy/workplace/> (last visited May 21, 2014).

clearinghouse for records relating to alcohol and controlled substances testing of commercial motor vehicles operators.”⁵ Employers of commercial motor vehicle (“CMV”) operators will be required to “report information about current and prospective employees’ positive drug and alcohol test results to the Clearinghouse” and query the Clearinghouse for “positive drug and alcohol test results, and refusals to test, on an annual basis for current employees and as a part of the pre-employment process for prospective employees.”⁶

The Clearinghouse’s collection, retention, and dissemination of electronic medical and employment information present inherent risks to personal privacy. For example, FBI background check databases, similar to the Clearinghouse, often maintain inaccurate and incomplete information.⁷ This erroneous information is subsequently disclosed to potential employers, costing individuals employment opportunities.⁸ And recently, the Government Accountability Office issued findings that “[t]he number of reported [federal agency] information security incidents involving personally identifiable information has more than doubled over the last several years.”⁹ In recognizing the inherent risks to personal privacy that the Clearinghouse presents, Congress explicitly ordered the DOT to safeguard individual privacy. For example, employers may not access personal records in

⁵ Moving Ahead for Progress in the 21st Century Act (“MAP-21”), 49 U.S.C. § 31306a (a) (1) (2012).

⁶ Commercial Driver’s License Drug and Alcohol Clearinghouse, 79 Fed. Reg. 9,704 (Feb. 20, 2014) (to be codified at 49 C.F.R. part 382).

⁷ Madeline Neighly and Maurice Emsellem, NAT’L EMP’T LAW PROJECT, *Wanted: Accurate FBI Background Checks for Employment* 1, available at <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>.

⁸ *Id.*

⁹ U.S. GOVT’ ACCOUNTABILITY OFFICE, GAO-14-487T, INFORMATION SECURITY: FEDERAL AGENCIES NEED TO ENHANCE RESPONSES TO DATA BREACHES (2014), available at <http://www.gao.gov/assets/670/662227.pdf>.

the Clearinghouse without first submitting proof to the Secretary of individual's "written or electronic consent" to access the records.¹⁰ MAP-21 also prohibits employers from using records other than to "assess and evaluate whether a prohibition applies with respect to the individual to operate a commercial motor vehicle for the employer."¹¹

Additionally, MAP-21 states:

the Secretary shall develop a secure process for--
(A) administering and managing the clearinghouse in compliance with applicable Federal security standards;
(B) registering and authenticating authorized users of the clearinghouse;
(C) registering and authenticating persons required to report to the clearinghouse under subsection (g);
(D) preventing the unauthorized access of information from the clearinghouse;
(E) storing and transmitting data;
(F) persons required to report to the clearinghouse under subsection (g) to timely and accurately submit electronic data to the clearinghouse;
(G) generating timely and accurate reports from the clearinghouse in response to requests for information by authorized users; and
(H) updating an individual's record upon completion of the return-to-duty process described in title 49, Code of Federal Regulations.¹²

Congress reiterated the Clearinghouse privacy directive by ordering that all releases of personally identifiable information from the Clearinghouse shall--

(1) comply with applicable Federal privacy laws, including the fair information practices under the Privacy Act of 1974 (5 U.S.C. 552a);
(2) comply with applicable sections of the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*); and
(3) not be made to any person or entity unless expressly authorized or required by law.¹³

Concerning "data quality and security standards for reporting and releasing,"

¹⁰ 49 U.S.C. § 31306a(h) (1) (A).

¹¹ *Id.* § 31306a (h)(1)(D).

¹² *Id.* § 31306a (b)(2).

¹³ *Id.* § 31306a (d).

The Secretary may establish additional requirements, as appropriate, to ensure that--

(A) the submission of records to the clearinghouse is timely and accurate;

(B) the release of data from the clearinghouse is timely, accurate, and released to the appropriate authorized user under this section; and

(C) an individual with a record in the clearinghouse has a cause of action for any inappropriate use of information included in the clearinghouse.¹⁴

MAP-21 also requires employers receiving Clearinghouse information to:

- (i) protect the privacy of the individual and the confidentiality of the record; and
- (ii) ensure that information contained in the record is not divulged to a person or entity that is not directly involved in assessing and evaluating whether a prohibition applies with respect to the individual to operate a commercial motor vehicle for the employer.¹⁵

In requiring the Secretary of Transportation to establish a controlled substances and alcohol test result clearinghouse, Congress has ordered the Department of Transportation to protect CMV operator personal privacy. As described below, some of FMCSA's proposals violate Congress's mandate that the Department of Transportation safeguard CMV operator privacy. Implementing those proposals would exceed the Department of Transportation's statutory authority. Accordingly, FMCSA should withdraw and amend its proposals as described below.

(II) The Federal Motor Carrier Safety Administration Must Amend its Current Proposals to Comply with MAP-21's Directive that the National Clearinghouse Protects Individual Privacy

MAP-21 explicitly requires the Transportation Department to safeguard personal privacy in establishing the Clearinghouse. Some of FMCSA's provisions comply with

¹⁴ *Id.* § 31306a (g)(5).

¹⁵ *Id.* § 31306a (h)(1)(E).

this mandate. For example, FMCSA proposes to prohibit employers from using CMV operators' Social Security numbers as a unique identifier when recording alcohol and controlled substance test results.¹⁶ Instead, FMCSA proposes that employers use drivers' CDL number and State of Issuance.¹⁷ Social Security numbers are notorious unique identifiers that criminals routinely use to steal identities.¹⁸ By using a less sensitive unique identifier and prohibiting employers from using Social Security numbers, FMCSA's proposal enhances driver privacy by decreasing the likelihood of identity theft.

The Clearinghouse will also "maintain an auditing function that tracks all user activities in relation to data including access and modification."¹⁹ This will provide meaningful oversight and transparency into who accesses the database. The proposed regulations would prohibit individuals from accessing and using the Clearinghouse without authorization.²⁰ Audit and access logs will help facilitate the prohibition by holding unauthorized users accountable. FMCSA also proposes to use a more objective and transparent criterion for reporting information to the database. Current regulations prohibit employers from allowing CMV operators to "perform safety-sensitive functions

¹⁶ *Supra* note 6, at 9,708.

¹⁷ *Id.* See also proposed 49 C.F.R. § 382.123 (a)(2),(b)(2) ("Driver identification").

¹⁸ See, e.g., Alessandro Acquisti and Ralph Gross, *Predicting Social Security numbers from Public Data*, 106 PROC.NAT'L ACAD. SCI. 10975, 10979- (2009); Brian Krebs, *Experian Breach Tied to NY-NJ ID Theft Ring*, KREBS ON SECURITY (May 19, 2014, 12:04AM), <http://krebsonsecurity.com/2014/05/experian-breach-tied-to-ny-nj-id-theft-ring/>; Abby Hayes, *3 Ways to Protect Your Child From Identity Theft*, U.S. NEWS AND WORLD REPORT BLOG, <http://money.usnews.com/money/blogs/my-money/2014/05/19/3-ways-to-protect-your-child-from-identity-theft>. See also THE PRESIDENT'S IDENTITY THEFT TASK FORCE REPORT vii (2008), available at <http://www.ftc.gov/sites/default/files/documents/reports/presidents-identity-theft-task-force-report/081021taskforcereport.pdf>.

¹⁹ U.S. DEP'T OF TRANSP., PRIVACY IMPACT ASSESSMENT: FEDERAL MOTOR CARRIER ADMINISTRATION (FMCSA) DRUG AND ALCOHOL CLEARINGHOUSE NOTICE OF PROPOSED RULEMAKING 12 (2014).

²⁰ Proposed 49 C.F.R. § 382.723 ("Unauthorized access or use prohibited").

if the employer has actual knowledge that the driver has used drugs or alcohol.”²¹ Under current regulations, “actual knowledge” means “actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer’s direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substance use [.]”²²

FMCSA proposes to limit “actual knowledge” reporting to

Actual knowledge that the driver received a traffic citation for driving a commercial motor vehicle while under the influence of alcohol or controlled substance.²³

FMCSA proposes this standard “because a traffic citation provides objective documentation on which to base a report to the Clearinghouse.”²⁴ This proposal protects the integrity of the driver data because it adheres to an objective, verifiable standard. Each of the aforementioned proposals is favorable for privacy, encourages transparency, oversight, and accountability, and complies with MAP-21’s privacy directive.

Other FMCSA proposals, described below, should be revised.

Proposed Section 382.705 Reporting to the Clearinghouse

Section 382.705(e) would prohibit individuals from “knowingly reporting false or inaccurate information”:

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

²¹ *Supra* note 6, at 9,710. *See* 49 C.F.R. § 382.213 (c).

²² 49 C.F.R § 382.107.

²³ Proposed 49 C.F.R. § 382.705(b)(1)(vi) (“Reporting to the Clearinghouse”).

²⁴ *Supra* note 6, at 9,710.

This is a favorable proposal because it protects the integrity of driver information submitted to the Clearinghouse. It is also in line with MAP-21's requirement that the Department of Transportation "develop a secure process for . . . persons required to report to the clearinghouse . . . to timely and accurately submit electronic data to the clearinghouse."²⁵ The proposal must, however, go further to fully comply with both MAP-21's requirements and the Privacy Act requirement that FMCSA "maintain all records which are used by the agency in making any determination about any individual with such accuracy . . . as is reasonably necessary to assure fairness to the individual in the determination [.]"²⁶ In the NPRM Discussion Section, FMCSA states, "[a]nyone making an inadvertent error should make a correction immediately upon discovering the error."²⁷ Instructing individuals to immediately correct errors complies with both MAP-21's mandate and the Privacy Act requirements that agencies maintain accurate records. After correcting errors upon discovery, FMCSA should also require individuals to alert employers and potential employers that queried the inaccurate data to the erroneous information. The aforementioned Clearinghouse auditing logs would facilitate this process because it would allow individuals to see the employers and potential employers who accessed the erroneous information. Notification to the employer and potential employers is a critical element in preventing adverse employment decisions resulting from inaccurate data.

Accordingly, FMCSA should revise the language as follows:

²⁵ 49 U.S.C. § 31306a (b) (2) (F).

²⁶ 5 U.S.C. § 552a (e) (5).

²⁷ *Supra* note 6, at 9,712.

(e) *Reporting truthfully and accurately.* Every person or entity with access must report truthfully and accurately to the Clearinghouse and is expressly prohibited from knowingly reporting false or inaccurate information. Anyone making an inadvertent error must make a correction immediately upon discovering the error, and notify all individuals having access to the erroneous information that the information is inaccurate.

Proposed Section 382.713 Duration, cancellation, and revocation of access

FMCSA proposes that the agency

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 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 in part 40 of this title.

Congress has directed the Transportation Department to “develop a secure process for . . . preventing the unauthorized access of information from the clearinghouse.”²⁸ FMCSA’s proposed language granting the agency discretion to revoke access to those abusing the Clearinghouse— as opposed to mandating revocation—directly contravenes Congress’s mandate that the Secretary has to prevent unauthorized access. FMCSA’s current proposal would permit individuals that have violated Clearinghouse rules continued access to driver information. FMCSA should therefore change the language to comply with MAP-21 the following way:

FMCSA ~~has the right to~~ must 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 information and misuse or misappropriation of access rights or protected information from the Clearinghouse and failure

²⁸ 49 U.S.C. § 31306a (b) (2) (D).

to maintain the requisite qualifications, certifications and/or training requirements in part 40 of this title.

Proposed Section 382.717 Procedures for Correcting Information in the Database

MAP-21 requires the Secretary to “establish a procedure, including an appeal process, for an individual to dispute and remedy an administrative error in the individual’s record.”²⁹ To this end, FMCSA proposes a redress program that it outlines in proposed section 382.717. FMCSA proposes a fairly limited redress program in which “petitioners may challenge only the accuracy of information reporting, not the accuracy or validity of positive test results or refusals.”³⁰ In the discussion section of the NPRM, FMCSA states that the redress program would be

used to correct clerical errors, such as reporting results to the wrong driver's record; an incorrect name or CDL number; a misidentified test type, such as a pre-employment identified as a random test; or other inaccuracies in the reported data. These procedures could also be used to request that an employer's report of actual knowledge of a traffic citation for driving a CMV under the influence of drugs or alcohol be removed from the Clearinghouse if the citation did not result in a conviction.³¹

Notwithstanding this redress procedure, individuals may still access and amend their information pursuant to the Privacy Act.³² Accordingly, FMCSA should amend should amend proposed section 382.717 to clarify that individuals may also pursue their Privacy Act remedies:

(g) Notwithstanding these procedures, drivers may still exercise their rights to correct inaccurate information through the Privacy Act. DOT’s Privacy Act regulations can be found in 49 C.F.R. part 10.

²⁹ 49 U.S.C. § 31306a (j) (2).

³⁰ Proposed 49 C.F.R. § 382.717(c)(1) (“Procedures for correcting information in the database”).

³¹ *Supra* note 6, at 9,712.

³² 5 U.S.C § 552a. *See also* 49 U.S.C. § 31306a (d).

Proposed Section 382.719 Availability and removal of information

FMCSA proposes to delete driver violation information after the driver meets certain compliance conditions. FMCSA seeks comment on whether the information should be deleted after driver compliance within three or five years after the violation. FMCSA should remove information after three years. This privacy enhancing technique will ensure that outdated information does not hinder future employment opportunities.

Accordingly, FMCSA should revise proposed section 382.719 to:

- (a) 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 substance abuse professional reports to the Clearinghouse the information required in § 382.705(d);
 - (2) The employer or consortium/third party administrator reports to the Clearinghouse that the driver received negative return-to-duty test results;
 - (3) The driver's current employer or consortium reports that the driver has successfully completed all follow-up tests as prescribed in the substance-abuse-professional report in accordance with §§ 40.307, 40.309, and 40.311 of this title; and
 - (4) Three years have passed since the date of the violation determination.

Proposed Section 382.723 Unauthorized access or use

FMCSA proposes:

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

Should FMCSA access Clearinghouse information for research purposes, it should anonymize individual driver information to enhance driver privacy:

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

purposes. FMCSA must first anonymize information before using it for research purposes.

Conclusion

To comply with Congress's mandate that the Department of Transportation protect personal privacy of Clearinghouse records, FMCSA must: (1) require anyone reporting to the Clearinghouse to immediately correct errors and notify employers and potential employers of the inaccurate data; (2) revoke Clearinghouse registration and access for those who fail to comply with Clearinghouse rules; (3) clarify that in addition to the administration petition process, individuals may still amend their records pursuant to the Privacy Act; and (4) implement privacy enhancing techniques such as data deletion and anonymization.

Respectfully submitted,

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