THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable John McCain
Chairman
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed is the U.S. Department of Transportation's study on the reporting requirements for positive controlled substances test results for holders of commercial driver's licenses. Section 226 of the Motor Carrier Safety Improvement Act of 1999 (P.L. 106-159) required the Secretary to conduct a study of the feasibility and merits of requiring Medical Review Officers and employers to report verified positive controlled substances test results to the State that issued the commercial driver's license. These reports would include the identity of the driver and of each controlled substance found.

The report also assesses the feasibility and merits of establishing a database(s) of positive controlled substances test results that prospective employers would be required to query before hiring a driver. Although the study notes that it would be possible to establish a Federal requirement for the implementation of a database that would be legally defensible, operationally and technically feasible, and capable of enhancing compliance with current Federal Motor Carrier Safety Administration regulations, it indicates that there are major obstacles to doing so. The report discusses these obstacles and provides the Department's recommendations for proceeding before a final decision on the database requirement.

Identical letters have been sent to the Ranking Member of the Senate Committee on Commerce, Science and Transportation; and to the Chairmen and Ranking Members of the House Committee on Transportation and Infrastructure; the Senate Subcommittee on Surface Transportation and Merchant Marine, Committee on Commerce, Science and Transportation; and the House Subcommittee on Highways, Transit and Pipelines, Committee on Transportation and Infrastructure.

Sincerely yours,

Norman Y. Mineta

Enclosure

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable Ernest F. Hollings
Ranking Member
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Senator Hollings:

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Sincerely yours,

Norman Y. Mineta

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THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable Kay Bailey Hutchison
Chairman
Subcommittee on Surface Transportation and Merchant Marine
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Madam Chairman:

Enclosed is the U.S. Department of Transportation's study on the reporting requirements for positive controlled substances test results for holders of commercial driver's licenses. Section 226 of the Motor Carrier Safety Improvement Act of 1999 (P.L. 106-159) required the Secretary to conduct a study of the feasibility and merits of requiring Medical Review Officers and employers to report verified positive controlled substances test results to the State that issued the commercial driver's license. These reports would include the identity of the driver and of each controlled substance found.

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Norman Y. Mineta

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THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable Daniel K. Inouye
Ranking Member
Subcommittee on Surface Transportation and Merchant Marine
Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Senator Inouye:

Enclosed is the U.S. Department of Transportation's study on the reporting requirements for positive controlled substances test results for holders of commercial driver's licenses. Section 226 of the Motor Carrier Safety Improvement Act of 1999 (P.L. 106-159) required the Secretary to conduct a study of the feasibility and merits of requiring Medical Review Officers and employers to report verified positive controlled substances test results to the State that issued the commercial driver's license. These reports would include the identity of the driver and of each controlled substance found.

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Norman Y. Mineta

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THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable Don Young
Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed is the U.S. Department of Transportation's study on the reporting requirements for positive controlled substances test results for holders of commercial driver's licenses. Section 226 of the Motor Carrier Safety Improvement Act of 1999 (P.L. 106-159) required the Secretary to conduct a study of the feasibility and merits of requiring Medical Review Officers and employers to report verified positive controlled substances test results to the State that issued the commercial driver's license. These reports would include the identity of the driver and of each controlled substance found.

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Sincerely yours,

Norman Y. Mineta

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THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable James L. Oberstar
Ranking Member
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Oberstar:

Enclosed is the U.S. Department of Transportation's study on the reporting requirements for positive controlled substances test results for holders of commercial driver's licenses. Section 226 of the Motor Carrier Safety Improvement Act of 1999 (P.L. 106-159) required the Secretary to conduct a study of the feasibility and merits of requiring Medical Review Officers and employers to report verified positive controlled substances test results to the State that issued the commercial driver's license. These reports would include the identity of the driver and of each controlled substance found.

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Sincerely yours,

Norman Y. Mineta

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THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable Thomas E. Petri
Chairman
Subcommittee on Highways, Transit and Pipelines
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed is the U.S. Department of Transportation's study on the reporting requirements for positive controlled substances test results for holders of commercial driver's licenses. Section 226 of the Motor Carrier Safety Improvement Act of 1999 (P.L. 106-159) required the Secretary to conduct a study of the feasibility and merits of requiring Medical Review Officers and employers to report verified positive controlled substances test results to the State that issued the commercial driver's license. These reports would include the identity of the driver and of each controlled substance found.

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Sincerely yours,

Norman Y. Mineta

Enclosure

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

April 12, 2004

The Honorable William O. Lipinski
Ranking Member
Subcommittee on Highways, Transit and Pipelines
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Lipinski:

Enclosed is the U.S. Department of Transportation's study on the reporting requirements for positive controlled substances test results for holders of commercial driver's licenses. Section 226 of the Motor Carrier Safety Improvement Act of 1999 (P.L. 106-159) required the Secretary to conduct a study of the feasibility and merits of requiring Medical Review Officers and employers to report verified positive controlled substances test results to the State that issued the commercial driver's license. These reports would include the identity of the driver and of each controlled substance found.

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Sincerely yours,

Norman Y. Mineta

Enclosure

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

A Review Conducted on Behalf of the
Federal Motor Carrier Safety Administration (FMCSA)
in Response to Section 226 of
The Motor Carrier Safety Improvement Act of 1999

March 2004

ACKNOWLEDGEMENTS

This Final Project Report was prepared and then updated for the Federal Motor Carrier Safety Administration (FMCSA) by GREYSTONE HEALTH SCIENCES CORPORATION of La Mesa CA as part of a joint effort between FMCSA and the Federal Railroad Administration. George M. Ellis, Jr., of GREYSTONE HEALTH SCIENCES was the author of this Report.

However, both he and Lee Seham, Esq., a contributing author and senior legal consultant on this Project, wish to acknowledge the following individuals from the law firm of SEHAM, SEHAM, MELTZ & PETERSEN who also contributed significantly to the legal content: George Diamantopoulos, Esq.; Stanley Silverstone, Esq.; Karen Dingle, Esq.; and Aliki Recklitis, Esq. Mr. Ellis also wishes to acknowledge Kirk Kryger of GREYSTONE HEALTH SCIENCES, who contributed to the computer-related issues covered in the Report.

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1.0 EXECUTIVE SUMMARY

Section 226 of the Motor Carrier Safety Improvement Act of 1999 directed the Federal Motor Carrier Safety Administration (FMCSA) to evaluate the feasibility and merits of requiring Medical Review Officers (MROs) and/or employers to report all Federal verified positive controlled substance test results on drivers tested under 49 CFR part 382, to the State which issued the driver's Commercial Drivers License (CDL). All employers of drivers required to have a CDL would conduct a pre-employment query of the applicable database to ensure driver eligibility under FMCSA controlled substance regulations.

Further, FMCSA was tasked with assessing how these records could be kept properly confidential; what would be the estimated cost benefit and safety impact of such a requirement; and whether a process should be created to permit drivers to correct errors or have their records expunged after a "reasonable" period of time.

1.1 Scope

This Report assesses the feasibility of the creation of one or more Federally-mandated databases containing verified positive Federal controlled substance test results for drivers required to have a CDL. The Report evaluates the potential obstacles to the development, implementation, and maintenance of such database(s); identifies options and potential courses of action; and attempts to identify the costs of their establishment. The Report further attempts to balance the safety concerns of Congress and the motoring public with the rights of CDL drivers and employers of those drivers.

In terms of core content, this Report presents seven (7) separate analyses. These are:

* Legal Issues. This section reviews significant legal concerns which may affect the potential database(s). Included among these are confidentiality and the right to privacy, equal protection, and potentials for liability.

* Operational Issues. This section addresses issues relating to how the potential database(s) may best be organized and managed.

* Administrative/Technical Issues. This section provides a comprehensive review of the administrative/technical concerns which must be addressed in order to properly implement and maintain the potential database(s).

* Employer-Related Issues. This section examines issues regarding employer roles and responsibilities with the potential database(s). Of special concern is how to ensure full employer participation and the likely roles and responsibilities of key employer service agents.

* Projected Costs. This section reviews the estimated costs for the development, implementation, and operation of the potential database(s).

* Alcohol and Test Refusals. This section assesses whether the potential database(s) should be expanded beyond a substance abuse test-only content to include alcohol positives (defined herein as 0.04% or greater) and test refusals.

* Comparable Databases. This section describes lessons learned and experiences with the implementation of similar types of database(s).

In addition to the core content discussions, this Report examines the opinions of groups who have an interest in the implementation and maintenance of any proposed database(s). These include: the National Transportation Safety Board (NTSB), State agencies, trade associations, safety advocacy groups, employers, labor unions, Medical Review Officers/Consortiums/Third Party Administrators, and private citizens.

1.2 Findings

A. It would be possible to establish a Federal requirement for the implementation of the potential database(s) which would be legally defensible; operationally and technically feasible; and, if properly implemented, could enhance compliance with current FMCSA controlled substance and alcohol regulations and improve transportation safety.

B. The potential database(s) would not pose any significant legal or technical problems which could not be overcome with well-crafted legislation authorizing or establishing the database, adequate funds, and effective planning and organization.

C. The database(s) could, if properly implemented, serve to:

* Help improve safety by permitting employers to better detect ineligible CDL holders before they are permitted to perform regulated safety-sensitive duties.

* Help alleviate some existing FMCSA safety concerns (owner-operators failing to remove themselves from safety-sensitive functions after a positive test; previous employers failing to respond to Federal test history queries from prospective employers; employers not wanting to lose a valued employee or an otherwise promising new hire).

* Enhance the ability of FMCSA to audit this critical safety responsibility, and thereby likely increase rates of compliance with FMCSA controlled substance and alcohol testing regulations.

D. There are <u>significant obstacles</u> which must be resolved before a final decision on the database requirement should be made by Congress. These obstacles <u>should not be underestimated</u>. Unless practical and cost-effective solutions can be assured, the database(s) should not be implemented or even seriously considered. These obstacles include:

* How to effectively register and properly authenticate up to 750,000 or more users of the database(s) such as employers, MROs, etc., and block unauthorized access and use of the system.

* How to reach the goal of 100% employer compliance so that all ineligible CDL holders can be found in the database(s) and that all adverse reports are immediately inputted into the system after the driver becomes ineligible.

* How to ensure that unnecessary due process requirements will not inhibit, burden, or obstruct the system.

* How to make certain that the system (computers, software, communications, and personnel) will be adequately funded for database development, implementation, and operation.

1.3 Recommendations

If a decision is made to establish a test results database, the following recommendations are offered for consideration:

General

a) The database requirement should be authorized or established by Congress through legislation and not just through FMCSA regulation.

b) The legislation should clearly direct FMCSA and the Department of Transportation to establish implementing regulations.

c) The legislation should prohibit the establishment of any competing commercial or trade association-sponsored databases.

d) The legislation should clearly state that its provisions preempt not only State and local laws and regulations, but also inconsistent Federal statutes and regulations.

e) Federal alcohol violations (positives equal to or greater than 0.04%) and test refusals should also be included in the database(s).

f) The most cost effective and logical organization would be to mandate a single Federal database covering the entire country, sponsored or operated by FMCSA. This would simplify data input and data query responsibilities for employers, reduce computer and personnel redundancies, lower costs, and simplify enforcement.

If it is instead decided that States are to be asked to operate their own databases, a mechanism must be established to route an employer's query to a centralized Federally-sponsored computer "pointer" system which would then link the employer to any State that may also have an adverse record on the CDL holder.

g) FMCSA should be responsible for providing detailed technical parameters and performance standards for database hardware, software, and technical support.

h) Employers and service agents who support the databases should have their potential liability minimized through a legislative provision.

i) The database requirement must be sufficiently funded to ensure the use of appropriate computer hardware, computer software, and technical support personnel.

j) FMCSA should be authorized to collect reasonable user fees from employers utilizing the database system and from disqualified applicants/employees wishing to become re-qualified. The monies collected would be used to offset or pay for the cost of system operation and maintenance.

Administrative

a) Only legitimate registered employers should be permitted to query the database. Their identities must be carefully verified before they are allowed to be registered.

b) All users of the system (data entry/data query) must be properly registered (including identity checks), and the identity of users must be properly authenticated before each access into the system is allowed. The system must also block unauthorized users from access.

c) Unauthorized access into the system by employers or others, or misuse of the information obtained, must be heavily sanctioned and penalized.

d) Failure to properly support the database(s), either by not inputting an ineligible driver in a timely manner or at all, must be heavily sanctioned and penalized.

e) Records should remain in the database(s) for a period of no more than 5 years, the current length of time positive records are to be maintained by employers under Federal substance abuse testing regulations.

f) A driver should be permitted to have his or her record expunged from the database if he or she submits an authenticated return-to-work recommendation by a qualified Substance Abuse Professional (SAP) and he or she has completed the SAP-designated period of follow-up tests established for that employee. FMCSA (or the States) should be the final arbitrator. Formal due process hearings should not be permitted in this forum.

Operational

a) All accesses into the system (inputs and queries) must be recorded and retrievable by Federal auditors or their compliance enforcement designees.

b) Medical Review Officers and, if carefully controlled, Consortiums/Third Party Administrators, should be the only entities permitted to input records into the system.

If a decision is made to permit employers to input the records, a check mechanism needs to be put in place to ensure full employer cooperation and compliance.

c) Data entries should be able to be made via the Web, or via a standardized Optical Character Recognition (OCR) form (capable of being read by an OCR scanner) mailed or faxed for scanned entry into the system.

d) The ability to amend a record must be closely controlled, limited, and auditable.

e) Data queries should be able to be made through the Web and by a voice call-in system. Both systems should be capable of providing hard copy reports by a variety of methods (including at least automatic fax-back).

f) No query to the database should be permitted unless the prospective employer holds a standardized FMCSA release form signed by the CDL holder, and this must be documented (or affirmed to) before access to the database is granted.

g) Drivers must have the ability to correct clerical errors in their records through a standardized written petition procedure. FMCSA (or the States) should be the final arbitrator. No formal due process hearings or challenges to the scientific soundness or legal defensibility of the test result should be permitted in this forum.

2.0 INTRODUCTION

In December 1999, the Motor Carrier Safety Improvement Act of 1999 (MCSIA) was enacted to amend title 49, United States Code, to create the Federal Motor Carrier Safety Administration (FMCSA) and to establish new compliance priorities with regard to motor carrier safety.

Section 226 of this Act directed the Secretary of Transportation to assess the feasibility and merits of requiring Medical Review Officers (MROs) and/or employers to report all verified positive Federal controlled substance test results governed by FMCSA regulations into databases operated by the State which issued the driver's Commercial Drivers License (CDL). All employers subject to these same Federal regulations would be required to query the applicable database to ensure driver eligibility in accordance with the requirements of 49 CFR 382.413 and 49 CFR 40.25.

Of special interest to Congress was the means of ensuring the confidentiality of the test results; the costs, benefits, and safety impacts from the implementation of such database(s); and whether a process should be established to amend, correct, or expunge records once they have been entered. The full text of section 226 of the Act, which mandated the substance abuse test database review, is at Appendix 1 of this Report.

In addition, several highly visible accidents (including the New Orleans bus accident in May 1999; see section 10.0 of this Report) increased Congressional interest in seeking a better alternative for checking CDL holder Federal test histories than may be offered by current Federal regulations.

2.1 Current Applicable Federal Regulations

FMCSA currently requires employers of regulated drivers required to have a CDL to obtain information on an applicant's Federal controlled substance and alcohol tests (at 0.04% or greater) and test refusals from all previous Department of Transportation-regulated employers for two years from the date of the application (see 49 CFR 382.413 and 49 CFR 40.25).[1] Employers must make a "good faith effort" to obtain this information before

[1] FMCSA also requires that an employer have in hand a negative Federal pre-employment test on an applicant/new hire before that individual can perform safety-sensitive functions (see 49 CFR 382.301). Some exceptions apply if the applicant was part of a Federal testing program at his or her previous employer (see 382.301(c)).

the driver performs regulated service for the employer. The employer may permit the driver to perform regulated service pending arrival of the responses, but unless a good faith effort to obtain a full history can be documented, the driver must be removed from regulated duties before 30 days.

Information obtained in this manner by prospective employers on applicant/drivers must be maintained confidentially for three years (49 CFR 40.25 (i)). Documentation on the employer's good faith effort to obtain Federal alcohol and controlled substance history information must be retained for an identical period. The relevant text from these sections of FMCSA's and the Department of Transportation's (DOT's) regulations are at Appendix 2.

2.2 Perspectives on the Current Regulations

FMCSA has always recognized that accurately detecting ineligible CDL holders before they are permitted to perform regulated safety-sensitive duties is a vital safety concern. Under the current regulations, regulated employers must rely on the list of previous employers provided by the applicant/CDL holder (which depends on the applicant's honesty to give a complete accounting) and/or a previous employer's willingness to complete and return a request form in a timely manner. Of special concern to FMCSA is if either the potential employer or the driver's previous employers fail to be diligent in complying with this important Federal safety requirement.

2.3 Historical Perspective on Driver Databases for Federal Positive Tests

Since the initiation of DOT controlled substance testing regulations in 1989, there have been a number of private commercial enterprises interested in creating centralized databases of positive controlled substances test results. Most of the interest has traditionally come from commercial vendors and trade associations supporting the motor carrier industry.

The vendors (mostly Consortiums and Third Party Administrators, or C/TPAs, and background check firms) wished to create "black-list" database(s) to which any client employer who subscribed to their services could access. DOT did not support these interests for several reasons, principally because of the confidentiality issue. There was concern that important privacy protections built into DOT regulations and other Federal

confidentiality statutes would be put at risk. DOT ultimately published guidelines in 1995 which specifically limited further exploration of this option by private vendors.[2] This policy position was also incorporated into the current DOT regulation (49 CFR 40.351). The current regulations specifically forbid so-called "blanket releases" and sharing of test results between employers or other entities without the regulated applicant/employee's specific written consent.

2.4 Limitations of This Report

This Report represents an attempt to provide balanced and practical findings and recommendations to respond to section 226 of the Motor Carrier Safety Improvement Act of 1999. However simple they appear on face, many of the issues associated with section 226 are actually extremely complex. This Report attempts to present a reasonable summary of each of the core issues, and hopes that this approach does not suggest that there are uncomplicated solutions to any concerns raised in the following chapters.

In addition, there are a number of legal issues and statutes covered in this Report which some legally-trained readers might believe are not necessary to describe in such detail or should already be well understood. It was important to include each of these discussions, however, because they are all issues that have been previously mentioned by States, employers, unions, service providers, or other interested parties as potential complications to the effective implementation of the potential database(s).

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[2] Federal Register, July 25, 1995, pp. 38204-38205.

3.0 LEGAL ISSUES

In considering the feasibility of Federally-required State or FMCSA-maintained database(s), there are a number of legal issues that must be considered. These include:

* Whether there are potential conflicts between the database(s) and existing Federal laws on confidentiality.

* Whether there are differences in legal ramifications if the database(s) are run by the individual States instead of one database run by the Federal government.

* Whether constitutional equal protection issues could be raised if the database(s) included only Commercial Drivers License (CDL) holders, as opposed to also including all other Federally-regulated transportation employees (i.e. in the aviation, maritime, rail, transit, and gas pipeline industries).

* Whether the legal standing of the database(s) would be enhanced if they were established by Federal legislation instead of only by U.S. Department of Transportation or Agency regulations.

* To what degree should those entities responsible for entering information into the database(s), such as employers, be liable if they made an error.

3.1 Federal Laws on Confidentiality and the Right to Privacy

3.1.1 The Effect on the Proposed Database(s) of Existing Federal Statutes and Regulations. There are a number of Federal statutes and regulations that establish privacy rights related to personal information in general, and to controlled substances and alcohol testing results in particular (and by extension, to the potential database(s)).[3] Those especially reviewed for the Report include:

* The Privacy Act of 1974

[3] There are other Federal statutes and regulations not cited specifically here which also incorporate relevant sections relating to the general topic of the confidentiality of medical, controlled substance, and/or alcohol records.

(5 U.S.C. §552a)

* The Freedom of Information Act
  (5 U.S.C. §552)

* The Confidentiality of Alcohol and Drug Abuse Patient Records Regulations
  (42 CFR 2.1, 2.13, 2.20, 2.22)

* The Transportation Equity Act for the 21st Century,
  Title IV -- Motor Carrier Safety
  (49 U.S.C. §508)

* U.S. Department of Transportation Regulations
  (49 CFR parts 40.25, 40.321, 40.323, 40.331, 40.349, 40.351)

* Federal Motor Carrier Safety Administration Regulations
  (49 CFR parts 382.405, 382.413)

* The Pilot Record Sharing Act
  (49 U.S.C. §44936)

* The Driver's Privacy Protection Act
  (18 U.S.C. §2721)

* The Health Insurance Portability and Accountability Act of 1996
  (42 U.S.C. § 1320d et seq)

Beyond doubt, a Federally-mandated database comprised of DOT-regulated employees ineligible to perform safety-sensitive functions because they are in violation of Federal controlled substance and alcohol prohibitions triggers Federal laws on confidentiality for substance abuse and alcohol records. The disclosure of such records may be restricted in some measure by at least one or more of the above-cited statutes and regulations.

However, all but one of the cited statutes and regulations provides for written consent for the release of records by the individual who is the subject of the records. Many, if not all, of the statutes and regulations also appear mindful of Constitutional privacy concerns and contain provisions designed to protect against unwarranted disclosures, namely by:

* permitting review of records by the affected person,

* affording the opportunity to correct or amend the record,

* restricting use of the record to a limited purpose,

* limiting access to the information,

* securing the information,

* limiting the duration that the information is retained, and

* imposing criminal penalties and fines for willful violations.

After review of existing Federal statutes and regulations, it appears that the potential database(s) will successfully comply with the restrictions described above, if:

A. The database requirement is authorized or mandated by Congress, and.

B. The legislation mandating these requirements includes the following elements:

1. Individual Consent and Waiver Requirements. In order to access the test record database(s), employers would be required to obtain written consent from the applicant CDL holder. Failure to complete the Federally-prescribed consent form would prohibit the prospective employee from being considered for safety-sensitive functions. The employer, before accessing a database, would be required to certify or affirm that he or she held such a written consent from the applicant. The written consent form would include both permission to enter information on the CDL holder into the database(s) as well as to be able to query the database about the applicant.

   The written consent form must be retained for a designated period by the employer (or their service agent). The consent form must be specific as to employer (or service agent) who is being permitted to input or solicit information from the database(s), the specific purpose of the input or query, and the limited length of time the consent was authorized.

2. Restrictions On, and Penalties For, Improper Use of Information. There must be significant penalties for employers either sharing information from the database(s) with unauthorized third parties [4] or for violating use restrictions. Database inquiries must be carefully controlled, with each authorized employer's request being recorded by the database computer system in an auditable form, and retrievable by FMCSA for employer audits.

3. Statutory Preemption of Conflicting State and Local Laws or Regulations, or Inconsistent Federal Statutes.

An excellent model with respect to most of these elements is to be found in the Pilot Record Sharing Act (49 U.S.C. §44936).[5] It is recommended that any contemplated Congressional mandate make liberal use of the core content and language in sections (f) and (g) of this statute, revised as appropriate and directed towards FMCSA-regulated drivers. A copy of the relevant portions of the Act (sections (f) and (g)) are at Appendix 3.

It should be noted that any contemplated legislation must also require implementing regulations by both FMCSA in 49 CFR part 382 and the U.S. Department of Transportation in 49 CFR part 40.

3.1.2 Discussion of the Individual Federal Statutes and Regulations

A. The Privacy Act of 1974 (5 U.S.C. §552a). The primary goal of the Privacy Act is to allow individuals on whom information is being compiled and retrieved the opportunity to review the information and request that the Agency holding the record correct any inaccuracies. Congress enacted the Privacy Act to provide certain safeguards against an invasion of personal privacy by providing individuals with more control over the gathering, dissemination, and accuracy of information collected by the government about them.

The Privacy Act sets forth specific conditions for disclosure of collected information (see 5 U.S.C. §552a, Records Maintained on Individuals, (b)).

The Privacy Act defines a "record" as:

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[4] Such as unscrupulous attorneys, insurance companies, companies conducting background checks on individuals, etc.

[5] The Act is also commonly referred to as the Pilot Records Improvement Act of 1996.

> ... any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history, and that contains his name ... or other identifying particulars ... (5 U.S.C. §552a (a)(4)) (emphasis added)

The Second Circuit U.S. Court of Appeals has held that "record" under the Privacy Act has a broad meaning that includes any personal information about an individual that targets that individual through "an identifying particular".[6]

It is evident that the definition of personal information found in this Act is sufficiently broad as to encompass the type of controlled substance and alcohol test records envisioned in the potential database(s). Accordingly, the disclosure of such information, absent either the prior written consent of the individual to whom the record pertains or a specific exception to disclosure under the statute, would be a violation of this statute.

The Privacy Act also provides further protections which appear to be applicable to the potential database(s):

* Each Agency maintaining records must, if requested, permit the individual to review and copy the record (5 U.S.C. §552a(d)(1)).

* An individual must have an opportunity to correct or amend the record (5 U.S.C. §552a(d)(2)).

* Each Agency must only maintain personal information that is relevant and necessary to accomplish the Agency's purpose (5 U.S.C. ' 552a(e)(1)).

B. The Freedom of Information Act (5 U.S.C. §552). The Freedom of Information Act substantially mirrors the Privacy Act, thereby enabling Federal agencies to deny access to private information about another individual.

Because the Privacy Act is considered a "statute" under the Freedom of Information Act ("FOIA") exemption, any record exempt from disclosure under the Privacy Act is likewise exempt from disclosure under the FOIA.[7]

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[6] Bechhoefer v. U.S. Department of Justice Drug Enforcement Administration, 209 F.3d 57, 60 (2d Cir. 2000).

C. The Confidentiality of Alcohol and Drug Abuse Patient Records Regulations (42 CFR 2.1, 2.13, 2.20, 2.22). U.S. Department of Health and Human Services (DHHS) regulations affecting confidentiality of drug abuse patient records severely limits the release of information from drug abuse patient records without prior written consent. These regulations also permit several exceptions, including for medical emergencies and to qualified personnel for research, audit, or program evaluation (see 42 CFR 2.22 (d)). It is questionable whether these rules will apply to the types of records which would be maintained in the potential database(s).

D. The Transportation Equity Act for the 21st Century, Title IV (49 U.S.C § 508). A portion of this Act limits the liability of anyone complying with U.S. Department of Transportation regulations when they provide safety performance records on drivers being considered for employment. The section further limits the use of such records by employers, establishes the right of drivers to review and comment on their record, and prohibits States and local jurisdictions from issuing contrary laws. Finally, written authorization by a driver to release motor vehicle driving records is not required.

E. U.S. Department of Transportation Regulations (49 CFR part 40) and FMCSA Regulations (49 CFR part 382). In August 2001, expanded Department of Transportation (DOT) regulations (replacing the previous 49 CFR part 40 with new and enhanced regulatory text) and FMCSA conforming regulations (amending 49 CFR part 382) were implemented.

The current 49 CFR part 40 requires regulated employers to request Federal substance abuse and alcohol test information from an applicant's previous employers for the previous two years (49 CFR 40.25).[8] This information, however, can be requested only with a written consent obtained from the applicant, which is forwarded to each previous employer. Each queried employer is required to respond with the required information and to maintain a record of the information released. The text of 40.25 is at Appendix 2.

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[7] Stimac v. FBI, 577 F. Supp. 923 (N.D. Ill. 1984).

[8] FMCSA regulations have had this specific mandate in place for several years. The new part 40 now requires all DOT-regulated employers to comply.

With a few exceptions, service agents[9] or employers may not release any medical or Federal test information about an employee to a third party without the employee's "specific written consent" (49 CFR 40.321). This is defined as a statement signed by the employee/applicant agreeing to the release of a specific piece of information to a "particular, explicitly identified, person or organization at a particular time". So-called blanket releases, permitting a release of categories of information or results to a category of parties (such as all members of a consortium or trade association), are forbidden (see 49 CFR 40.321 and 40.351). The relevant regulatory text is at Appendix 2.

Service agents are responsible for the same confidentiality requirements as employers. They must protect the security and confidentiality of test records from unauthorized persons. This includes the physical security of records, access control, and computer security measures to safeguard confidentiality of data in electronic databases (49 CFR 40.351).

FMCSA's conforming regulations echo DOT's information protection requirements for employers, including the necessity of obtaining a written release (see 49 CFR 382.405(f) and (h); 49 CFR 382.413). The relevant regulatory text is at Appendix 2.

F. Pilot Record Sharing Act (49 U.S.C. §44936). In the Pilot Record Sharing Act, Congress created a records system which eliminates or minimizes many of the potential conflicts which might constrain an effective implementation of the potential database(s). To date, there has been no successful challenge to the Act. The Act contains acceptable consent and waiver of liability provisions (also discussed in section 3.5 of this Report), as well as incorporating language resolving conflicts with other laws in favor of the Act. It also contains restriction of use language that could help ensure that Constitutional rights to privacy are not encroached without the employee's permission.

As codified in 49 U.S.C § 44936, Employment Investigations and Restrictions, the statute covers background investigation requirements established by the Federal Aviation Administration (FAA) to establish if pilots meet air transportation security standards.

Section (f) establishes the requirements for pilot records of employment. Subsection (f)(2) requires written consent to furnish and obtain records (along with a release from liability clause which is discussed in section 3.5 of this Report). Subsection (f)(3) and (f)(4) limits records which can be obtained to a five-year reporting period with one exception (a driver's license or airman suspension that is still in effect).

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9 Such as laboratories, Medical Review Officers (MROs), and Consortiums and Third Party Administrators (C/TPAs).

Subsection (f)(5) prohibits furnishing required records without receipt of a written consent form and establishes a 30-day deadline to furnish the requested records. Subsection (f)(6) requires the pilot whose records were requested to be notified within 20 days, and to receive a copy of the document(s) furnished if requested. Subsection (f)(7) permits reasonable charges to be established for the cost of preparing and furnishing these records. Subsection (f)(8) requires FAA to create standard forms to be used to request pilot records.

Subsection (f)(9) establishes that pilots have the opportunity to correct inaccuracies in their records by submitting written comments before a hiring decision is made. Subsection (f)(10) gives pilots an opportunity to review certain employment records and requires employers to provide the documents within a 30 day deadline.

Subsection (f)(11) limits employers on how they may use records obtained under the statute to only assessing qualifications to hire the pilot. This subsection also prohibits divulging records to individuals not directly involved in the decision.

Subsection (f)(12) requires FAA to periodically review the records described in the statute and report to Congress.

G. The Drivers' Privacy Protection Act of 1994 (18 U.S.C. §2721). In this statute, State departments of motor vehicles are prohibited from releasing "personal information" and "highly restricted personal information" about a driver except in described circumstances. Among the permissible uses are for employers (or their agents or insurers) to obtain or verify "personal" information relating to a holder of a CDL (18 U.S.C. §2721 (b)(9)). For uses not described in Section (b) of the statute, personal information in motor vehicle records may not be disclosed without the "express consent" of the driver (Section (b)(11)). The driver may choose to waive his or her individual right to privacy for individual requests that fall outside the described exemptions (Section (c)), but has no obligation to do so.

H. The Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. §1320d et seq). The Act (commonly referred to as HIPAA) required DHHS to establish national standards for the electronic transmission of health care claims and related transactions. The Act also required DHHS to adopt national security and privacy standards to protect health care information. As required by the Act, DHHS issued final and amended rules establishing privacy requirements. DHHS' Standards for Privacy of Individually Identifiable Health Information was published in late 2000 (65 FR 82462) and amended in 2002 (67 FR 53182).

Although HIPAA intends that at least some types of substance abuse and alcohol testing are to be affected by the Act, DHHS essentially exempted DOT testing from its requirements in both the preamble of the original final rule (65 FR 82593-4) and in the final rule text itself (45 CFR 164.512a). DHHS' regulations state specifically that health information deemed to be protected may be disclosed without the need for a written authorization to the extent that it is required by law (as would be the case with DOT testing).

3.1.3 Constitutional and Other Statutory Issues Relating to Confidentiality and the Right to Privacy Concerns. Besides potential conflicts with current Federal statutes and regulations, Constitutional issues relating to confidentiality and right of privacy may also impact the feasibility of the potential database(s). Constitutional concerns include issues related to the Commerce Clause (Article II, Section 8), the Tenth Amendment, the Fourteenth Amendment, the Fourth Amendment, the Fifth Amendment, and the Supremacy Clause (Article VI, Clause 2).

An additional statutory concern may be raised if it is believed the Americans with Disability Act (ADA) applies.

In addition, portions of the U.S. Office of Management and Budget (OMB)'s and DOT's guidelines on the quality of information disseminated by the Federal government will apply to FMCSA-maintained or sponsored database(s).[10]

A. The Commerce Clause. The Federal government's ability to legislate in the area of State-maintained databases of Federal test records is bolstered by the Commerce Clause of the U.S. Constitution.[11] The Supreme Court recently held that the Driver's Privacy Protection Act of 1994 (18 U.S.C. §2721), which regulates the disclosure and resale of personal information contained in the records of State motor vehicle departments, was a

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[10] The OMB published final guidelines effective January 3, 2002. They were entitled "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies." In response to OMB's requirements, the DOT issued its own "Information Dissemination Quality Guidelines" to be effective October 1, 2002.

[11] Article II, Section 8. The Commerce Clause of the Constitution grants Congress the power to regulate the channels of interstate commerce; regulate the instrumentalities of persons, or things in, interstate commerce; and regulate activities having a substantial relation to or effect on interstate commerce.

proper exercise of Congress' authority.[12] In addition, the Court held that the principles of Federalism contained in the Tenth Amendment were not violated by the Act's restrictions on a State to not disclose a driver's personal information without the driver's consent.[13]

B. Right to Privacy. The U.S. Constitution does not contain any express right to privacy provision. However, there is U.S. Supreme Court dicta, mainly in Whalen v. Roe[14], which suggests that a limited right to informational privacy is a liberty interest within the Fourteenth Amendment.

The Court in Whalen identified the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks and other massive government files. In addition, the Court stated that the right to collect and use such data for public purposes is typically accompanied by a parallel statutory or regulatory duty to avoid unwarranted disclosures.[15] The Court further noted that in "some circumstances", the duty to avoid unwarranted disclosures "arguably has its roots in the Constitution".[16]

The Court in Whalen did not need to decide any question on the actual unwarranted disclosure of accumulated private data, since the involved State's statutory scheme appeared to give proper concern and protection to the individual's reasonable expectation to privacy.[17] However, it seems evident that Congress would be well advised to carefully consider this issue in order to ensure the Constitutionality of information-related legislation such as the potential databases.

C. Fourth Amendment. Fourth Amendment issues relating to the Federal government's ability to promulgate regulations which affect regulated employees and mandate Federal substance abuse testing appear to have been effectively resolved by Skinner v. Railway Labor Executives' Association.[18] In Skinner, the Court held that the

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12 Reno v. Condon, 528 U.S. 141, 120 S. Ct. 666, 671 (2000).

13 Id. at 672. See also footnote 27 for a description of the Tenth Amendment.

14 Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869 (1977). See also footnote 35 for a description of the Fourteenth Amendment.

15 Id. at 879.

16 Id.

17 Id.

18 Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 619, 109 S. Ct. 1402

Federally mandated substance abuse and alcohol tests prescribed by the Federal Railroad Administration were not for the purpose of assisting in the prosecution of employees, but rather to prevent accidents and casualties caused by alcohol or drugs. The Court in Skinner, in relevant part, reasoned that the governmental interest in ensuring the safety of the traveling public and of the employees themselves justified prohibiting covered employees from using drugs or alcohol on duty, or while subject to being called to duty.[19] This general tenet was more recently affirmed in Parry v. Mohawk Motors of Michigan, Inc.[20]

However, in Skinner, the Court's approval was based on a determination that the government properly balanced safety and privacy concerns, and that actions that would upset this balance (e.g. by significantly reducing privacy protections without appropriate safeguards) could throw the Court's acceptance into question.

It would appear that as long as there is a clear safety nexus, properly divorced from a law enforcement interest, employees regulated by the Federal government will be deemed by Federal Courts to have a reduced expectation of privacy. No Fourth Amendment violation appears to exist where the right to protect the public is seen to outweigh the limited intrusion on the regulated employee created by a Federal substance abuse or alcohol test. Similarly, if the driver is properly protected against unwarranted or unauthorized disclosure, the potential database(s) would not appear to create a Fourth Amendment violation.

D. Americans With Disabilities Act (ADA). It is well established that if an employee or applicant is currently engaging in the illicit use of drugs, and the employer acts on the basis of the knowledge of such usage, the employee or applicant is not afforded protection under ADA as a "qualified individual with a disability".[21] Further, psychoactive substance abuse

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(1989). The Fourth Amendment addresses the right of the people to be secure from unwarranted searches and seizures. This issue was often raised in the past as a challenge against Federal substance abuse and alcohol testing programs.

[19] Id. at 620-621.

[20] Parry v. Mohawk Motors of Michigan, Inc. 236 F.3d 299, 307 (6th Cir. 2000). The Court held that a random substance abuse test required of a truck driver who occupied a safety sensitive position under Federal regulations did not violate the Fourth Amendment prohibition against unreasonable searches.

[21] 42 U.S.C. ' 12114(a)(1990); 29 CFR 1630.3(a). However, use of a prescription drug under the supervision of a health care professional, or other proper uses under the Controlled

disorders resulting from current illicit drug use are expressly excluded from being considered a disability.[22] Protection is afforded an individual who has successfully been rehabilitated and is no longer using drugs, is being rehabilitated and is no longer using drugs, or is erroneously regarded as engaging in illegal drug use.[23] Importantly, casual or recreational use of illegal drugs without dependence or addiction does not qualify for ADA status.[24]

ADA does impose severe restrictions on medical examinations/inquiries and strictly regulates the confidentiality of such information. ADA provides that before an offer of employment is made, an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."[25] Post-job offer medical examinations and inquiries can be conducted prior to the commencement of job duties provided that the information is maintained separately and is treated as a confidential medical record.[26]

ADA, however, does create a significant exemption for testing conducted by the Department of Transportation:

> [An employer] may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that ... employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of

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Substances Act or other provisions of Federal law, may be covered under ADA. 42 U.S.C ' 12111(6)(A)(1990); 42 U.S.C ' 12210 (d)(1)(1990).

22 42 U.S.C. ' 12211(b)(3); 29 CFR 1630.3(d).

23 42 U.S.C. ' 12114(b)(1)(2)(3)(1990); 29 CFR 1630.3(b)(1)(2)(3).

24 EEOC Technical Assistance Manual in Employment Provisions of the Americans With Disabilities Act, at &8.5, page VIII - 4 (1992).

25 42 U.S.C. ' 12112(d)(2)(A).

26 42 U.S.C. ' 12112(d)(3)(B).

> employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation)[27]

ADA further provides:

> Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to:
>
> (1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and
>
> (2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (C) of this subsection ... [28]

Thus, ADA would not appear to have application to the privacy issues affecting the potential database(s). However, beyond the scope of the database(s), employers may still be at risk by not hiring an applicant solely because he or she was positive on a previous Federal test, having discovered that information by querying the database, where the applicant has since rehabilitated themselves in accordance with Federal requirements. Therefore, ADA's requirements militate in favor of purging the databases so they only contain information that currently disqualifies the applicant under existing Federal law. Thus, a positive test from four years ago would not constitute "currently engaging" in drug or alcohol use for ADA purposes.

E. Information Dissemination Quality Guidelines. Consistent with OMB requirements (republished in final form at 67 FR 8452), the DOT issued guidelines effective October 1, 2002, to help ensure the quality of information collected and disseminated pursuant to its regulations. Entitled "Information Dissemination Quality Guidelines", the guidelines focus

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[27] 42 U.S.C. ' 12114(c)(5)(C)(1990); 29 CFR 1630.16(b)(5).

[28] 42 U.S.C. ' 12114(e)(1) and (2).

on the utility, objectivity, and integrity of data and other information which is either routinely or even occasionally made available through them to the public. Such guidelines would be seen to apply to any database(s) that FMCSA authorizes, operates, or sponsors.

The standards found in the Guidelines not only apply to information that DOT or its Agencies directly generate, but also to information that other parties provide to them either by request or mandate, or data they intend to rely upon for some action, policy, or other consideration.

In accordance with the DOT Guidelines, procedures must be in place to help ensure the integrity of any disseminated information before its release by the DOT or its Agencies. In addition, a key to the effectiveness of the Guidelines is having in place a mechanism for a company, group, or individual to correct information that is inaccurate or of questionable credibility. The Guidelines establish a review process which will examine the requested correction and make a determination of whether an amendment or record deletion is required. Such a consideration must be made within a limited timeframe (60 days) by the DOT or the Agency.

3.2 State Versus Federal Operation of a Federal Test Database

3.2.1 The Database as a State Requirement. Compelling States to administer database(s) of Federal substance abuse test results could raise the issue of whether the Federal government was impermissibly violating State sovereignty in violation of the Tenth Amendment of the U.S. Constitution.[29] The Constitution has never been understood to confer upon Congress "the ability to require the States to govern according to Congress' instructions".[30] States cannot be compelled to enact and enforce a Federal regulatory program.[31]

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[29] The Tenth Amendment establishes States' rights, reserving to States all powers not specifically granted the Federal government or prohibited to the States by the Constitution.

[30] New York v. United States, 505 U.S. 144, 162, 112 S. Ct. 2408, 2421 (1992);Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365 (1997).

[31] New York v. United States, 505 U.S. 144, 176, 188, 112 S. Ct. 2408, 2428, 2435.

Nevertheless, the Tenth Amendment issue could be addressed by tying the States' receipt of highway funding to their voluntary involvement in the Federal database requirement. Congress may attach conditions on the receipt of Federal funds,[32] and did so successfully with their approach in the Motor Carrier Safety Improvement Act of 1999.[33]

In section 202 of the Act, Congress linked actions by the States regarding management of certain CDL requirements with obtaining their full measure of Federal highway funds.

> To avoid having amounts withheld from apportionment under section 31314 of this title, a State shall comply with the following requirements ... (49 U.S.C § 31311(a))

In this circumstance, compliance with the Federal requirement is not considered mandatory for a State; non-compliance (like compliance) is also an option. Even with such "incentives" for volunteering, State cooperation is not seen as infringing upon State sovereign rights under the Tenth Amendment.

If States are to be required to implement, manage, and operate a database of test results mandated by the Federal government, a similar approach as applied in this Act would be necessary.

The Constitutionality of a State-maintained database may also be resolved by a recent U.S. Supreme Court ruling that Federal statutes that regulate States in their capacity as owners of databases appear not to be inconsistent with the Tenth Amendment. In Reno v. Condon, the Supreme Court held that the Drivers Privacy Protection Act of 1994 (DPPA), which regulates the disclosure and resale of personal information contained in State department of motor vehicle records, does not violate the Tenth Amendment.[34]

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[32] South Dakota v. Dole, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795 (1987).

[33] Pub.L. 106-159.

[34] Reno v. Condon, 528 U.S. 141, 120 S. Ct. 666 (2000). While agreeing that the DPPA requires time and effort on the part of State employees, the Court upheld the statute based on the distinction that "the DPPA does not require the States in their sovereign capacity to regulate their own citizens," but that "the DPPA regulates the States as owners of databases@. 528 U.S. at 151, 120 S. Ct. at 672. The Court found that the DPPA did not require the State to enact any laws or regulations, and did not require State officials to assist in the enforcement of Federal statutes regulating private individuals. Id. Therefore, the Court held that the DPPA is consistent with the constitutional principles established in New

3.2.2 State Laws on Confidentiality. Legal protections regarding confidentiality in State laws vary widely in scope. However, any variances found in State laws can be overcome with properly drafted Congressional legislation, which would include an explicit preemption provision. Analogous case law has generally held that Federal law preempts conflicting State law confidentiality provisions.[35] In some cases (i.e. Rhode Island, Minnesota, others), State confidentiality legislation already specifically incorporates exceptions for Federal laws and/or U.S. Department of Transportation regulatory compliance.

3.3 Equal Protection Issues Under the U.S. Constitution

Of interest is whether an equal protection claim could be made if Congress mandates a database which contains FMCSA-regulated commercial drivers, and does not include other Federally-regulated safety-sensitive occupations (ship captains, airline pilots, railroad engineers, etc.). A statute that requires regulated employers to monitor the controlled substance or alcohol positive tests of commercial drivers, while not imposing similar requirements on other safety-sensitive workers, will not violate either of the Equal Protection Clause provisions of the U.S. Constitution (the Fourteenth and Fifth Amendments). [36]

The Fourteenth Amendment is not by its terms applicable to the Federal government. Actions taken by the Federal government, however, that classify individuals in a discriminatory manner will, under similar circumstances, violate the equal protection section of the Due Process Clause in the Fifth Amendment. There is no expectation that a database limited to CDL holders would be a violation of this Clause. [37]

York and Printz.

[35] See Pennsylvania Protection & Advocacy v. Feather Houstoun, 228 F.3d 423, 428 (3d Cir. 2000); Wisconsin Coalition for Advocacy, Inc. v. Czapleuski, 131 F. Supp. 2d 1039 (E.D. Wisc. 2001); many State cases.

[36] The Fourteenth Amendment establishes citizenship rights, and in Section 1, reaffirms the rights of citizens to both due process and equal protection of the laws before any State may deny them life, liberty, or property. The Fifth Amendment, in part, similarly provides protection to all persons from being deprived of life, liberty, or property without due process of law.

[37] See Federal Communications Commission and United States v. Beach Communications, Inc., 508 U.S. 307, 309, 313-314, 315-316, 113 S. Ct. 2096 (1993).

In the circumstance where ownership of the database(s) is considered to be held by the States, or the State passes legislation to take administrative action against a driver on the basis of the information contained in the database they manage, there is a potential question whether the Equal Protection Clause might now apply. Even if it does, however unlikely, the content of the potential databases does not meet either the intent or the letter of the legal threshold necessary to establish a violation.[38]

3.4 Congressional Legislation Mandate Versus Federal Agency Mandate

There is little debate about whether any conflicting State laws will adversely affect a Federal mandate for the potential database(s). The Supremacy Clause of the U.S. Constitution (Article VI, Clause 2) establishes that enacted Federal law prevails over State law irrespective of whether the latter's source is the State legislature or State Constitution.[39] In addition, the Supreme Court has previously interpreted "laws" under the Supremacy Clause to embrace both Federal statutes and administrative regulations.[40] Therefore, Federal regulations that are promulgated in accordance with an applicable enabling statute, and are otherwise free of conflict with other Federal law, should prevail over any conflicting State law.

The ability of U.S. Department of Transportation regulations to prevail over conflicting State laws has been enhanced by previous Federal legislation. Congress has granted the Secretary of Transportation the authority to review State laws or regulations for preemptive purposes where these laws present a potential for conflict with Federal

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[38] Based on the rather extensive case law, a statute or regulation creating a program to monitor commercial drivers would likely be upheld as naturally related to the interest of safety on the streets and highways. While Federal legislation would probably not equally burden all persons regulated by the Department of Transportation, this type of equality is not required under the Equal Protection Clause. In addition, drivers do not comprise a "suspect class", such as categorizations based on race, national origin, religion, gender, etc. The possession or use of a driving license is not a right but a privilege. The analysis applicable to the issue if it is raised would be the traditional "rational relationship" test for a legitimate State purpose.

[39] Chicago & N.W. Transp Co. v. Kalo Brick and Tile Co., 450 U.S. 311, 317, 101 S. Ct. 1124 (1981); Solid Waste Drivers' Association v. City of Albuquerque, 1997 WL 280761 (D. New Mexico March 11, 1997) No. Civ. 96 - 1421 JC/LFG).

[40] Fidelity Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014 (1982).

commercial motor vehicle safety standards. Although subject to judicial review, the law provides that, pending rule review:

> [a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced ... (49 U.S.C. §31141(a)).

In order to minimize possible conflicts with previously enacted Federal law, or the issue of whether a Federal agency (like FMCSA) exceeded its own enabling statute, implementation of the potential database(s) via carefully-crafted Federal legislation (rather than regulation standing alone) would provide a greater level of certainty that any conflict with State law would be resolved in favor of the potential database(s).

To review, there are two considerations which strongly encourage implementing the potential database(s) via legislation:

First, Federal regulation without specific preemptive legislation as its basis would not resolve the conflict with pre-existing statutes.[41] By contrast, if properly drafted, Federal legislation could eliminate any concern over inconsistencies with pre-existing Federal statutes. A possible model would be the language utilized in the Pilot Record Sharing Act which provides in the context of liability that, with certain narrowly drawn exceptions, no action may be brought "under any Federal or State law with respect to the furnishing of such records ... "49 U.S.C.§ 44936 (g)(1). Similarly, the Act empowers the private employer to demand from the applicant a release from liability "notwithstanding any other provision of law or agreement to the contrary ... " 49 U.S.C § 44936 (f)(2)(B). These relevant sections of the Act may be found at Appendix 3.

Second, the enactment of specific legislation would eliminate any argument that FMCSA had exceeded its enabling statute.[42]

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[41] Chemical Manufacturers Association v. National Resources Defense, Inc. 470 U.S. 116, 126, 105 S. Ct. 1102, 1108 (1985); Watson v. Proctor, 161 F.3d 593, 598 (9th Cir. 1998).

[42] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214, 96 S. Ct. 1375, 1391 (1976).

3.5 Employer Liability Issues

Of special concern in any implementation of the potential database(s) would be the issue of employer liability. Specifically, what might be the employer's degree of vulnerability if they made a good-faith mistake entering an individual into the database (either an error of omission or commission), or made a mistake in not removing an individual from the system (if and when that became required)?

Even assuming a Constitutionally valid Federal statute directing regulated employers and/or States to share information regarding commercial drivers, the potential would still exist for State Court actions against an employer by applicants or employees alleging defamation - related causes of action.[43] Nevertheless, the existing common law severely restricts the circumstances under which a private employer could be held liable for erroneous communications concerning an applicant or former employee.

The general rule under common law is that an employer is not liable for a defamatory statement unless the defamatory statement is made with "actual malice". In order to satisfy the threshold standard, an applicant/former employee would have to show that the defamatory statement was made with actual knowledge of its falsity or with reckless disregard to its truth or falsity. If the statements were made in good faith and without actual malice, "conditional" or "qualified" privilege would attach:

> ... It is an established general rule that a communication respecting the character of an employee is qualifiedly privileged if made in good faith by a person having a duty in the premises to one who has a definite interest therein, and this is true even though the communication contains a charge of a crime. So long as good faith is present, the person making the statement is not limited to facts that are within his personal knowledge, but may, and should, pass on to his inquirer all relevant information that has come to him, regardless of whether he believes it to be true or not ... (50 Am. Jur. 2d § 273 at 791)

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[43] Johnson v. Baylor University, 214 F.3d 630 (5th Cir. 2000).

In a substantial number of cases, State Courts have widely held that statements of former employers to inquiring prospective employers enjoy this qualified privilege.[44] The privilege attaching to statements made to inquiring prospective employers has been expressed in the following terms:

> ... the public interest requires that the protection of the privilege be accorded to a communication by a former employer to a prospective employer with regard to a former employee's work characteristics where the publisher acts in good faith and has reason to believe that to speak out is necessary to protect ... his own interests, or those of third persons, or certain interests of the public. By giving such information in good faith to other employers protects the publisher's own interests by insuring that he may seek and receive the same information when about to hire new employees... [45]

In Smith v. Baylor University Medical Center, a State Court recently applied this general standard to the specific context of a shared database that allegedly provided a false indication of a former employee's illicit drug use.[46]

Also in the substance abuse context, a more recent Federal Court decision recognized an employer's qualified privilege as applicable to what turned out to be apparently incorrect statements made to its employees concerning another employee's alleged substitution of her urine sample during a random drug test.[47] In Ishikawa v. Delta Air Lines, the Court held that a qualified privilege applied to an employer's communications "on a subject of mutual concern to the employer and the employee to whom the statement was made." The Federal Court further stated that liability would only arise if "the speaker does not

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[44] Kenney v. Gilmore, 195 Ga. App. 407, 393 S.E. 2d 472 (Ga. Ct. App. 1990), writ denied; Chambers v. American Trans Air, Inc., 577 N.E. 2d 612, 615-616 (Ind. Ct. App. 1991); Alford v. Georgia-Pacific Corporation, 331 So. 2d 558 (La. Ct. App), writ denied, 334 So. 2d 427 (1976); Erickson v. Marsh & McLennan Co., Inc., 117 N.J. 539, 569, A. 2d 793 (N.J. 1990); many others.

[45] Swanson v. Speidel Corporation, 110 R.I. 335, 293 A.2d 307, 310 (R.I. Sup. Ct. 1972).

[46] Smith v. Baylor University Medical Center, 1999 Tex. App. LEXIS 6569 (August 31, 1999).

[47] Ishikawa v. Delta Air Lines, Inc., 2001 U.S. Dist. LEXIS 10347 (D. Oregon June 27, 2001).

believe in good faith that the statement is true or if the speaker lacks reasonable grounds to believe the statement is true." Although the employer may have communicated erroneous information to its employees based on an allegedly incorrect laboratory report, the Court found that the plaintiff had failed to establish that the employer lacked a good faith belief that the laboratory results were accurate.

In two other related cases (Elcier v. Toys "R" Us, Inc. and Merritt v. Detroit Memorial Hospital), an employer's allegedly defamatory statements made to other employees were subject to a qualified privilege due to the employer's legitimate interests with regard to the other employees.[48]

In another case, Willis v. Roche Biomedical Laboratories, Inc., a drug testing laboratory also used the qualified privilege defense successfully in the case of a false positive report.[49] The Court in Willis reinforced the significance of the determination of malice:

> ... Malice is not implied or presumed from the mere fact of the publication, nor may it be inferred alone from the character or vehemence of the language used, nor found from the falsity of the statement alone...

To assist with the protection of employers who make good faith errors, Congress could provide a national standard of employer liability with respect to such data-sharing projects as the potential database(s), as it did in the Pilot Record Sharing Act (49 U.S.C. §44936). The Act requires, inter alia, that an air carrier request and receive certain information before allowing an individual to be placed into service as a pilot. In order to acquire this information, the air carrier is required to obtain written consent to the release of those records from the individual, and:

> ... may, notwithstanding any other provision of law or agreement to the contrary, require the individual who is the subject of the records to request to execute a release from liability for any claim arising from the furnishing of such records to or the use of such records by such air carrier (other than a claim arising from furnishing information

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[48] Elicier v. Toys "R" Us, Inc., 130 F. Supp.2d 307 (D. Mass. 2001); Merritt v. Detroit Memorial Hospital, 81 Mich. App. 279, 285, 265 N.W. 2d 124, 127 (Mich. Ct. App. 1978).

[49] Willis v. Roche Biomedical Laboratories, Inc., 61 F.3d 313 (5th Cir. 1995).

known to be false and maintained in violation of a criminal statute) ... (49 U.S.C. §44936(f)(2)(B)).

In a complement to the release provision, the Act also prohibits any individual who has executed such a release from bringing an action, under either Federal or State law, against the air carrier requesting the pertinent records, persons complying with such requests, or persons entering information contained in these records (49 U.S.C. §44936(g)(1)). This immunity provision does not apply to a person who supplies information that the person knows is false and was maintained in violation of a criminal statute of the United States (49 U.S.C. §44936(g)(3)).

The adoption of such language into any contemplated Federal legislation would ensure that private employers are subject to a uniform standard of liability.

4.0 OPERATIONAL ISSUES AND OPTIONS

From an operational standpoint, the potential database(s) could best be established in one of three ways. These are (in reverse order of recommendation):

* Each State would be required to establish an independent database, with employers querying the individual State database directly.

* Each State would be required to establish an independent database, but a computer link operated by or on behalf of FMCSA would provide a "pointer" for employers, directing them to any other State database with an adverse test record for that Commercial Drivers License (CDL) holder.

* FMCSA would operate (or sponsor) a single Federal database containing all records.

4.1 Option 1: The Database Responsibility is Assigned to the States/State Databases are Independent

With this option, each State would be asked to operate and maintain a database containing Federal positive test records for any driver holding a CDL for that jurisdiction. The database would be independent from those maintained by all other States, and employers would directly query the database when the driver/applicant produced his or her CDL for that State.

With the proper Federal technical support and funding, carefully crafted legislation which clearly described goals and responsibilities, and an ability to ensure employer compliance, this option is certainly possible from an operational standpoint. However, it is not recommended.

States currently are responsible for maintaining CDL records. [50] One State (Oregon) already has in place a State-legislated substance abuse test database for resident CDL

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[50] CDLs are issued by States in accordance with standards established by Federal Motor Carrier Safety Regulations (FMCSRs). States are likewise responsible for imposing licensing sanctions on CDL drivers who violate State laws or regulations, including FMCSR requirements which States have adopted. While the FMCSRs require drivers and employers to comply with its alcohol and controlled substance testing requirements, they do not require the imposition of a disqualification or other licensing sanction against drivers who test positive or otherwise violate its substance abuse and alcohol prohibitions unless the driver is operating a Commercial Motor

holders who have verified positives on Federal controlled substances tests (see also section 9.3 of this Report).

The principal disadvantages of this option are:

* Without supplemental government funding, this requirement would provide a significant level of financial burden on each State. Each State would have to purchase equipment, establish data input and data query infrastructures, and provide personnel to operate and manage its system. For small States, the cost to maintain the few records in their database would neither be cost effective nor cost beneficial.

* CDL holders who have moved from State to State will not automatically have their previous positive records from other States linked into an employer's query. An offending driver could continue to avoid detection from past positive tests.[51]

* Employers would have to be aware of how to access up to 50 different State databases.

* Service agents responsible for inputting information into the system (e.g. Medical Review Officers) may have difficulty determining in which State the applicant/driver has held a CDL.[52]

* Even if States choose to implement State sanctions for their own jurisdiction, they do not necessarily have direct enforcement capability to

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Vehicle at the time of the offense. FMCSA's role is to ensure that States comply with these FMCSR requirements.

[51] This assumes that Federal testing histories do not follow drivers as they move from State to State.

[52] Although specimen collectors could be directed to record the driver's State CDL number on the collection form, this is not an uncomplicated solution. First it would require FMCSA and DOT to change the donor identification requirement in each of its regulations. Second, if the driver failed to bring their State CDL, it might have to be construed as a refusal to test since this would be the only mechanism to verify the CDL. Finally, most collectors are only made aware they are conducting a Federal test; they don't necessarily know what regulation the donor is testing under (FMCSA, FAA, RSPA, USCG, FTA, FRA, or Federal employee). This requirement would require an extra collection step, and would significantly increase the potential for a collection error.

sanction out-of-state employers or MROs directly for non-compliance (see section 9.3 of this Report). A mechanism to notify FMCSA of non-compliance would have to be established.

4.2 Option 2: The Database Responsibility is Assigned to the States/State Databases are Linked

With this option, States would continue to be responsible for establishing an independent database of Federal test records for an employer to query. However, there would be a computer-based mechanism that "linked" the State databases so that an employer's query about a CDL holder would get a complete answer about the driver's eligibility to perform regulated safety-sensitive functions.

This "link" could best occur in one of two ways:

First, a system modeled on the current CDLIS[53] or NDR systems[54] could be created. In this model, employers would query a single central computer system database which would link the employer to all States holding adverse reports on the applicant/driver. The central database would operate essentially as a "pointer" system, with identified States being responsible for responding individually to the requesting employer. This approach is not recommended because of cost and administrative burden. It would require a single centralized database much like Option 3 and still require each State to create a separate database system to receive results or modify their existing databases.

Second, a modification to the current CDLIS or NDR-type model could also accomplish the desired goal. In this version, employer queries would be directed at the State holding the applicant/driver's CDL. The State would examine its own database, but before issuing a response, would query the centralized "pointer" computer which would direct the queried State to other States which hold adverse reports on the CDL holder. The State would report their findings to the employer, who would then be expected to directly query each other State identified by the "pointer" system.

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[53] Commercial Drivers License System. This system is sponsored by FMCSA, and is described in more detail in section 9.1 of this Report.

[54] National Driver Register. This system is sponsored by the National Highway Traffic Safety Administration (NHTSA), and is described in more detail in section 9.2 of this Report.

In both of the above choices, the central linking "pointer" database computer would have to be populated by the individual States in a manner similar to the way they support the current CDLIS and NDR systems. CDLIS and NDR themselves, however, are not capable of managing direct employer queries as they are currently designed and operated.[55] The States are also not currently prepared to handle the volume of expected employer queries and also lack the automated resources necessary to provide timely responses to employers in hiring situations.

However, as with Option 1 above, with the proper technical support and funding, carefully crafted legislation, and an ability to ensure employer compliance, this option also becomes possible.

The principal disadvantages of this option are identical to those described in section 4.1 of this Report, with the exception that a driver's history of violations would more likely "follow" them as they change States. An additional cost will accrue to the Federal government which must also sponsor and fund the projected central "pointer" computer system, unless a State's inquiries could be funneled through the existing CDLIS or NDR systems along with other routine information transactions.

4.3 Option 3: A Single Federal Database

With this option, the Federal government would be mandated to operate a single master database which would cover the entire country. No individual State databases would be necessary. Employers would be required to query only the single Federal database regardless of which State held the applicant/driver's CDL. The principal advantage of this type of single system is that it would avoid fifty State duplications of a data input, data management, and data reporting computer and communications infrastructures. For employers, it could greatly simplify their data entry/data query responsibilities.

The principal disadvantage of a single system is that it requires the Federal government to directly operate (or oversee) another large computer system. None of the other disadvantages described in sections 4.1 and 4.2 of this Report would apply in this option.

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[55] Currently, States can only access CDLIS or the NDR through a central State link. Individual State field locations are able to query CDLIS and the NDR, but the State is responsible for routing the remote locations into its single State link.

4.4 Principal Obstacles for Any Database Requirement. There are several major operational obstacles which must be carefully considered before any decision is made to implement the potential database(s). These are:

* How to effectively register and authenticate system users (both for data input and data query), and block unauthorized access and use of the system.

* How to fully guarantee employer compliance and ensure proper resources for enforcement.

* How to make certain that records on tests are inputted into the database(s) immediately as they are verified by MROs and other service agents, and reported to employers.

* How to ensure that any unnecessary due process requirements will not overwhelm or obstruct the system.

* How to fully fund the proposed system(s).

4.4.1 User Registration and Access Verification. Although cost-benefit questions remain, there is no question that the potential database(s) could provide a valuable safety service for the motoring public by better ensuring that CDL holders are eligible to perform safety sensitive duties before they are hired or drive. However, the logistics of managing such a system (up to 8,000,000 estimated drivers; over 575,000 regulated employers) is a formidable problem when consideration is given to how to manage the over half million potential users of the system.

Federal laws on confidentiality clearly limit access to Federal controlled substance and alcohol test records.[56] Any prescribed database containing these types of records must protect access to that information from unauthorized users. This makes a proper system of registering users essential, both those users of the system who must be approved to input data, and those users who will query the database (not necessarily the same group). The registration system must ensure that both categories of users go through an effective

[56] A more complete discussion of these issues is found in section 3.1 of this Report.

eligibility screen and that the system can prevent and/or detect identity theft or identity trading.[57]

Any registration and user management system considered for implementation must be able to effectively and efficiently manage system access, ensuring that access can be quickly approved/denied for 750,000 or more users. The system must also be able to check and verify identities of incoming users beyond a simple unencrypted user ID/password philosophy. Unless a suitable technical solution is agreed upon, however, no database of this type should be attempted, either at the State or the Federal level.

This issue is more fully discussed in section 5.7 of this Report.

4.4.2 Compliance and Enforcement. A second serious operational obstacle to be overcome is how to ensure that over a half million employers comply with this important safety requirement. The database(s) are essentially valueless as a safety protection if they only contain a percentage of the ineligible drivers who have violated FMCSA's substance abuse and alcohol program prohibitions. The current system, where employers are required to check back two years with previous employers, may be equally insufficient to fully and effectively protect safety (see also section 10.0 of this Report). An incomplete database containing only a portion of the required records would not improve the safety posture of the existing system. With an incomplete database, it could appear that a driver is eligible when, in fact, he or she may not be.

Unless the implementation of the database(s) is complemented by an equivalent commitment to enhance compliance monitoring and an increase in the sanctions for non-compliance, there is no point in making the type of investment necessary to create and maintain the proposed database(s).

A further discussion of this issue is found in sections 6.1 - 6.3 of this Report.

4.4.3 Timeliness of Record Input. A third serious operational obstacle to be overcome is to ensure that adverse records on drivers are inputted into the database(s) immediately after a violation of a Federal regulation is determined. Unnecessary or unauthorized

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[57] By identity trading, unscrupulous employers may share their identity with unauthorized users (lawyers or private detectives wanting to identify someone relative to a case they are working on; individuals checking up on others for personal or professional reasons; etc.).

delays will permit drivers to move quickly to another potential employer and avoid detection, because the adverse record is not yet available for query.

A further discussion of this issue is found in sections 6.1 - 6.3 of this Report.

4.4.4 Unnecessary Due Process Demands. A fourth serious obstacle to be overcome is to ensure that unnecessary due process demands are not permitted to overwhelm or obstruct the database system(s). Currently, the ability for a regulated employee to challenge a test result or test refusal falls within the purview of the employer/employee employment relationship, and secondarily with the employer's service agents (collectors, laboratories, and Medical Review Officers) performing their oversight duties in accordance with Federal regulations and guidelines.

Due process should be limited to a routine administrative procedure to correct erroneous information in the database(s). Such an error correction process need not require a formal administrative review hearing. Carefully crafted legislation must ensure that entry into a Federally-mandated database does not re-open either the scientific validity or legal defensibility of the reason an employee is being entered into the database.

Due process issues are especially concerning with a State-operated database, where sometimes cumbersome and expensive State due process procedures may apply. If formal administrative hearings are permitted, the system can be soon overwhelmed with costly and slow-moving due process procedures.

4.4.5 Cost Issues. Projected costs to the States (or to the Federal government for a single database) can be substantial and not cost-effective unless there is a commitment by all of the partners in this process (Congress, FMCSA, employers, MROs, etc.) to fully use this proposed system to improve safety. A cost review is provided as section 7.0 of this Report.

4.5 FMCSA Resources

If the potential database system is implemented, FMCSA currently does not have sufficient technical personnel in-house or the financial resources to properly manage/monitor a complex system of one or more databases. FMCSA has only one FTE employee assigned to oversee a large substance abuse and alcohol compliance program for the entire motor carrier industry. Although FMCSA has a Technical Assistance Group

(TAG) to advise it regarding compliance and technical issues, and field investigators who help ensure compliance with this safety program as part of their numerous duties and responsibilities, there are no additional headquarters staff available to plan, develop, or implement Federally-sponsored databases. Funding for additional staff resources or contractors would be necessary in order to ensure proper management of any required new project.

5.0 ADMINISTRATIVE/TECHNICAL ISSUES

This section of the Report focuses on the core administrative and technical issues which must be considered in determining the feasibility of creating one or more Federally-sponsored databases. Although there are numerous areas of potential concern, the following issues are discussed:

* Projected computer hardware requirements.
* Projected computer software requirements, including data security.
* Projected staffing requirements.
* Projected database content.
* Potential methods/means for employers/Medical Review Officers (MROs) to input data in the system.
* Responsibility for data accuracy.
* Establishing eligibility for employers/MROs to input the data and for employers to query the database(s).
* Potential methods/means for employers to query the database(s).
* Potential mechanisms for excising erroneous, invalid, or outdated entries from the database(s).
* Responsibility for data correction.
* Computer communications requirements (including if State computers must be linked by a "pointer" system).

In section 226 of the Motor Carrier Safety Act of 1999, Congress directed FMCSA to examine the feasibility of State-maintained databases. However, to ensure that Congress has a more comprehensive review for its deliberations, this section of the Report includes both a discussion of the potential for databases maintained by the States and a single Federal-maintained/operated database.

5.1 Projected Computer Hardware Requirements

Regardless of whether the potential database(s) are managed or maintained by individual States, or whether a single Federal database is determined to be necessary, the computer hardware requirements are projected to be neither technologically complex nor prohibitively expensive.

Hardware requirements for the database portion of the system, whether State-operated or Federal, should include (see Figure 1, page 45 for a functional diagram):

* A Data Server. The core database would reside on this server.

* A Web Server. This server would permit both employer/MRO data entry of positive and other ineligible drivers as well as employer queries on applicant eligibility through the Internet.

* A User Registration/Authentication Server. This server would house the user registry and user identification information, maintain system use and record amendment archives, and assist other computer components in the authentication of users attempting to access the system. This server would easily combine with the Web server.

* An Optical Character Recognition (OCR) Server. This server would be involved in the scanning of mailed or faxed-in forms filled out by employers/MROs to input positive controlled substance test results.

* An Interactive Voice Response (IVR) Server. This server would manage employer telephone inquiries on applicant eligibility.

* A Fax Reporting Server. This server would respond automatically by fax to requests for applicant eligibility received through the Web server or through the IVR server.

* Other Servers That Might Prove Necessary for the Operation of a Network (i.e. Mail Server, etc.)

* Cabling, Printers, Routers, Switches, and Other Hardware Necessary to Complete a Local Area Network (LAN) to Link all Required Servers.

Although individual servers are identified for each projected main function of the database system, applications on several servers may be combined onto one server where appropriate.

The estimated costs for these systems may be found at section 7.0 of this Report.

5.1.1 Data Server and Other Support Servers. If individual State databases or a single Federally-maintained database is mandated, FMCSA should be tasked with establishing specific computer hardware specifications and performance standards which must be met by each system.

If individual State databases are mandated, one option for the States would be to place the database requirement on their existing State computer hardware networks along with other State applications. This choice is not recommended unless the decision is made to append the positive Federal test information to the existing State driver files.

For individual States or for a single Federal database, it is generally recommended that selected software functions be each housed on a separate server, linked in a Local Area Network (LAN). It is therefore expected that at a minimum, separate servers for the database itself, for the Web program, for the fax reporting system, for the OCR/input system, for the user registration/authentication system, and for the Interactive Voice Response (IVR) software application be established (see also section 5.2 of this Report).

Firewall software solutions will likely be integrated onto the Web server and the database server, or could reside on its own separate server. Most States will already have an acceptable firewall protection system in place, so this requirement will likely not be necessary.

For small States, either a single microprocessor (one CPU[58]) or dual-processor system (two CPUs) for one or more of the above mentioned servers may be all that is necessary to handle the expected volume of transactions (data inputs and queries). For larger

[58] Central Processing Units, the so-called computer "chips".

States or for a single Federal database, consideration can be given to either a dual or a quad microprocessor system (four CPUs) for some of the servers, or establishing several dual microprocessor servers linked in a "server farm" for managing an expected larger volume of transactions at any particular point in time.[59]

Each server will have differing system demands depending on function. For example, a modest dual processor server may be able to handle up to 75,000 hits a day if performing as a Web server, but be able to handle 250,000 transactions per day if operating as the database server. Necessary increases in server capacity (including adding additional linked servers) can be predicted based on individual system demands and estimated peak loads.

Special hardware is necessary to support the Optical Character Recognition (OCR), Interactive Voice Response (IVR), and fax reporting systems. The OCR system will likely require a special high speed document scanner. The IVR (telephone call-in) and fax reporting systems both involve telephony technology in which the user (in this case the employer) utilizes a touchtone telephone to interact with the database. No human intervention from the database side is necessary; all transactions are handled by the computer. Their respective hardware systems, however, require special high-end fax boards and voice boards with multiple ports depending on user demand. The number of ports necessary will be dictated by expected volume of requests.[60]

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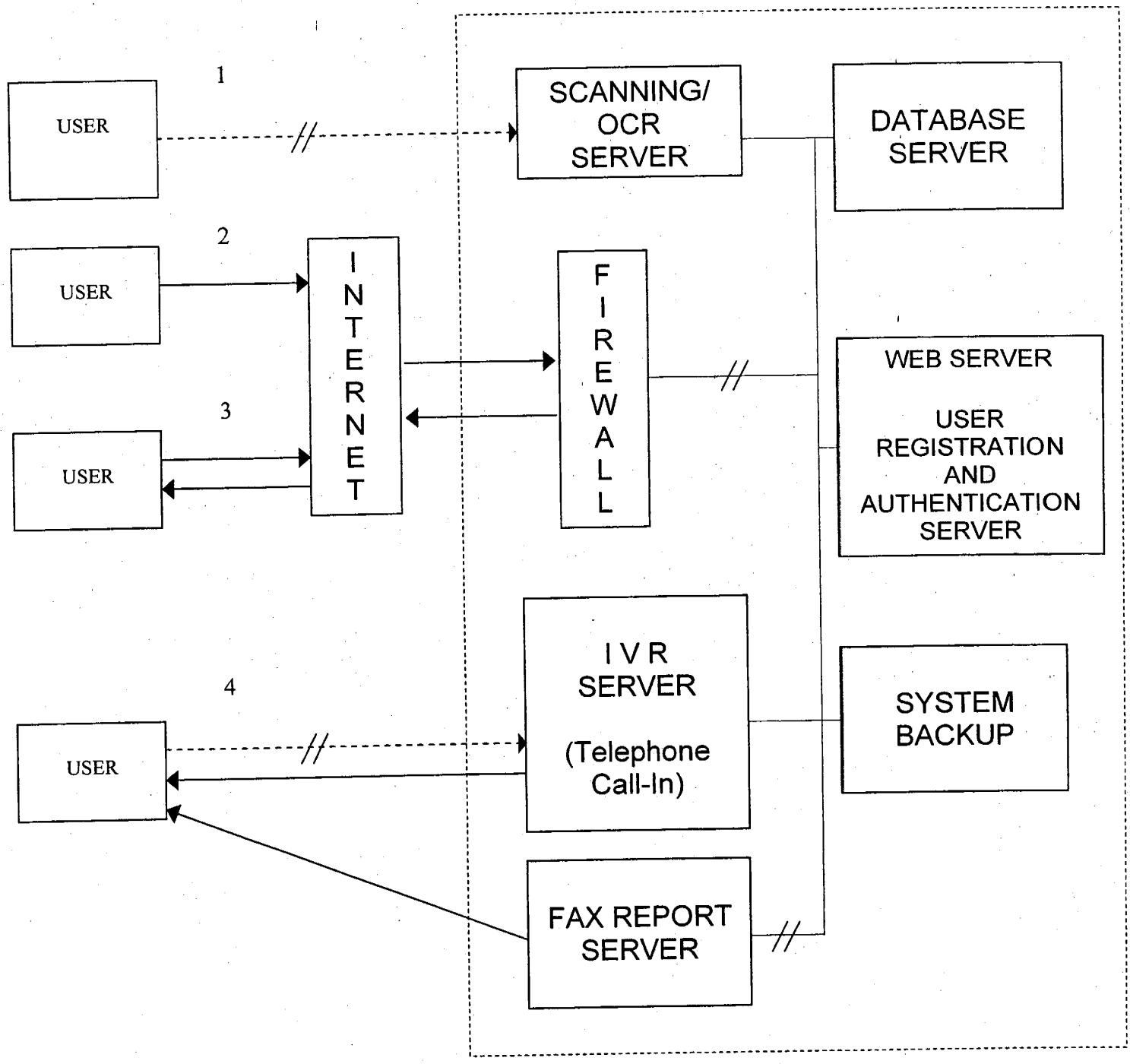
[59] This may be particularly necessary for the Web server. However, the predicted increase in the volume of records over time, even if it would extend into the millions, will likely have no real impact on computer hardware selection.

[60] Individual fax boards can be currently purchased having up to 12 ports; voice boards can be purchased having up to 32 ports each. For example, a 32 port voice board could handle over 1,000 calls per hour of two minutes duration each.

Figure 1.

Functional Model -- State or Federal Database System



1 Input received by mail or fax, then scanned into the system. Limited or no computer security vulnerability possible.

2 Input received through the Web.

3 Query received through the Web.

4 Query received via telephone keypad, and reply received by computer voice response and fax. No computer security vulnerability possible.

≠ Limited or no computer security vulnerability.

5.1.2 **Redundancies and Back-ups**. All data and support servers need to be established with maximum redundancies, including hard drive redundancy arrays with multiple drives to protect from potential data loss due to a hard drive failure. Suitable tape or hot-swappable hard-drive hardware back-up systems, and an appropriate size of UPS[61] would be mandatory. Specifications and performance standards for these support requirements must be established by FMCSA to ensure that all hardware systems are compatible.

5.1.3 Internet Connections. Each designed database system should have Internet access connectivity. The method and speed necessary to ensure rapid transactions with users will define what kind of connectivity infrastructure should be chosen.

For this type of Internet application, high-speed connections are essential.[62] Three possibilities may be applicable: T1 lines, ATM (Asynchronous Transfer Mode) lines, and T3 lines. [63]

For the proposed database(s), T1 and ATM lines will be adequate.[64] Multiple ATM and T1 lines can each be configured to increase bandwidth.[65] The difference is that ATM lines are much more flexible and cost-effective to add bandwidth to a system. [66]

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[61] Uninterrupted Power Source, which provides protection from power outages and surges.

[62] Connectivity speed is often tied to bandwidth. Bandwidth is the measure of information carrying capacity (the amount of data that can be transmitted in a fixed amount of time). In general, the greater the bandwidth, the greater the speed of the connection. The more complex the task (downloading a picture, video, music file), the more bandwidth is needed to achieve the same speed as a less complex task (downloading a page of text).

[63] T1 lines are dedicated phone connections supporting data rates of up to 1.5 Mbits per second. A T1 line actually consists of 24 channels, each of which supports 64 Kbits per second. Most telephone companies permit purchase of a full T1 line or fractional parts of a T1 line. T1 lines support both voice and data traffic.

ATM lines are a network technology based on transferring data in cells or packets of a fixed size. The small constant cell size permits ATM equipment to transmit video, audio, and computer data over the same network. The data rate for an ATM is also an equivalent 1.5 Mbits per second.

T3 lines are dedicated phone lines supporting data rates of up to 43 Mbits per second. A T3 line actually consists of 672 channels, each of which supports 64 Kbits per second.

5.1.4 Hardware Hosting. A cost option to purchasing hardware, and consequently being forced to replace it as it becomes outdated or obsolete, would be to have the computer systems "hosted" by an outside third-party vendor. An increasingly popular solution, the States or the Federal government could contract with a "host" vendor which would provide the hardware for a monthly or yearly fee. Usually, the hosted hardware would reside at the vendor's location. [67]

The host service would essentially be responsible to ensure that its equipment meets the latest technological standards, so that hardware update/upgrade costs would be borne by the third-party provider. This option is attractive because hardware configurations could be arranged which help ensure application load balancing, network load balancing, and dedicated database clustering to handle periodic high traffic volume.

Although hosted systems traditionally have been used to support Web-based commerce, there is precedence to expand the responsibility to cover all hardware requirements contemplated for by the potential database(s). This option would permit rapid increase in capacity, increased reliability, improved flexibility, increased transaction processing speed even during peak volumes, and decreased staff costs. Database confidentiality could still be properly managed in a hosted system to ensure minimum vulnerability to intrusion or failure of the hardware or software protection schemes.

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[64] Besides the high cost and the lack of flexibility it would provide, predicted demands on the potential database system will never likely come close to requiring the bandwidth provided by a T3 line.

[65] Connectivity speed is often tied to bandwidth. Bandwidth is the measure of information carrying capacity (the amount of data that can be transmitted in a fixed amount of time). In general, the greater the bandwidth, the greater the speed of the connection. The more complex the task (downloading a picture, video, music file), the more bandwidth is needed to achieve the same speed as a less complex task (downloading a page of text).

[66] The equipment cost for installing multiple T1s is about three times as expensive as for ATMs. The installation process for ATMs is much simpler. Multiple T1 installations often require a special resident onsite professional to manage the T1s. Multiple ATMs can be managed by the regular network administrator.

[67] Although not equivalent to the proposed database(s), CDLIS (see section 9.1 of this Report) essentially operates in this manner. The "Central Site" of the CDLIS pointer system resides at a subcontractor's facilities, located across the country from the actual contractor's location.

5.2 Projected Software Requirements

The computer software requirements projected for this Project are expected to be neither particularly sophisticated from a programming standpoint nor prohibitively expensive.

5.2.1 Server Operating Systems. The software operating systems selected for each projected server and the LAN need to be stable and robust in and of themselves; compatible with other server systems throughout the LAN; and capable of transparent transactions with each of the software applications selected (fax reporting, Web, IVR, etc.), and, potentially, other equivalent systems (if each State has its own system).

5.2.2 The Test Result Database. The core database software (where the test records will reside) will not need to accommodate more than about 100,000 new records each year, covering less than 25 megabytes of hard drive space.[68] For the core database, no major data manipulation will be necessary, with only lookup and data entry/data edit functions requiring database access. Most competent mainstream commercial relational databases would likely prove more than acceptable to house the core database(s). No extensive programming or re-programming will likely prove necessary.

For larger States or for a single Federal database, a higher end relational database would provide sufficient robustness to handle up to thousands of data inquiries each day. Smaller States may only expect to see less than 500 records each year, with relatively few inquiries each day.

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[68] It is estimated by FMCSA that there are 8,000,000 commercial drivers subject to its regulations. If 50% are randomly tested each year for drugs and less than 2% are positive, this will produce a total of less than 80,000 new records each year. If 1,000,000 pre-employment and other FMCSA category tests also occur, that will add no more than an additional 20,000 records to the total. If Congress decides to add alcohol positives and adulterations/sample substitutions/test refusals to the database, it would add only an estimated additional 3,000 records. Assuming 100% compliance with placing records into the database(s), only a little over 100,000 records would be entered in the database(s) each year nationwide. With a projected record length of 100 characters each, the total nationwide record storage requirement would be less than 25 megabytes each year.

High end relational databases are designed to allow access of data easily and securely through a Web browser, through firewalls, and through other software applications. They perform fast searches from formatted fields, and permit almost indefinite growth with enhanced scalability and reliability. Advantages of a relational database over less sophisticated database products include:

* Support for multiple users, data sharing, concurrency, transaction processing, and multiple data views.

* Support for various types of users, including database or system administrators, end users, etc.

* Support for multiple ways of interfacing into the database, including programmed applications, Internet access, interactive voice processing programs, fax-on-demand programs, etc.

* Better control of information redundancies, restriction of unauthorized access, enforcement of data integrity constraints, and facilitation of data-backup and recovery.

The software program itself is considered the engine for the database system, so that the actual database and any required interfaces must be planned, designed, and developed (programmed).

The cost of the core database software can vary based on the number of concurrent users, features, and if the database is to be accessed from the Internet. Commercial software manufacturers often base their pricing structure on at least several of these variables.

Depending on expected costs, it may prove to be more cost beneficial for a contractor to be hired to create a single custom database for use throughout the entire Program. In such a circumstance, all States could share the same software or the software could be used for a single Federal database. It is likely that the contractor would simply customize an existing commercially available product.

It is recommended that FMCSA be tasked with identifying one or more specific acceptable database product(s) and/or establishing minimum technical specifications for an approved final product.

5.2.3 Front End/Back End Software Operations. The potential database(s) will have to be accessed by users (employers, MROs, C/TPAs [69]), provide for database administration, and manage reporting back to the employers. One or more programs will have to be written, or one or more commercial products will have to be activated, to achieve the proper number and kind of user-friendly interfaces necessary. Such interfaces must be carefully constructed, and should give the same end-product appearance to users regardless of the number of separate database(s) mandated. A qualified contractor should be selected to create and program the user interfaces and user reporting packages, integrate them into the selected core database software, and be prepared to modify and/or add to the interfaces in order to accommodate evolving program data management requirements. Programs and programming languages employed in creating the front end/back end software operations should be mainstream, stable, and suitably robust.

5.2.4 Data Input/Data Query Software. Software to manage the data input/data query systems will need to be integrated into each projected database system. These include IVR (Integrated Voice Response) software, fax reporting software, and OCR/scanning software. Capable, commercial-grade products in each of these areas are currently available, and would likely need only light to moderate customization to fully meet the requirements of the Project. Both the IVR and fax reporting applications are from the same family (telephony) and in many cases the same application generator could be used to program both systems. OCR software should support the high-speed document scanners necessary to process up to hundreds of forms each hour.

In the description above, it should be noted that email is not recommended, either for data input or for data query. [70] Email can significantly increase the vulnerability of the system to data theft or integrity challenges to the system (hackers, virus introduction or re-transmission, etc.), while only adding minimally to the convenience for system users.

5.2.5 Data Security. Security and protection software will also need to be integrated into each protected system. Powerful commercial-grade firewall software solutions and

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[69] Consortiums/Third Party Administrators

[70] Employers/service providers with Internet access will already be able to transact their business without the need for confidential information being transmitted by email (see sections 5.5 and 5.8 of this Report).

sophisticated data virus scanning and system oversight software are currently available, and would likely need only light to moderate customization to fully meet the requirements of the database systems.

There can be many different types and points of attack to challenge the integrity of the potential database(s). Described below is an outline of the types of protection measures that must be incorporated into the final systems to help protect against intrusion (see also Figure 1, page 46).

Internet Access.

* IP Address. A commercial-grade firewall system must be used. Firewalls can be implemented in both hardware and software solutions, or a combination of both.

* Online Access Activities. Relying on unencrypted password protection schemes for users of the database(s), of course, is totally unacceptable. There are two standard methods to ensure security of information that is either being posted (inputted) or retrieved (queried): digital certificates[71] and SSL.[72] Both protocols have been approved by the Internet Engineering Task Force. A digital certificate type of system would clearly be the best choice for the database Project. However, it is likely that the certificates could be issued by the database system itself, without the need of contracting with an outside authenticator.

IVR (Voice Response) System. No special security measures are necessary. The information sharing mechanism in the voice-activated response is one-way only (the database server gives information to the IVR system which converts the information to a computer-generated voice response given over the phone). The user does not

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[71] A trusted third-party organization or entity (including a Federal agency such as FMCSA or the States) issues a "digital certificate" used to create digital signatures and public-private key pairs. The purpose is to guarantee that the individuals granted the unique certificates are, in fact, who they claim to be. When the registered users check into the system, they are identified specifically through their unique encryption IDs.

[72] SSL (Secure Sockets Layer) is a protocol designed to transmit private documents over the Internet. This is the protocol users enter when they provide credit card information in a secure manner with an Internet Service Provider (ISP). A user enters into a system, and once linked, can transmit only protected information.

directly access the computer network where the database resides. There is no perceived computer system vulnerability to intrusion or hacking.

Fax Back Reporting System. As with the IVR system, the information sharing mechanism is one-way. In this system, the user does not directly access the computer network where the database is resident. There is no perceived computer system vulnerability to intrusion or hacking.

Fax-In and Mail-In Data Entry. The user does not directly access the computer network where the database resides. There is no perceived computer system vulnerability to intrusion or hacking.

The Database Itself. The database software can be configured to record the source of internal and external data modifications, additions, and deletions. Decisions on the type of security protocols to be implemented at the database level are very important.

5.3 Projected Staffing

It is very difficult to estimate exact staffing requirements for this database Project. It is recommended that the system design be as automated as possible, both for purposes of data input and for data query.

5.3.1 At the System Location. Each database system itself will require a System Administrator. The System Administrator is expected to provide hands-on management and operation of the system. This position would require at least three years of experience in an equivalent management position, and at least three years direct operational and/or programming experience with sophisticated network operating systems and environments, one or more of the commercial applications software being employed, data and system security, user authentication, Web programming and site management, and communications protocols. Differing levels of skills and experience may be necessary depending on the size of the database. For the States, this function may be part of the duties of a senior member of the State's IT staff.

Larger State database systems or a single Federal database will likely also require an Associate System Administrator/Programmer. This individual should have at least three years of direct experience as a programmer and in the operation of similarly scoped database systems. This experience should cover LANs, system security, Web sites, and communications protocols.

Larger State database systems or a single Federal database will require two to four Client Service Representatives. These individuals will field user questions and solve problems, handle data scanning responsibilities, and provide miscellaneous administrative and clerical support duties. Smaller State databases would likely handle these duties with a single full-time or part-time individual.

Other full-time or part-time administrative personnel may be necessary to cover accounting/ bookkeeping and other administrative overhead functions.

All described positions may be FMCSA or State employees, contractors, or a combination of both.

5.3.2 At FMCSA. Regardless of whether States are required to maintain individual databases or there is a single Federal database, FMCSA will have to maintain a Project Manager to be responsible for the on-going Project, establish policy, ensure compliance with regulations and guidelines, and oversee the budget. This position could be full-time or part-time.

If a decision is made to handle error correction petitions and/or return-to-work re-qualifications (see sections 5.9 and 5.10 of this Report), one to three Program Analysts would be responsible for the evaluation of documents to determine compliance with pre-established FMCSA guidelines. These positions may be FMCSA employees or this function could be contracted out.

There may be additional overhead functions required at FMCSA to manage this Project.[73]

5.4 Projected Database Content

The proposed database will be made up of individual records, each of which will contain information on a regulated Commercial Drivers License (CDL) holder who has tested positive on a Federal test or violated a Federal prohibition sometime in the designated timeframe established by Congress. Each record will contain the results of one positive test, or a refusal, and should be no longer than 100 characters. The record should be sorted on the basis of the driver's social security number, but also should contain his or

[73] Such as contract procurement, accounting, or other technical support.

her full name, date of birth, the date of specimen collection, the specimen identification number, laboratory (if applicable), the date the Medical Review Officer (MRO) or Breath Alcohol Technician (BAT) notified the employer of the positive determination (or the date the refusal was determined), the identification of the MRO or who inputted the information, an employer code, the type of test (e.g. random), the substance causing the test result (e.g. marijuana), and information regarding completion of the return-to-work requalification (if applicable).

5.5 Methods/Means to Input Data

Parties responsible for inputting entries would be required to complete the task within 24 hours of the adverse determination or being notified of the adverse finding by the determining party.

There are three practical methods to input data into the potential database(s). They are:

* Web
* Fax
* Mail / Overnight Courier

Each method should be available to users and each should involve a standardized format to accept responses. All three methods are required because not all users (service agents or employers) will have Web access. Email would not be an acceptable means to input data due to computer security issues and the difficulty of user authentication.

The following process is recommended.

In the Web-based input format, only pre-registered users would be permitted to have access to the data entry section. They would first have to establish their identity (i.e. through a registration number/digital certificate, user name, and password).[74] Once granted access into the system, users would type in their identity information, and then

[74] See section 5.7 of this Report.

proceed to fill out an on-screen computer form for each test record to be entered. Users would be permitted to edit their entries before they were finalized.

For the fax and mail inputs, the identical data entry format would be used as was employed for the Web entry. A hard copy of the standardized form should be downloadable/printable from the Web, or obtainable from a fax-back call-in system. The form would then be completed, and as appropriate, required to be faxed back or sent by mail or overnight courier to the database sponsors to arrive within 24 hours. The hard copy form should be OCR-compatible, so that the information could be incorporated into the database by either manual input or OCR-reader.

In the cases of Web, fax, or overnight courier input, the data input form must be authenticated before being scanned into the system. The user would also receive by email or mail an affirmation of the input. This would be both a verification for the user that the input was entered into the database, and a means to affirm that the registered (approved) user actually was the one submitting the test result.

Data inputers should also have access to a question and answer mechanism on how the system operates and other frequently-asked questions (FAQs) both through the Web and through the fax-back system. Data inputers also need to be able to email or mail-in technical or administrative questions and receive an answer from the database Client Services Representatives or Helpdesk.

It is further recommended that the database software also document the details of each inputted record and record changes to the record in a way that can be easily retrievable by Federal inspectors for their field audits of employers. All data inputers contributing to the record must be identifiable, and the additions, corrections, or amendments they made must be retrievable.

5.6 Responsibility for the Accuracy of the Data

The quality and accuracy of the information contained in any database authorized, operated, or sponsored by FMCSA is ultimately the responsibility of FMCSA. However, all users responsible for the original data entries in a record should also be made responsible for the accuracy of the data. Users (employers or service providers such as Medical Review Officers) unwilling or unable to perform their responsibilities correctly or with the proper due diligence would be eligible for sanction from FMCSA and/or

through Subpart R (Public Interest Exclusion) of the DOT's regulation (49 CFR part 40), as appropriate.

FMCSA rules as they are currently written would permit only limited sanctions, and then only against employers, for errors that did not constitute an egregious violation of regulations or a pattern or practice of misconduct (and thus permit consideration of a Public Interest Exclusion). Given the emphasis on the quality and the accuracy of the data required by DOT (see section 3.1.3H of this Report), broadening FMCSA sanctions to include civil penalties for MROs and other service agents would be beneficial. Such sanctions have been long available to the Federal Railroad Administration (see 49 CFR 219.9).

5.7 Establishing Eligibility to Input Data and Query the Database(s)

One of the most difficult aspects of the proposed database requirement will be the effective management of how to ensure that the proper people are made eligible to enter data into the system and/or query the system. This should be done by a formal user registration/user authentication system. The intent would be to create the equivalent of a Class 2 digital certificate.[75]

The user registration/authentication system could either be an established part of the database system LAN or be "entrusted" to a third party vendor. The third party vendor would provide what is commonly termed a "trusted" digital certificate. In such a third party system, users attempting to access the system would be first routed to the offsite vendor who would be responsible for authenticating the user. The third party vendor normally charges an established fee per authentication.[76] Once authenticated, the user could enter the system. This option provides valuable objectivity and transfers responsibility to an outsider, but does not necessarily increase the level of actual system protection. It is therefore recommended that consideration be given to having the database(s) themselves hosting any necessary digital certification process.

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[75] There are four accepted classes of "digital certificates". Generally, different classes require different levels of security to register and authenticate the user. A Class 2 equivalent would likely provide the best match of protection and user friendliness for the users of the proposed database(s).

[76] This fee, although not usually very expensive, could add up to a million dollars per year in total costs if employed in the potential database(s).

5.7.1 Registration for Data Input Eligibility. In order to be made eligible to enter drivers into the system, FMCSA would need to establish a formal mechanism to assess and grant (or deny) eligibility. This registration mechanism is extremely important because the ultimate credibility and integrity of the database will be established only by the proper management of this action.

Such an eligibility system would involve approving the credentials of the system user in some fashion. The criteria for eligibility could be modeled after at least the same level of identification required to access personal financial information from a bank or credit card company.

Applicants for eligibility would be asked to fill out a form which would include name, address, telephone and fax numbers, email address, reason for being considered (e.g. status as a MRO), social security number, date of birth, one or more other identifiers (perhaps medical license number, driver's license number and State, mother's maiden name, etc.), and other relevant qualifying information. The form could be available on the Web, by fax, or by mail.

The information on the form would be entered into a separate but linked user registration database, which would then issue the applicant a user name and password through some agreed-upon means (email, fax, mail). If a formal digital certificate is to be issued, it could be mailed to the applicant in a self-deleting file on a disk, or be entered onto the applicant's computer the first time they accessed the database.

All newly eligible users would receive verification of their eligibility by mail. This would act as another check mechanism should an unauthorized person attempt to gain eligibility. Spot checks could be made by FMCSA auditors comparing entered addresses against other independent identification systems (e.g. addresses held by MRO certification bodies).

5.7.2 Registration for Data Query Eligibility. In order to be made eligible to query the database(s), FMCSA must establish a system to assess and grant (or deny) eligibility.

Such an eligibility system would be open to employers only, and would be limited to only those employers previously granted a DOT number or who are otherwise subject to 49 CFR part 382 and could be suitably registered. An eligibility system similar to

the data input scheme described above requiring pre-registration and authentication of individual users of the system (such as Designated Employer Representatives (DERs)) would be necessary (see section 5.7.1 of this Report).

In addition, FMCSA would grant access to necessary public agencies and its own safety inspectors in order to ensure regulatory compliance and public safety. Access would not be granted to any private or commercial entity not subject to FMCSA regulations (e.g. insurance companies, attorneys, private investigators, background check companies, etc.). Access should also not be granted to MROs, consortiums, or third party administrators, even if they are operating on behalf of the employer. CDL holders should also not be able to directly access the database(s) (see section 6.1.2 of this Report).

5.8 Methods/Means to Query the Database(s)

There are four practical methods to query the proposed database(s). They are:

- Web
- Interactive Voice Response (IVR; telephone call-in)
- Fax
- Mail / Overnight Courier

It is recommended that only two of these (Web, IVR) be made available to employers for the proposed database(s). The call-in system, however, should provide computer voice responses to queries as well as a fax-back report in a format acceptable for passing a Federal audit. The Web system report should also be printable in a format acceptable for a Federal audit. Email would not be an acceptable means to query the database due to computer security issues and the difficulty of user authentication.

If States maintain their own databases, the printed report should include not only results of the query, but an affirmation that no other State holds results on this specific CDL holder.

Mailing driver reports from the database system to an employer is not desirable because it would likely require substantial clerical time to hand process and mail back the reports.

Entrance into the Web-based and IVR query systems should be tightly controlled through the same types of security measures established for data input (registration number/digital certificate, user name, password, other authentication information). The system would be established to provide a "read-only" capability.

Similar to the data input process (see section 5.5 of this Report), employers should also have access to a question and answer mechanism on how the system operates and other frequently-asked questions (FAQs) both through the Web and through the fax-back system. Employers also need to be able to email or mail-in technical or administrative questions for an answer from the database Client Services Representatives or Helpdesk.

It is further recommended that the database software also record each employer query on a CDL holder in a way that can be easily retrievable by Federal inspectors or their designated agents for their field audits of employers.

5.9 Excising Erroneous, Invalid, or Outdated Entries From the Database(s)

5.9.1 Erroneous, Invalid, or Inaccurate Data. A CDL holder or an employer who believes a particular record is incorrect and wishes to amend or excise it, must have an established mechanism in place to petition FMCSA (or the State, if operating the database). A designated FMCSA or State arbitrator/reviewer would receive a hard copy of the petition to amend the record, make a decision, and notify the petitioner of their decision.

This review is intended as a simple administrative determination. The only issues that will be considered by the arbitrator/reviewer should be clerical errors, use of wrong names, identity theft, etc. This forum may not be used to challenge the accuracy of the original results, reason for testing, claims of innocent or accidental ingestion, problems in specimen collection, and similar issues which must follow other avenues for due process.

It is recommended that the FMCSA or State arbitrator/reviewer would have the final decision, and be the final level of appeal. No formal hearing process beyond the paper review would be ordinarily authorized.[77] Given a credible petition, the burden of proof as to the accuracy of the record may be shifted by the FMCSA or State reviewer/arbitrator to the individual (MRO, employer) responsible for the original alleged adverse entry. If the FMCSA or State arbitrator/reviewer decided for the driver or employer, they would then amend the record and inform the CDL holder.

An additional level of appeal could be considered, such as the FMCSA Administrator, if there was a need to adjudicate a decision by the arbitrator/reviewer because of a failure to properly interpret the facts involved. Such an additional step, however, seems unnecessary unless there was a compelling reason (such as compliance with the DOT's guidelines on information quality (see section 3.1.3H of this Report)).

An expedited review process should also be constructed for when a MRO or other designated employer agent becomes aware that a test has been subsequently cancelled (e.g. because of the lack of a split urine specimen). In such a case, the MRO would be responsible for immediately petitioning FMCSA to delete or cancel the original record (see also section 5.10 of this Report).

5.9.2 Outdated Data. Once a CDL holder is entered into the database system, a standardized policy established by Congress must govern how long that record will remain. Several issues need be considered for when a record should be removed from the system. Three options present themselves. It is recommended that the last of these options be selected:

* The Record is Automatically Removed After an Established Period

  For this option, the adverse record on the driver could be left in the system for a pre-designated period. The record would not be removed whether or not the driver made himself or herself re-

[77] This must be incorporated through the authorizing or establishing Congressional legislation. This evaluation is not to be an assessment of the scientific soundness or legal defensibility of the original determination.

eligible under FMCSA regulations for return to regulated safety-sensitive duties.

If this option is selected, a five-year period is recommended. Five years is the time under current regulations that a positive substance abuse test record must be retained by the employer under DOT regulations. Any longer period of time would in most circumstances eliminate the original evidence of the adverse determination.

This option is not recommended because an employer's possession of such information will likely increase their vulnerability to ADA litigation (see section 3.1.3 of this Report).

* The Record is Automatically Removed Only After the Driver Presents Evidence That He or She is Again Eligible Under FMCSA's Regulations

Under this option, the record is retained in the database until the driver presents a FMCSA-designated arbitrator/reviewer with the evidence that the driver is again eligible to perform safety-sensitive functions and has completed all mandated follow-up testing. It is unlikely that this option would prove viable if the CDL holder was forced by regulation to petition through his or her previous employer.[78]

This may be a significant issue since it is not clear whether leaving a driver as "black-listed" even after the driver is rehabilitated could be a violation of ADA (see section 3.1.3 of this Report).[79]

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[78] Most employers/prior MROs would refuse responsibility for a former applicant or employee unless directed to by an amended FMCSA regulation. The current FMCSA regulations would not now mandate this action.

[79] Providing employers with access to a vast reservoir of information which they could not legally utilize would make these same employers vulnerable to allegations that the rejection of any given applicant was based on either an erroneous perception of current illicit drug use or deliberate discrimination based on the applicant's prior rehabilitation history.

* The Record is Removed After Either of the First Two Options, Whichever Occurs First

  This is the recommended option.

The first option described above would be the easiest choice to manage. Drivers would be excised from the database automatically by the computer after five years, and would require no decisions, special assessment, or arbitrators/reviewers.

The difficulty of choosing either the second or third option is the decision of who will act as the final arbitrator for establishing eligibility for a driver to be removed from the database(s). It is not practical that employers control the decision (see footnote 78), and it may be too unwieldy to qualify another class of service providers (Substance Abuse Professionals, or SAPs) into being able to access and delete records from the database. In all cases, the burden of proof for the second and third options would reside with the ineligible CDL holder.

If either the second or third options are chosen, it is recommended that FMCSA establish a method to ensure consistency and integrity in the process. A driver who wishes to be removed from the database(s) would have an established mechanism in place to petition FMCSA (or the States). A designated FMCSA or State arbitrator/ reviewer would receive a hard copy of a petition to excise the record which would also contain an original or notarized copy of the return-to-work certification by a qualified SAP and evidence of successful completion of all mandated Federal follow-up tests.

Similar to the review in section 5.9.1 of this Report, this evaluation is intended as a relatively straightforward administrative determination. The only issues considered by the FMCSA arbitrator/reviewer would be the qualifications of the Substance Abuse Professional (SAP), the compliance with Federal regulations as to the initial assessment process and reassessment (as evidenced by the two required Federal letters authored by the SAP which must be sent to the employer), the results of a

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The ADA issue is also clouded by the fact that ADA would only apply to a driver if the driver had completed required rehabilitation or if the driver was falsely labeled as a drug user. Interestingly, the latter may possibly be seen as fitting this circumstance since their presence in the database is no evidence per se that the driver is continuing to use drugs.

negative Federal return-to-work test, and (if appropriate) any other relevant work documents which affirm the completion of the follow-up testing requirement.[80]

The ability to assess the completeness of this documentation to determine re-qualification does not require a clinical background or special skills. This "eligibility" decision is not perceptibly different than that a Federal safety inspector would routinely make to determine whether an employee was qualified to have been returned to work by an employer.

It is recommended that the FMCSA or State arbitrator/reviewer would make a decision and notify the petitioner. No formal hearing process beyond the paper review would be ordinarily authorized, but the arbitrator/reviewer would be required to notify the CDL holder of deficiencies in the petition and what would be necessary to remedy the unsuccessful petition. If the FMCSA or State arbitrator/ reviewer decided for the driver, they would then excise the record.

An additional level of appeal could be considered, such as the FMCSA Administrator, if there was a need to adjudicate a decision by an arbitrator/reviewer because of a failure to properly interpret the facts involved. Such an additional step is again seen as unnecessary unless required under the DOT's information quality guidelines (see section 3.1.3H of this Report).

With the third option, adverse records would be automatically excised after an agreed-upon time-frame (five years is recommended). Excising records in this manner is a difficult safety decision, but there would be no hard copy evidence of the original violation since employers may destroy positive substance abuse test records after five years.

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[80] It must be reminded that the burden of providing a complete records package for review falls solely on the driver. If the driver is unable to obtain copies of records from the SAP or previous employer, he/she will be unable to demonstrate re-eligibility to perform FMCSA regulated duties. FMCSA must publicize and provide a reasonable mechanism to assist drivers in obtaining records when a SAP or employer fails or refuses to cooperate. Such a mechanism could range from a standard FMCSA form to be provided the recalcitrant records holder outlining the Federal requirements to provide such records in a timely manner (and the sanctions for non-compliance) up to a formal established complaint mechanism to FMCSA resulting in Federal investigation of the records holder.

5.10 Responsibility for Data Correction

The responsibility for an inaccurate or invalid report should reside principally with the individual who originally inputted the data (see section 5.6 of this Report). However, the CDL holder should have the ability under due process to petition FMCSA for a reconsideration review of the report once it has been entered into the database. It is important to re-emphasize that this petition must not be allowed to reopen a debate on the reason a driver is placed in the database in the first place (see section 5.9.1 of this Report).

Drivers must be able to obtain a copy of their database record at any time upon written request. This should be an action which can be coordinated through the Medical Review Officer, Consortium/Third Party Administrator, or employer, but must be mandated by regulation. Since only the employer will have direct access to the database(s), the employer should be responsible for providing the record within a reasonable period of receipt of a signed request (i.e. ten working days).[81]

5.11 Computer Communication Requirements (A "Pointer" Computer System Linking State-Hosted Databases)

If each individual State maintains its own database, there should be a "pointer" mechanism to direct an employer/user to other States where the applicant had an adverse record (see section 4.2 of this Report). This would be necessary because drivers change States, sometimes to try to avoid the consequence of their previous driver history. Not to link the State databases in this manner would defeat the purpose and effectiveness of the database Project (see section 4.1 of this Report).

The mechanism to do this would either be to create a database system modeled generally after the current CDLIS or NDR systems (see sections 4.2, 9.1, and 9.2 of this Report) or to require the individual State database itself to directly query a centralized "pointer" computer to identify other States where an adverse record on a driver may be found. In the first choice, using the CDLIS and NDR models, all initial queries by employers would be first routed to a centralized Federally-sponsored

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[81] Records could not ordinarily be obtained directly by a driver from the operators of the potential database(s) because of the difficulty of verifying the identity of the requestor. If that issue could be resolved without an undue administrative burden being placed on the database operator(s), a direct request mechanism could be added.

computer database which would either provide the names of States where results on applicants could be found or directly link the employer to the appropriate States.[82] In the second choice, where the employer would query a State and the State would itself query a centralized computer, the summary results of the employer request could be relayed to the employer, who would then know to query the additional States identified.

Hardware requirements for the centralized "pointer" portion of State-hosted databases should include:

* The Pointer Server. The core "pointer" database would reside on this computer.

* A Web Server. This optional server would provide a separate link with each State, and would be necessary unless the link was provided by dedicated telephone lines.

* Firewall and Other Security Protection Software. This software would be necessary if the link with the States would be made through the Web server and not through individual dedicated telephone lines.

* Cabling, Printers, Routers, Switches, and Other Hardware Necessary to Complete a Local Area Network (LAN) to Link All Required Servers.

If Internet connectivity is required, ATM or T1 lines would also be necessary to handle the expected information transactions with the States (see also section 4.2 of this Report). Internet connection would not be necessary if the links to the States were through dedicated telephone lines such as is currently the case with CDLIS (see also section 9.1 of this Report).[83]

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[82] The current CDLIS and NDR systems are not designed to process these kinds of queries, and would likely have to receive extensive and costly modification in order to perform this service.

[83] Dedicated phone lines are the equivalent of a T1 line. A direct open telephone link to the State would be established and permanently maintained for computer to computer system access.

Data security for the pointer system would generate similar concerns to that described previously for all of the Internet access connections (see section 5.2.5 of this Report). Data security is, of course, less of an issue with dedicated telephone lines to the States.

The software which would support the "pointer" system would have as its basis a customized high end relational database which would match a State's inquiry on a CDL holder with records held by other States on that driver. [84]

[84] High end relational databases are described in section 5.2.2 of this Report.

6.0 EMPLOYER-RELATED ISSUES

In assessing the feasibility of creating the potential database(s), the complete support of regulated employers and their service providers are among the very most important factors in the potential success and viability of this Project. [85] Without 100% compliance, the potential database(s) will have a significantly reduced safety value. Employers who access the database(s) in a good faith effort to comply with Federal safety requirements must have confidence that a result of "no adverse finding" is valid.

6.1 Employer Responsibilities

Although possible employer responsibilities in the potential database(s) could extend to data input and data queries, it is recommended that employers be limited only to data queries.

6.1.1 Data Input. Although on face it might appear that employers are the best choice to input the data, it is recommended that only Medical Review Officers (MROs), (and possibly also C/TPAs) be permitted to enter test information into the database(s). There are several reasons for this:

* First, given the nature of the motor carrier industry and the large number of smaller employers and owner/operators, the professionalism and objectivity of the MRO (and possibly also C/TPAs [86]) will better ensure a timely and full compliance with this essential safety requirement.

  Currently MROs are the original source of 100% of controlled substance test determinations and, thus, approximately 95% of the total findings which could end up in the database (substance abuse test positives, adulterated specimens, and substituted specimens).[87] Employers are the more direct source for the

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[85] See section 4.4 of this Report. The other largest obstacle is control over the registration and verification of database users.

[86] Consortiums/Third Party Administrators.

[87] Based on an estimated positive rate of 1.3 % for drugs and 0.2 % for alcohol; a random testing rate of 50 % for drugs and 10 % for alcohol; and an estimate for other types of positive tests (for pre-employment, post-accident, and reasonable suspicion) and collection-site refusals.

remaining 5% (alcohol positives, collection site refusals, and miscellaneous other violations of FMCSA prohibitions).

If a decision is made to include other than substance abuse test positives into the system (see section 9.0 of this Report), requiring employers to report to MROs these remaining 5% of test results is not considered a significant additional administrative burden. Because of the owner/operator issue, this reporting mechanism (or something similar) will be made necessary anyway (see below).

* Second, MROs are often more easily identifiable than employers. MROs have a unique medical license number from one or more States and many will also have a Federally-mandated professional certification from one of the MRO certification organizations. If not already being done, FMCSA would request that each certified physician be granted a unique certification number from the MRO body. The MRO organization can be required to maintain up-to-date contact information on each of its certified MROs which will permit easier tracking.

  If the MRO does not belong to one of the three current certifying bodies, the MRO would be required to register with FMCSA (who would then issue a unique identification number). The MRO would be required to keep FMCSA updated for tracking purposes or be required to reapply every year for eligibility.

  MROs are likely to be less transient than smaller FMCSA-regulated employers, and a more reliable and objective resource for ensuring that this action is properly accomplished and in a timely fashion. They are also less likely to be involved in permitting access to unauthorized parties (such as attorneys and background screening companies).

* Third, some employers may have a vested interest in protecting the record of a valued Commercial Drivers License (CDL) holder and even their ability to continue to employ the driver at that company. This would make them more likely to not participate in the database for this driver.

* Fourth, one of the largest concerns for compliance under the existing regulations is how to manage/monitor the compliance of an owner/operator. Certainly, service agents such as MROs under the current system have little control over an owner/operator taking himself or herself out of covered service because of their own positive test result. Under current regulations, even if a MRO or C/TPA suspects an owner/operator is continuing to work after a positive test result, there is little they can do. By making MROs (and possibly also C/TPAs; see section 6.3 of this Report) responsible for inputting positive results directly into the proposed database(s), this problem should be substantially lessened.

6.1.2 Data Queries. With regard to data queries, the database(s) would significantly lessen the workload of employers in the hiring of CDL drivers. Current regulations require the employer to solicit Federal testing histories from each previous employer of an applicant/driver for the preceding two years. This is a burdensome mandate as it is currently constructed, and difficult to properly audit by Federal safety inspectors.[88]

In the potential database system, regulated employers will no longer be able to hire a CDL holder into safety sensitive duties and then wait up to 30 days to see if he or she has a previous drug history as is permitted by current regulations. Currently, an ineligible driver may be able to perform FMCSA-regulated duties for weeks after hire before return correspondence from their previous employers arrives (even assuming the driver has identified the employer for whom he or she failed a test). During this period, the public remains at risk. Once the database(s) are in place, new regulations would mandate that employers access the database before hire or before being permitted to perform regulated duties.

Accessing the driver's computer record by an employer will be a recorded event, both in documenting the hard copy record produced by the system as well as in the computer log which should be maintained by the database on each employer and retrievable by a

[88] Although many employers appear to take this safety responsibility seriously, some prospective employers don't, either because they are lax or because they are not committed to a substance abuse and alcohol-free workplace. Applicant drivers will leave out previous employers from their job applications (often attempting to hide previous substance abuse and alcohol positives, or test refusals). Previous employers often fail to cooperate in a timely manner or at all, some fearing liability. All of these compliance issues are difficult to audit.

Federal inspector. Date/time stamps on a hard copy positive report produced by the database and database computer logs would give for the first time irrefutable evidence of employer compliance with this portion of the FMCSA regulations.

Record retention requirements by employers should remain at two years.

CDL holders must be able to obtain a copy of their record upon written request of their current or immediately previous employer (see section 5.10 of this Report), but may not be granted direct access into the database system itself.

6.2 Ensuring Employer Participation

Ensuring full employer participation in the databases is essential. Although it is unlikely that 100% compliance can ever be achieved, it should continue to be the goal.

To improve the likelihood that every employer queries the database, stepped-up enforcement by FMCSA and its compliance partners specially targeting this issue would be necessary. Publicity through trade associations and business networks could be helpful. Increased penalties for non-compliance would contribute. Education of consultants, service agents (MROs, laboratories, SAPs, etc.), and the legal profession may also help add to the level of participation.

By turning over the data input responsibility to service agents (at least MROs and possibly also C/TPAs), it is likely that the database(s) will be more complete. Service agents would run the larger risk of disqualification from performing services for any regulated employers due to the Department of Transportation's recently imposed Public Interest Exclusion, or PIE proceeding (49 CFR part 40 Subpart R).[89] It is understood that current regulations give consideration for a PIE proceeding only for an egregious violation of the regulations or a pattern or practice of misconduct. FMCSA's stepped up enforcement of this issue should facilitate compliance.

6.3 The Potential Roles and Responsibilities of Medical Review Officers (MROs) and Consortiums/Third Party Administrators

[89] Current 49 CFR part 40 regulations for PIE focus primarily on Part 40-related issues. These are principally in the area of responsibilities for the specimen collectors, laboratories, MROs, SAPs, and C/TPAs. The regulations, however, clearly permit use of PIE proceedings for failure to comply with operating administration regulations (49 CFR 40.361 and 40.363).

As was discussed in sections 6.1 - 6.3 of this Report, it was recommended that consideration be given to requiring Medical Review Offices (MROs) to be the only entity approved to input positive results into the proposed database(s). However, consideration can also be given to permitting Consortiums and Third Party Administrators (C/TPAs) in certain circumstances to input data into the systems. In some cases, small-sized MROs may be unable or unwilling to register as a user of the proposed database(s). In such circumstances, the C/TPAs could be permitted to perform this essential service. Current Department of Transportation regulations give increasing roles to C/TPAs in the management and reporting of test results to employers.[90] An increased role for C/TPAs with the proposed database(s) may be in line with Department current initiatives.

However, there is no role contemplated for either MROs or C/TPAs in being asked to query the potential database(s) on behalf of employers (see section 5.7.2 of this Report). This safety requirement should not be deferrable by employers, who must remain responsible for ensuring that their drivers are (and remain) eligible to perform FMCSA-regulated duties.

[90] See 49 CFR 40.345, 40.349, etc.

7.0 PROJECTED COSTS

Establishing an accurate estimate and/or future prediction of costs associated with the potential database(s) is made extremely difficult by the absence of agreed upon hardware and software specifications, the volatility of the computer hardware marketplace, the lack of an approved final system design, and significant differences in personnel costs depending on the geographical location of the computer system(s). Nonetheless, general costs and cost ranges can be suggested based on the various recommendations provided in section 5.0 of this Report.

Where costs and cost ranges are described in this section, they are generally established based on pricing provided by commercial vendors in a competitive marketplace. No attempt was made to factor in additional overhead costs, personnel, benefits, or management requirements associated with a non-competitive procurement (sole source award).

7.1 For the Federal Government and for State Governments

The costs for establishing and maintaining a single Federal database will be significantly less overall than requiring each State to maintain a separate database and then linking them by a centralized "pointer" system. If each State must host its own database, it will require States to create duplicate automated data input and data query computer systems in order to provide the necessary immediate responsiveness for employers hiring a CDL holder. Most States do not already have similar types of automated systems in place which could be modified for this type of requirement.

A summary of total estimated costs for the development, implementation, and operation of a single Federal database is at Figure 2 (at page 67). A detailed breakdown of estimated costs for both a single Federal database and for individual State databases are found following. Cost ranges provided are high estimates; it is likely that efficacious planning and a competitive procurement environment will deliver lower prices for all described elements.

7.1.1 Initial Design Phase and System Plan Development.

An initial planning and design phase would be necessary before the implementation of the database(s) should proceed. This phase should be budgeted for approximately $500,000, and will be necessary regardless of whether a single Federal database or individual State databases are selected.

During this phase, system objectives will be determined, the database system architecture will be formally designed, system specifications and performance standards drawn up, and a work plan established. As part of this process, FMCSA and contract consultants will establish the Project's features, determine program goals, resolve identified obstacles, specify implementation targets and timelines, and evaluate the specific needs of its end users. All identified program problem areas including system logistics, system integration issues, and procurement requirements should be assessed and resolved.

It is essential that this initial planning phase of the Project be well organized and focused. It must be dedicated to quick and effective problem resolution and the goal of having the database(s) become fully operational and successful. [91] This phase of the Project should take no more than one year.

At the end of this phase, if practical and cost-effective solutions to the obstacles described in sections 1.2 and 4.4 of this Report cannot be overcome, FMCSA should not attempt to proceed further with the implementation of the database(s).

[91] It is recommended that FMCSA be permitted the flexibility in this initial phase to make whatever design, implementation, and operational decisions they feel are necessary to ensure the proper capability and enhanced utilization of the database program(s).

Figure 2

SUMMARY OF ESTIMATED COSTS B SINGLE FEDERAL DATABASE

A. PROJECT DEVELOPMENT AND PROJECT IMPLEMENTATION

1.	Initial Design Phase and System Plan Development	$500,000
2.	Computer Hardware	$155,000 - 195,000
3.	Computer Software	$480,000 - 550,000
	Program Implementation Total	$1,135,000 - 1,245,000

B. ON-GOING (YEARLY) BUDGET

1.	Hardware Repair/Replacement	$75,000
2.	Software Upgrades/Technical Support	$50,000
3.	Connectivity Costs (T1 or ATM Lines)	$54,000
4.	Other Telephone Costs (Long Distance, 800 Numbers)	$120,000
5.	Project Staffing	$295,000
6.	FMCSA Staffing	$225,000
7.	Staff Training	$75,000
8.	Other Direct Costs (Printing, Shipping, etc.)	$100,000
	Program Operation Total	$994,000

7.1.2 Computer Hardware Costs.

A. Single Federal System. If a single Federal database is created, the estimated one-time cost to create a Local Area Network (LAN) containing all of the elements described in section 5.1 of this Report would be estimated at approximately $155,000 - $195,000. [92]

Such a system would include the data server, Web server, IVR (telephone call-in) server, fax report server, scanning/OCR server, system backup hardware, UPS systems, operating system software, integrated firewall protection, and supporting equipment. These costs are for one-time system creation and installation. No costs for future hardware replacement or upgrades are included in this pricing.

Data Server. The hardware cost of a capable data server would be estimated at $15,000-20,000. This would include a dual-processor system, RAID 5 array, autoloading tape backup, rack-mounted UPS, operating system software, and integrated firewall software.

Web Server. The hardware cost of a capable Web server would be estimated at $27,000-32,000. This would include a quad-processor system, RAID 5 array, autoloading tape backup, rack-mounted UPS, operating system software, and integrated firewall software.

IVR Server. The hardware cost of a capable IVR server would be estimated at $20,000-25,000. This would include a single-processor system, rack-mounted UPS, operating system software, and two 36-port voice boards.

Fax Report Server. The hardware cost of a capable fax server would be estimated at $18,000-23,000. This would include a single-processor system, rack-mounted UPS, operating system software, and two 12-port fax boards.

Scanning/OCR Server. The hardware cost of a capable scanning/OCR server would be estimated at $10,000-15,000. This would include a single-processor system, a rack-mounted UPS, operating system software, and one OCR scanner.

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[92] This cost and all subsequent amounts in this section, unless otherwise noted, are in 4th quarter CY2001 dollars.

Additional Servers, Workstations, Peripherals, and Miscellaneous Hardware Expenses. The hardware cost for a mail server, associated rack-mounted UPS, up to 15 workstations, two laser printers, an electronic switching system for the network, other network accessories, racks, wiring, and shelving would total an estimated $65,000 - 80,000.

B. State Systems. If a large State or small State put together an equivalent but scaled-down version of the Federal system described above, the cost could be estimated at $109,000-146,000 and $76,000-108,000, respectively. Costs provided below assume purchase of a complete State system. The cost differences between large and small States can be generally attributed to a lesser need of computing power and some system hardware which may not be required in a small State.

For States, cost savings could be realized if the State (large or small) had no need of firewall software because it was already present in their existing computer systems. Further cost savings may be realized by eliminating the OCR server for at least the small or medium-sized States. Realistically, the smaller number of records likely to be inputted through this server may not be worth the investment for OCR hardware and software, and could be more easily (and cheaply) entered manually. This would, of course, possibly increase clerical staffing costs because of the need for manual data entry.

If the proposed database(s) are hosted by the States, a centralized "pointer" computer hosted by FMCSA should be established (see sections 4.2 and 5.11 of this Report). The estimated one-time hardware cost to create this type of separate system would be estimated at approximately $75,000 for the server, key supporting equipment, and system installation. If the States are to be linked to the pointer system by dedicated telephone lines with each State, this would be a preferred protection scheme and no additional computer equipment (such as a Web server and a complementary firewall server to provide protection) would be likely necessary. If firewall software and a Web server become necessary, this would likely increase the hardware costs (including installation) by another estimated $25,000.

C. Hosting Solution. In this Report, the possibility of a hardware hosting option was not discussed at length (see section 5.1.4 of this Report). However, this option has great potential because it would eliminate the cost of ongoing capital outlays to update and/or replace outdated hardware technology. A hardware hosting solution for the

system described in this Report would likely cost between $15,000-25,000 per month for the high-end Federal or large State systems.

D. Equipment Repair and Replacement. A yearly hardware replacement, repair, and upgrade budget of $75,000 could be established.

7.1.3 Computer Software and Programming Costs.

A. Single Federal System. If a single Federal database is created, the estimated cost to develop, create, and/or customize all of the required software applications would likely range from $480,000-550,000. This estimated cost includes the customization of off-the-shelf software applications, necessary special and custom programming, and software applications integration. These costs are for one-time system development and implementation. No costs have been included to cover software upgrades or additional customization that might be required in the future for evolving or changing program needs.

Data Server. The software cost for this portion of the system applications would be estimated at $185,000-195,000. This includes the purchase of an "enterprise level" commercial high-end database product (estimated at $32,000), database design and custom programming costs (estimated at $40,000), and front end database design and custom programming (estimated at $120,000). Operating system software and firewall software costs have already been built into the hardware cost, and are not included here.

Web Server. The software cost for this portion of the system applications would be estimated at $105,000-115,000. This includes the purchase of server software and configuration (estimated at $7,500) and web site design and programming (estimated at a combined $105,000). Operating system software and firewall software costs have already been built into the hardware cost, and are not included here.

IVR Server. The software cost for this portion of the system applications would be estimated at $25,000-35,000. This includes the purchase of the IVR application generator (estimated at $7,500) and custom programming (estimated at $25,000). Operating system software costs have already been built into the hardware cost, and are not included here.

Fax Report Server. The software cost for this portion of the system applications would be estimated at $25,000-35,000. This includes the purchase of the application generator (estimated at $7,500) and custom programming (estimated at $25,000). In some cases, the application generator purchased for programming the IVR application could also be employed again here at no additional charge. Operating system software costs have already been built into the hardware cost, and are not included here.

Scanning/OCR Server. The software cost for this portion of the system applications would be estimated at $25,000-35,000. This includes the purchase of OCR scanning software (estimated at $5,000) and custom programming (estimated at $25,000). Operating system software costs have already been built into the hardware cost, and are not included here.

Digital Certificates. The software cost for this portion of the system applications would be estimated at $60,000-70,000. This includes the purchase of a commercial software product (estimated at $40,000) and server side custom programming (estimated at $25,000).

Miscellaneous Other Software and Network Configuration Costs. The software cost of these portions of the system applications would be estimated at $55,000-65,000. This includes mail server software purchase (estimated at $10,000), custom mail server programming (estimated at $8,000), and network set-up and configuration (estimated at $40,000).

B. State Systems. For States, whether large or small, the cost per State would likely be estimated to range from $32,000-60,000 each. These prices are significantly lower than for the Federal database because it is expected that a single set of customized applications would be developed under FMCSA's sponsorship and each State would share equally in their use. For purposes of this Report, the cost of a shared application is amortized equally through all of the States (large and small), although commercial software license requirements have increased the projected total costs as they apply to each State.

If a Federal "pointer" system is employed, it will require software to support the exchange of information with the States and establish the database necessary to support queries. It is estimated that the cost to develop, create, and/or customize all of the required software applications would likely range from an estimated $100,000-

125,000. The cost includes the customization of off-the-shelf software applications, necessary special programming, and software applications integration. No costs have been included to cover software upgrades or additional future customization.

C. Upgrades and Technical Support for the Commercial Software Products. A yearly total software upgrade and technical support budget of $50,000 could be established.

7.1.4 Connectivity Costs.

A. Single Federal System. If a single Federal database is established, it is estimated that three linked ATM lines would be necessary to support the Web-based access and reporting systems. [93] The cost of these linked lines is estimated at $4,500 per month or $54,000 per year. Additional ATM lines could be added at a cost of $1,500 per month if demand increased.

B. State Systems. For large States, the cost of Internet connectivity would be approximately $1,500 per month or $18,000 per year for a single ATM line. Additional ATM lines could be added at a cost of $1,500 per month if demand increased.

For small States, the cost of Internet connectivity would be approximately $1,200 per month or $14,400 per year for a T1 line. This single T1 line would support extensive demand and additional lines would likely never be necessary (hence the T1 selection).

If States are assigned to host the proposed database(s), the established "pointer" system must be linked to each State either through dedicated phone lines or through Internet connectivity with one or more ATM or T1 lines. For this second option, the overall cost should range from between $14,400 per year (for a single T1 line) to $36,000 per year for two linked ATM lines. A dedicated telephone line for each State would be approximately equivalent in cost to that of a T1 line.

C. Telephone Lines and Long Distance Charges. An estimated yearly telephone line and long distance budget of $120,000 should be established for a single Federal database and $36,000 and $24,000, respectively, for large and small States. This would

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[93] See section 5.1.3 of this Report for an explanation of both ATM and T1 lines.

also include 800 number charges for access to Client Services and/or a dedicated Helpdesk.

7.1.5 Staffing Costs. In the absence of an approved system design, it is difficult to estimate the cost of staffing for the proposed database(s) or even the number of personnel necessary to fully support the database(s). Personnel costs will also vary significantly depending on the physical location of the database(s), whether some systems or operational functions are contracted out, and what benefit packages are offered. [94]

The yearly staffing cost (including benefits) of a single Federal database can be estimated at $295,000. This would include a System Administrator (at $100,000 including benefits), an Associate System Administrator/Programmer (at $75,000 including benefits), and four Client Services Representatives (at $30,000 each including benefits).

If a decision is made to create individual State databases, for large States the yearly staffing cost (including benefits) can be estimated at $235,000. This would include a System Administrator, an Associate System Administrator/Programmer, and two Client Services Representatives. For small States, the yearly estimated staffing cost (including benefits) can be estimated at $130,000. This would include a System Administrator and one Client Services Representative. Since a Federal pointer computer system would still be required, the yearly staffing cost for this additional separate system can be estimated at $295,000. This would include a System Administrator, an Associate System Administrator/Programmer, and four Client Services Representatives.

At FMCSA, regardless of whether a single Federal database or individual State databases are selected, staffing needs could vary substantially depending on the needs of the Agency. A yearly cost estimate of $225,000 in staffing costs may be possible. Certainly, a Project Manager (at GS-12 or 13, or $75,000-85,000 including benefits) and three Program Analysts (at GS-9, or $50,000 each including benefits) would form a

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[94] The following discussion of salaries should be taken for context only, and may not represent the final price which will have to be paid for personnel.

minimum staff. Procurement costs, accounting, and other FMCSA overhead was not considered as part of this review.

In addition, a yearly training budget of $75,000 could be incorporated.

7.2 For Employers and Service Agents

Employers or service agents (such as MROs, etc.) could be required to either pay a very modest fee to register as a system user (i.e. an initial registration cost and/or a yearly renewal charge) and/or pay a small transaction fee for each system query made on a Commercial Drivers License (CDL) holder. If a decision is made to charge a modest sum for either of these requirements, it could significantly defray the costs of operation given the large number of users.

The difficulty in charging for either registration or use of the database rests more in how to collect the fees and whether either potential sponsor of the proposed database(s) (the States or FMCSA) are able to develop a payment mechanism which is efficient, user-friendly, and avoids collection problems. Certainly, a secure Web-based credit card mechanism to collect money could be developed and implemented, [95] but other options (cash, checks, money orders, etc.) will require some sort of internal accounting structure and personnel to physically process the payments. In addition, issues such as whether employer invoicing would be permitted or whether larger employers could "run a tab" or "open an account" need to be carefully considered before a final determination is made.

It is recommended that a fee be charged for the registration of system users of $10-$20 per year (to be paid in advance), and that employers would not be made to pay a fee per system query.[96] Credit card payments, money orders, or personal checks would be acceptable as payment. Web-based secure payment by credit card or any other similar hosted mechanism (Paypal, Bidpay, etc.) would be strongly recommended, and would eliminate the need for a bookkeeping and accounts receivable requirement. This fee structure would potentially generate from $1,500,000-$3,000,000 per year

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[95] See the brief discussion on SSL (Secure Sockets Layer) in section 5.2.5 of this Report.

[96] Consideration should be given to a two-tier or multi-tier fee based on employer size. The minimum yearly fee for even small employers should be set at no less than $10.

depending on the number of users. Not charging a fee for each query would simplify bookkeeping and eliminate potential accounting overhead.

No charge is recommended for drivers seeking re-qualification (see section 5.9.2 of this Report).

7.3 Additional Costs

Because Federally-mandated inputs and queries to the potential database(s) will be required of employers and/or service agents (such as MROs and C/TPAs), there will be a Paperwork Reduction Act impact review that will have to be conducted by FMCSA. No preliminary assessment of the information collection burden of the program or an assessment of predicted costs have been made in this Report.

8.0 ALCOHOL POSITIVES AND TEST REFUSALS

In section 226 of the Motor Carrier Safety Improvement Act of 1999, Congress required FMCSA to review the feasibility of creating database(s) for Federal urine controlled substance test positive results (section 226; the full text of this section is at Appendix 1). There was no mention of considering alcohol test positives or test refusals (refusal to provide a specimen, sample adulteration, or sample substitution). However, transportation safety would be significantly better served by expanding any Federally-mandated database to include alcohol positives and test refusals.

Under current Federal law, a driver is disqualified from performing safety-sensitive functions if he or she has tested positive on a Federal test for controlled substances or alcohol (defined as equal to or greater than 0.04%), or has refused to test. There is no difference in the sanctions mandated by FMCSA in its regulations, nor is there a lesser standard in the Department of Transportation's umbrella testing regulation (49 CFR part 40).

In 1989, the Department of Transportation implemented comprehensive substance abuse testing regulations. There was no mention of alcohol. Congress corrected that oversight in its Omnibus Transportation Employee Testing Act of 1991, by mandating Federal alcohol testing. By consensus, this decision by Congress was considered as a significant enhancement to transportation safety. By 1994, the alcohol testing regulations were in place.

If Congress was to legislate a commercial driver database system only for controlled substance test positives, it is suggested that this might complicate FMCSA's program and create a potential safety issue:

A. Drivers could repeatedly fail alcohol tests at 0.04% or greater, demonstrating a significant safety risk to the motoring public, and yet completely avoid the database. Since FMCSA regulations require employers to determine whether there has been a violation of any of its drug and alcohol prohibitions in the preceding two years, employers would still be forced to query previous employers to determine alcohol test histories and refusals. Therefore, the proposed database(s) would do nothing to lessen the administrative and compliance burden of employers and, in fact, would increase it.

B. Drivers may decide that actually refusing a test or being caught adulterating or substituting a specimen will provide less consequences than testing positive, since these serious violations of FMCSA regulations will not be included in the Federally-mandated database(s).

Under current regulatory authority administered by the Department of Transportation and the Department of Health and Human Services, test refusals for sample adulteration and sample substitution have been defined as equally scientifically sound and legally defensible as controlled substance test positives. Adding these records would only minimally expand the records input, records storage and management, and test record reporting mechanisms contemplated for controlled substance test results (see also section 5.2.2 of this Report).

Because of DOT collector training and equipment certification standards, Federal alcohol positives at 0.04% and greater are equivalently respected as scientific evidence of a violation of Federal prohibitions. They would also minimally expand the records input, records storage and management, and record reporting mechanisms.

9.0 COMPARABLE DATABASES

Although there is no existing database system exactly equivalent to the potential database(s) described in this Report, several data collection systems currently in place provide useful models for "lessons learned". These are:

* CDLIS (the Commercial Drivers License Information System) established by the Commercial Motor Vehicle Safety Act of 1986,

* NDR (the National Driver Register) originally created by the Federal Highway Safety Act in 1960, and since amended several times (1966, 1982), and

* The State of Oregon's requirement to report positive drug tests on CDL holders to its Department of Motor Vehicles to be entered into the driver's record (59 ORS § 825.410).

9.1 CDLIS

In the Commercial Motor Vehicle Safety Act of 1986, among its other purposes, Congress enacted legislation to help ensure that a driver could not obtain a Commercial Driver License (CDL) in multiple States. The Commercial Driver License Information System (CDLIS) is a distributed data exchange application which was created so that States could query a single nationwide driver information system before issuing a CDL to a driver. CDLIS is sponsored by FMCSA.

CDLIS is organized around a centralized computer "pointer" system which, if the driver already holds a CDL, will direct the State querying the system electronically to the State which holds the current CDL driver record. This helps ensure that States are able to share information on commercial drivers in a timely and effective manner.

The system operates essentially as follows. Through its local Department of Motor Vehicle offices, computer inquiries are made by each State into the CDLIS system. Inquiries are processed through dedicated telephone lines and routed into the CDLIS Central Computer Site, managed by a private contractor.

The CDLIS Central houses the "pointers" and summary driver personal data necessary to identify each CDL holder and the State which retains his or her most recently issued

CDL. This information constitutes the driver's unique CDLIS Master Pointer Record (MPR).

When a State queries the CDLIS system, the CDLIS Central Site uses the MPR to locate a personal match with an existing CDL record in another State (identified as the State of Record). If no match is found, the requesting State is so notified. If a match is found, the CDLIS Central Site "points" the requesting State to the State of Record, where the driver's commercial driving history is located.

If the new State issues a CDL to a driver, CDLIS is notified and amends the driver's pointer (MPR). The new State of Record requests the driver's history file from the old State of Record, which archives the driver's records.

The CDLIS system is operated under authority of FMCSA by AAMVAnet, Inc., who manages the system and provides the telecommunication network which binds the program together. AAMVAnet is a not-for-profit affiliate of the American Association of Motor Vehicle Administrators. States, wishing to comply with the Commercial Motor Vehicle Safety Act of 1986, may join CDLIS or they are free to find another means to comply. Currently, all States and the District of Columbia subscribe to CDLIS.

At this time, there are over 10 million driver record summaries in CDLIS, with an additional 40,000 added each month. Records are left in the system indefinitely. Subscribing States pay a fee based on the amount of records they have in the CDLIS system.

9.2 NDR

The National Driver Register (NDR), as it is currently implemented, is a computer-based "pointer" system generally similar to CDLIS which can be queried by States and others to identify individuals whose licenses to operate a motor vehicle have been previously revoked, suspended, canceled, or denied, or have been convicted of certain serious traffic related violations (such as a DUI) in another State.

State driver licensing officials check this nationwide index when an individual attempts to obtain a license in their State before determining whether or not to issue a license. This system is routinely checked for every State license type, including CDLs. NDR is sponsored by the National Highway Traffic Safety Administration (NHTSA).

Originally established by legislation in 1960 (The Federal Highway Safety Act), NDR has been further amended in 1961, expanded in 1966 (in the National Traffic and Motor Vehicle Safety Act of 1966), and required to be fully automated in 1982 (in the National Driver Register Act of 1982).

Currently, the NDR is often referred to as the Problem Driver Pointer System (PDPS). Under PDPS, the centralized NDR "pointer" system only contains basic identity information on drivers where adverse action has been previously taken against their license. When a State queries the system, NDR provides possible identity matches from other States. With each possible match, the State holding an adverse record is notified and automatically provides the querying State with specific information about the driver's adverse record. After verifying that the applicant driver is the same individual with the adverse record, the inquiring State makes a licensing decision.

Adverse records include drivers license denials, "for cause" license suspensions, and license revocations. States are also required to report the following types of convictions:

* DUIs, DWUIs, or DWIs for alcohol or controlled substances
* Traffic violations arising from a fatal crash, reckless driving, or racing
* Failure to render aid or provide identification in a fatal injury crash
* Perjury or making a false official affidavit or statement relating to laws affecting the operation of a motor vehicle.

As with CDLIS, all 50 States and the District of Columbia participate in the NDR/PDPS. Three types of inquiries are authorized by law: driver licensing, driver improvement, and transportation safety. States are encouraged to make inquiries for license renewals, duplicate licenses, and for driver improvement.

Other Federal agencies (including the Federal Aviation Administration, the Federal Railroad Administration, and the National Transportation Safety Board), air carriers (for pilot applicants), and employers and potential employers of motor-vehicle operators are permitted to make inquiries.

All inquiries from employers and potential employers must be accompanied by a notarized signed release from the driver.

Except for NTSB crash investigations, inquiries are limited to a three to five year timeframe and to license suspensions or revocations that are still open. Record retention length is governed by State law, since these are State records. There is also no required consistency on when or if a record is to be expunged by the State holding the adverse record.

Drivers are permitted to determine if they are listed on the NDR.

In CY2000, the NDR processed more than 42 million file checks, with approximately five million possible matches.

9.3 State of Oregon

On March 1, 2000, State legislation was enacted which required in part that Medical Review Officers (MROs) for employers of Oregon CDL holders must report positive Federal drug tests to the State Department of Motor Vehicles (DMV). The State DMV would add the test report finding to the State's computerized driving record for that driver. The legislation was not actually implemented until September of that year.

The Oregon system is simply an added computer field in the existing DMV computerized driver record. Data is entered into the field manually by DMV staff based on a standardized form filled out by the employer's MRO and the employer.[97]

Accompanied by a MRO-signed copy of the urine collection custody and control document certifying the positive test, the Oregon form requires the MRO to again certify the test result and affirm that his or her responsibilities as a MRO under Federal regulations were performed properly. The form is easy to fill out, requiring only a few seconds of a MRO's time.

In addition, the second part of the Oregon form is to be filled out by the employer, certifying that the employer has a substance abuse and alcohol testing program which fully complies with FMCSA regulations found in 49 CFR part 382.

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[97] Oregon Form # 735-7200

Once the information is manually placed into the driver record by the Oregon DMV, it can be queried for $2.00 by an employer, who must also file a standardized consent and release form signed by the applicant/driver.[98]

Once the consent form and the employer's request for information have been filed, the DMV will generate a complete driver's record for the employer which also contains extra information on any Federal drug test history. If no request is made, information on previous substance abuse tests is currently not included in the driver report sent to the employer. It should be noted that use of this program by employers would not exempt them from soliciting information on a driver's Federal testing history directly with the applicant's previous employers in accordance with FMCSA regulations.

Under Oregon law, drivers may request a formal hearing if they wish to contest the result and/or do not want the positive drug test to be added to their record (59 ORS 802.412). This can be a substantial administrative burden for the DMV and is the principal reason for completion of the standardized forms described above as a means of establishing the State's prima facie case. The consent and release form for this program is also required under Oregon confidentiality laws (59 ORS 802.202).

After one year, the program cannot yet be considered successful in spite of the minimal requirements and paperwork burden imposed on MROs and employers by the DMV. The principal issue simply appears to be the failure of all MROs and employers to participate in, or cooperate with, the program. It has informally been estimated that Oregon receives only a fraction (perhaps as low as 20%) of the positive tests on Federally-regulated Oregon CDL holders.

A number of factors possibly contribute to the high rate of non-compliance. Oregon believes that most in-State MROs cooperate fully with the new Oregon law. It also believes, however, that it has a very poor compliance rate from out-of-State MROs and employers. Some non-compliance can be attributed to general out-of-State MRO resistance to a State law which has no real enforcement authority over them. Some non-compliance can be attributed to a lack of knowledge about the Oregon requirement.

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[98] Oregon Form # 735-7195

For the future, the Oregon administrative appeal process will likely have to cope with the absence of in-person testimony from out-of-State MROs and laboratory personnel if the documents submitted are judged insufficient by administrative law judges to establish the State's case.

9.4 Other Databases

It is recognized that several commercial enterprises currently attempt to track Federal controlled substance and alcohol test records on behalf of their employer clients. A review of the procedures and outward structures of these services did not yield new or useful insight into how the potential Federally-mandated database(s) could be properly designed and managed.

10.0 THE 1999 NEW ORLEANS BUS ACCIDENT

On May 9, 1999, about 9:00 AM, a 46 year old male was driving a charter bus which crashed on Interstate 610 in New Orleans, LA. Enroute from La Place, LA, to a casino approximately 80 miles away in Bay St. Louis MS, the bus crossed over several lanes of traffic at just under 60 miles per hour, exited the roadway, and crashed. Twenty-two passengers were killed; the bus driver and 15 passengers received serious injuries; and five passengers received minor injuries.

The driver held a Commercial Drivers License (CDL) and the driving assignment was regulated by FMCSA. He had been subject to Federal controlled substance and alcohol testing requirements for many years. He worked part-time for the charter bus company, and was considered a reliable driver.

The National Transportation Safety Board (NTSB) investigated the accident. On August 28, 2001, the NTSB released its preliminary findings to the public. Although the direct cause of the accident appeared to be the driver's severe medical conditions, the toxicological findings also revealed very recent use of marijuana, use of an over-the-counter antihistamine, and use of one or more other potentially impairing drugs. NTSB interpreted the marijuana levels as suggesting the driver was impaired but not incapacitated from the drug at the time of the accident.

NTSB's investigation also revealed several significant findings relating to the driver's previous history of drug use. His current employer, the bus charter company, had apparently made the required inquiries to previous employers about the applicant's Federal testing history in accordance with FMCSA regulations. However, NTSB noted that the driver neglected to inform the charter company of several previous employers or potential employers from which he had been fired or denied employment because of positive drug tests. Of the previous employers he did list, one or more did not respond to the company's written inquiries.

Current FMCSA regulations did not ensure that the driver's current employer could obtain a full and complete substance abuse testing history on him before he was hired. NTSB, in its preliminary report, addressed this concern in several of their conclusions about the accident:

12. Results of tests for controlled substances performed under U.S. Department of Transportation testing guidelines, even when positive, are not often available to prospective employers, making it difficult for them to make well-informed hiring decisions.

13. The current Federal testing regulations cannot adequately identify owner-operators who abuse controlled substances.

In light of these conclusions, NTSB made the following safety recommendation to FMCSA (one of two offered to the Agency):

2. Develop a system that records all positive drug and alcohol test results and refusal determinations that are conducted under 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.

Besides expressing its concerns about an employer having to rely on an applicant's self-report to solicit controlled substances testing information from previous employers, NTSB broadened its concern to include more than just controlled substance test records. In NTSB's view, previous histories of Federal alcohol positives and test refusals are an equivalent safety problem.

11.0 RESPONSES TO FMCSA's FEDERAL REGISTER REQUEST FOR INPUT ON THE PROPOSED DATABASE(S)

On July 9, 2001, FMCSA published a notice in the Federal Register to solicit input on Congress' interest in the feasibility of creating the proposed database(s). In the Notice, comments and suggestions were invited concerning the general feasibility of implementing the proposed database(s), as well as requesting input on specific questions relating to:

* The potential impact of the database(s) on the motor carrier industry and the service agents who support it.
* The costs and benefits of having such systems in place.
* Confidentiality and privacy issues.
* Whether procedures to correct records need be in place.
* If and when records could be/should be expunged.
* Expected costs for each State (if databases were mandated at the State level).
* The advantages and disadvantages of requiring employers to query a database before hiring a driver.
* What type(s) of databases should be permitted.
* What conditions should govern the release of information.
* What conditions should govern access to the database(s).
* Whether the proposed database(s) should be owned and/or operated by the States or the Federal government.
* Whether there were comparable databases available for review from which FMCSA could gain by their knowledge and experiences.

By request of several trade associations, FMCSA extended the original deadline for responding to the Notice from August 8, 2001, to September 8, 2001. In addition, to the extent feasible, FMCSA accepted written comments that were submitted even after the extended deadline.

A total of 64 sets of comments were received in response to the notice. Of these, 54 represented separate comments which were reviewed for this Report. [99] These were categorized as follows:

From States: 14 [100]

From Trade Associations and Safety Advocacy Groups: 12

From Employers: 3

From Unions: 2

From Medical Review Officers/Consortiums/Third Party Administrators/ Miscellaneous Service Providers: 17 [101]

From Private Individuals: 6 [102]

11.1 From the States

There were 14 State agencies which responded to the notice. One State (California) responded with inputs from two separate State agencies. A complete list of the responding States is at Appendix 4.

Overall, almost all of the State agencies (12 out of 14) favored the database(s) at least in concept. The two that did not appear to favor the databases were concerned that the States had no real use for the information.

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[99] The others generally represented copies of the original Notice and the deadline extension, and requests by various parties for the extension.

[100] One State had submissions from two different departments.

[101] One group submitted three sets of comments.

[102] One anonymous response was submitted but not reviewed for this Report.

Ten of the State respondents suggested that the Federal government should be the operator of a single database. The remaining respondents considered that the States were the proper location for the databases. Five (some from both groups) specifically believed that the CDLIS system should manage the databases in a manner similar to its current structure.

The States raised a number of important issues. These included, in no priority order, the following concerns which received mention by at least 25% of the respondents:

* The importance (and subsequent burden to the States) of due process and appeal.

* The importance of obtaining the driver's signed release forms.

* Concern about whether the databases would be considered a record under the Driver Privacy Protection Act of 1994 (DPPA).

* Concerns about confidentiality of the records.

* Cost concerns for the States.

There was no consensus on how long records should remain in the databases. The shortest mentioned length was three years, the longest was to keep records for an indefinite length. The most often cited length was five years (four respondents).

Other issues mentioned by more than one respondent included concerns about accessing and querying the database; the rate of participation by employers; whether the records would be judged as "medical information"; concerns that the States had no reason to manage the databases because they could take no action against the driver's license under their State law; concerns about owner/operators avoiding disqualification from safety-sensitive duties; inconsistencies between the database(s) and State laws; and concerns about any increased liability to the States if they were to be required to manage these databases.

11.2 From the Trade Associations and Safety Advocacy Groups

There were 11 trade associations and one safety advocacy group responding to FMCSA. A complete list of the respondents is at Appendix 4.

All of the respondents thought the idea of the proposed database(s) was valuable. All but one of the respondents was of the opinion that there should be a single centralized database. The remaining respondent accepted the States as operators of the proposed database(s).

The associations raised a number of important concerns as well. These included, in no priority order, the following issues which received mention by at least 25% of the respondents:

- Only MROs should be inputting positive records into the database.
- The importance of obtaining a signed driver's release form before employers could access the database.
- The importance of establishing a mechanism for drivers to correct errors in their record, but only with incontrovertible evidence. (Note: It was also clear that the respondents intended that this "appeal" process should not be permitted to address challenges to the original test finding.)

There was no consensus on how long records should remain in the database(s). The shortest mentioned length was as soon as the driver was eligible again after rehabilitation. The longest mentioned length was 10-15 years. The most often mentioned length was five years (two respondents).

Other issues mentioned by more than one respondent included the need to eliminate the prohibition on blanket releases and to ensure entries were made into the databases in a timely manner.

11.3 From the Employers

There were three employers responding to FMCSA. A complete list of the respondents is at Appendix 4.

Overall, all three employers approved of the idea of the proposed database(s). All three indicated there should be only one centralized database.

The employers raised several important concerns. These included the following issue which received mention by more than one of the respondents:

* The importance of establishing a mechanism for drivers to correct errors in their record.

11.4 From the Unions

There were two labor unions responding to FMCSA. A complete list of the respondents is at Appendix 4.

Both unions approved of the idea of the proposed database(s) and that there should be one centralized database.

Both unions indicated the following issues as important:

* The importance of obtaining a signed driver's release before employers could access the database. It was also noted by both unions that if electronic access is permitted to employers, the employer should be required to add additional driver information giving confidence that the driver's consent had been actually obtained.

* The importance of establishing a mechanism for drivers to correct errors in their record, but with the burden of proof being on the employer and the MRO.

There was a basic consensus on how long records should remain in the databases. One respondent proposed two, but no more than five years. The other respondent found five years to be acceptable.

11.5 From Medical Review Officers, Consortiums, Third Party Administrators, and Other Service Providers

There were eighteen sets of comments submitted to FMCSA, with 17 reviewed. One respondent sent in two sets of comments (one labeled as "draft" and one an apparent final version; only the final version was reviewed in this Report). A complete list of the respondents is at Appendix 4.

Of these respondents, all but five were affiliated with the provision of MRO services or the training and certification of MROs. Four others appeared to represent Consortiums or Third Party Administrators (C/TPAs) or represented C/TPAs and MROs. One respondent was a consumer reporting agency.

Overall, a large majority of the respondents (14) thought the idea of the proposed database(s) was a good one. Two appeared to be against the idea, and one respondent had no apparent opinion. All the respondents with an opinion on the issue indicated that one centralized database was preferable to individual State databases.

The MROs and other service providers raised a number of important concerns. These included, in no priority order, the following issues which received mention by at least 25% of the respondents:

* The importance of obtaining written consent from the driver before being able to access the database.

* The importance of confidentiality in inputting information, querying the database, and otherwise disseminating information on the drivers in the database.

* The difficulty MROs will face, if they are responsible for entering positives in the database, in determining who is a driver and from what State they have a CDL.

- The additional paperwork burden on MROs.
- Whether all Department of Transportation positives (including from all of the operating administrations) should be put in the database.
- The importance of drivers having a mechanism to be able to correct clerical errors in their records.

There was no consensus on how long records should remain in the database. The respondents ranged in opinion from two years to 10 years. The most often mentioned length was five years. All of the respondents with an opinion on this issue believed that records should be expunged, especially for first time offenders, after the driver produced rehabilitation records which established he or she was now eligible to perform safety-sensitive duties. Several respondents had opinions that drivers with multiple positives should be treated differently than drivers with only one positive.

Other issues mentioned by more than one respondent included the importance of including alcohol positives and refusals in the database; the importance of getting positives into the database as quickly as possible; concerns about the liability faced by MROs in supporting the databases; and concern about unauthorized access to the database.

11.6 From Individual Respondents With No Known Affiliation

There were six sets of comments from individual respondents with no known affiliation reviewed for this Report. A complete list of respondents is at Appendix 4.

Overall, all of the respondents felt the database(s) were a good idea, with a positive benefit for safety. All but two of the respondents felt there should be a single national database, one supported State control, and one offered no opinion. The one issue identified by more than one respondent was the importance of having a process for drivers to correct clerical errors.

Regarding the length of time the adverse record should remain in the database, only two of the respondents had an opinion. One felt two years was sufficient and one recommended 7-10 years.

11.7 Summary of Inputs

After review of all of the responses to FMCSA's request for input (States, trade associations, safety advocacy groups, employers, unions, service agents, and individuals), the following limited conclusions suggested themselves:

A. A large majority of respondents generally favored the creation of the proposed database(s).

States	86%
Trade Associations and Safety Advocacy Groups	100%
Employers	100%
Unions	100%
Service Agents	82%
Individuals	100%

B. There appeared to be a general consensus on what should be the key issues in the consideration of the database(s). Four of the five groups prominently mentioned the importance of obtaining a release of information from the CDL holder before being able to query the database(s) (States, trade associations, unions, and individuals). Four out of the five groups also mentioned that drivers should have the ability to amend erroneous or incorrect entries (trade associations, employers, unions, and individuals).

By both the nature of the questions posed by FMCSA and the limited number of respondents, no firm conclusions as to the feasibility and merits of the proposed database(s) could be reached based solely on the inputs received. Respondents in each group, as would be expected, tended to focus on those issues which directly related to their own interests. Nonetheless, the inputs were considered extremely valuable in the creation of this Report. A number of the respondents concerns were helpful in establishing priorities and in the formulation of the Report's recommendations.

12.0 CONCLUSIONS

This Report has attempted to review the critical issues which might affect the proper and effective implementation of the potential database(s). This has included legal, operational, administrative/technical, and employer-related concerns. This has also included discussions of cost; comparable databases (for lessons learned); and inputs provided by States, trade associations, safety advocacy groups, employers, unions, service agents, and private individuals. The following conclusions have been drawn:

General

The purpose of the potential database(s) must be to improve safety for employers, other CDL holders, and the motoring public. In order to be effective, the database(s) must be constructed in a manner which allows employers to identify all ineligible Commercial Drivers License (CDL) holders before they are permitted to perform regulated safety-sensitive duties. If this goal is not met, either through ineffective organization or lack of support, there is no value in making either the financial investment or operational commitment to the proposed database(s).

In addition, if Congress only includes positive controlled substance test records in the database(s), employers would still be obligated to manually pursue through a CDL holder's previous employers other violations of FMCSA prohibitions (alcohol positives and test refusals) which also result in a driver being disqualified from Federally regulated safety-sensitive duties. Without these additions, the new database(s) would end up actually increasing the administrative burden on employers while still leaving a substantial safety gap.

Legal

There are no insurmountable legal obstacles associated with implementation of the proposed database(s). However, the database(s) would maximize their legal defensibility if:

* The test results database was authorized or established by Congressional legislation.

* The CDL holder was required to fill out a consent-for-release-of-information form each time a prospective employer queried the database.

* Significant restrictions were placed on the use of information contained in the database(s), and severe sanctions were applied to its misuse.

* Statutory language was incorporated that would ensure that the new legislation would prevail over State and local laws and regulations, as well as inconsistent Federal statutes and regulations.

The Pilot Record Sharing Act (49 U.S.C 44936), especially sections (f) and (g), provides an extremely helpful model for how to properly resolve a number of the legal issues associated with the database(s).

The implementation of this FMCSA-sponsored database or databases should not permit commercial enterprises, trade associations, consortiums, or third party administrators to develop competing databases for their members.

Operational

The most efficient and cost-effective organization for the potential database(s) would be to have FMCSA either operate or sponsor a single Federal database that would be directly supported by the employers' service agents as well as the employers. Having a single, centralized database would simplify the logistics of inputting CDL holder positive test results and other violations of FMCSA prohibitions and for employers needing to query the database. It would greatly simplify the registration and authentication of system users. It would also avoid having to create costly computer system infrastructures in each State.

Another acceptable organizational structure for the potential database(s) would be to require each State to host a database containing records on CDL holders under their jurisdiction. In the preferred version of this option, employers would query the State with the CDL drivers license for that driver. The State, after reviewing its own records, would also query a centralized computer "pointer" system (similar to the current CDLIS and NDR systems) which would identify any other States with adverse records on the driver. This version would require each State, large or small, to develop a complete

computer infrastructure to manage data inputs from employer service agents and accept data queries from employers.

Whether a single Federal database or individual State databases with a centralized pointer system are selected, the principal obstacles for the effective implementation of the proposed database(s) are:

* How to register up to 750,000 system users and authenticate each user before access is granted to the database.

* How to ensure that employers and their service agents will cooperate completely and participate fully in a timely manner.

* How to make certain that the database(s) are not bogged down by unnecessary due process hearings or procedures.

* How to ensure the database(s) will be properly funded and staffed.

Administrative/Technical

None of the suggested hardware, software, or connectivity requirements for the potential database(s) are projected to be neither technically complex nor prohibitively expensive. FMCSA would be responsible for establishing the hardware and software standards necessary to construct the proper database systems, whether for a single centralized FMCSA-sponsored database or for individual State databases.

Data security will be a critical issue. All users of the database system(s) must be pre-registered. FMCSA would develop a mechanism to establish and verify the identity of users petitioning to use the potential database(s). FMCSA would also develop a mechanism to authenticate users every time they wish to enter the database(s). The registration and authentication system should be roughly the equivalent of a Class 2 digital certificate.

Medical Review Officers (and perhaps limited other service agents) should be the only ones permitted to enter information on CDL holders into the database(s). Only FMCSA (and/or the States) should have the ability to edit the database(s).

Only employers, FMCSA (and/or the States), and limited numbers of others designated by FMCSA (such as appropriate Federal or State Agencies), should have the ability to query the database(s). Access would not be permitted to any private individual or commercial enterprise, even if that entity was ostensibly operating on behalf of a regulated employer.

The database system(s) must be prepared to receive data inputs through the Web (Internet) or by fax or mail. Fax or mailed-in inputs must be on Federally-standardized Optical Character Recognition (OCR)-capable forms in order to facilitate scanned reading into the database(s) where possible.

The database system(s) must be capable of being queried by employers through the Web or through an Interactive Voice Response (IVR) system. Employers would receive responses to their queries about a CDL holder through a Web printout, a voice response, or an automated fax-back system.

All database record additions, amendments, or corrections, and all reports made from the database, must be captured by the computer system and easily retrievable for audit by FMCSA inspectors.

FMCSA should establish a due process mechanism where CDL holders can petition in writing to have erroneous or incorrect adverse records amended or excised. This is intended as an administrative function to resolve clerical errors or identity issues. The petition process should not be permitted to re-open issues about either the scientific soundness or legal defensibility of the original test result. FMCSA (or the States) should be the sole arbitrator of the driver's claim, but no formal hearing process should be made necessary.

CDL holders with adverse records in the database(s) should have the ability to petition FMCSA (or the States) to have their records expunged when they have met the Federal requirements for eligibility to perform regulated safety-sensitive duties and have completed their full measure of Federal follow-up tests. FMCSA (or the states) should be the sole arbitrator of the driver's petition, but no formal hearing process should be made necessary.

Employer-Related Responsibilities

Employers must be required query the potential database(s) before permitting a CDL holder to perform regulated safety-sensitive duties. For the database(s) to be effective, FMCSA would have to ensure through aggressive enforcement efforts, that all required adverse test records are entered into the database immediately after their verification.

In certain circumstances, besides Medical Review Officers (MROs), Consortiums and Third Party Administrators (C/TPAs) may be permitted by FMCSA to also enter adverse records in the database(s). This option would be valuable if certain MROs are unwilling or unable to perform the regulatory requirement.

Costs

The total cost of establishing a single centralized Federal database (hardware, software, connectivity, staffing) would be significantly less than that of requiring all States to establish individual driver record database infrastructures supported by a Federal "pointer" database system.

Even if the current CDLIS or NDR systems could be modified to support the potential State databases, the cost of creating a single centralized Federal database would likely be significantly less than the total costs necessary to support all of the newly required State databases and to modify either CDLIS or the NDR "pointer" systems.

Comparable Databases

The current CDLIS system, a FMCSA-sponsored "pointer" system, permits States to identify whether a driver holds a CDL in another State. CDLIS is currently not configured to manage the proposed database(s). Similarly, the NDR system, a NHTSA-sponsored "pointer" system, is not currently configured to manage the proposed database(s). In addition, no State is currently organized to accept either positive records or respond to eligibility queries in an automated fashion.

The current Oregon system reveals concerns about the States being able to ensure compliance by out-of-state employers and MROs without a mechanism to pursue Federal sanctions.

Reaction of Both Participants and Partners in the Proposed Database(s)

A majority of respondents to FMCSA's request for input on the proposed database(s) prefer a single centralized Federal database (as opposed to individual State databases).

Other consensus concerns expressed by respondents included the necessity of obtaining a consent form from a CDL holder before querying the database(s), and permitting the CDL holder to petition for the amendment of erroneous or incorrect database entries.

APPENDIX 1

APPENDIX 1

MOTOR CARRIER SAFETY IMPROVEMENT ACT OF 1999

SECTION 226
DRUG TEST RESULTS STUDY.

a. IN GENERAL - The Secretary shall conduct a study of the feasibility and merits of --

   1. requiring medical review officers or employers to report all verified positive controlled substances test results on any driver subject to controlled substances testing under part 382 of title 49, Code of Federal Regulations, including the identity of each person tested and each controlled substance found, to the State that issued the driver's commercial driver's license; and

   2. requiring all prospective employers, before hiring any driver, to query the State that issued the driver's commercial driver's license on whether the State has on record any verified positive controlled substances test on such driver.

b. STUDY FACTORS - In carrying out the study under this section, the Secretary shall assess -

   1. methods for safeguarding the confidentiality of verified positive controlled substances test results; and

   2. the costs, benefits, and safety impacts of requiring States to maintain records of verified positive controlled substances test results; and

   3. whether a process should be established to allow drivers -

      A. to correct errors in their records; and

      B. to expunge information from their records after a reasonable period of time.

c. REPORT - Not later than 2 years after the date of the enactment of this Act, the Secretary shall submit to Congress a report on the study carried out under this section, together with such recommendations as the Secretary determines appropriate.

APPENDIX 2

APPENDIX 2

RELEVANT PORTIONS OF DEPARTMENT OF TRANSPORTATION AND FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION REGULATIONS

A. Department of Transportation: 49 CFR 40.25 (total text)

§ 40.25 Must an employer check on the drug and alcohol testing record of employees it is intending to use to perform safety-sensitive duties?

(a) Yes, as an employer, you must, after obtaining an employee's written consent, request the information about the employee listed in paragraph (b) of this section. This requirement applies only to employees seeking to begin performing safety-sensitive duties for you for the first time (i.e., a new hire, an employee transfers into a safety-sensitive position). If the employee refuses to provide this written consent, you must not permit the employee to perform safety-sensitive functions.

(b) You must request the information listed in this paragraph (b) from DOT-regulated employers who have employed the employee during any period during the two years before the date of the employee's application or transfer:

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

(2) Verified positive drug tests;

(3) Refusals to be tested (including verified adulterated or substituted drug test results);

(4) Other violations of DOT agency drug and alcohol testing regulations; and

(5) With respect to any employee who violated a DOT drug and alcohol regulation, documentation of the employee's successful completion of DOT return-to-duty requirements (including follow-up tests). If the previous employer does not have information about the return-do-duty process (e.g., an employer who did not hire an employee who tested positive on a pre-employment test), you must seek to obtain this information from the employee.

(c) The information obtained from a previous employer includes any drug or alcohol test information obtained from previous employers under this section or other applicable DOT agency regulations.

(d) If feasible, you must obtain and review this information before the employee first performs safety-sensitive functions. If this is not feasible, you must obtain and review the information as soon as possible. However, you must not permit the employee to perform safety-sensitive functions after 30 days from the date on

which the employee first performed safety-sensitive functions, unless you have obtained or made and documented a good faith effort to obtain this information.

(e) If you obtain information that the employee has violated a DOT agency drug and alcohol regulation, you must not use the employee to perform safety-sensitive functions unless you also obtain information that the employee has subsequently complied with the return-to-duty requirements of Subpart 0 of this part and DOT agency drug and alcohol regulations.

(f) You must provide to each of the employers from whom you request information under paragraph (b) of this section written consent for the release of the information cited in paragraph (a) of this section.

(g) The release of information under this section must be in any written form (e.g., fax, e-mail, letter) that ensures confidentiality. As the previous employer, you must maintain a written record of the information released, including the date, the party to whom it was released, and a summary of the information provided.

(h) If you are an employer from whom information is requested under paragraph (b) of this section, you must, after reviewing the employee's specific, written consent, immediately release the requested information to the employer making the inquiry.

(i) As the employer requesting the information required under this section, you must maintain a written, confidential record of the information you obtain or of the good faith efforts you made to obtain the information. You must retain this information for three years from the date of the employee's first performance of safety-sensitive duties for you.

(j) As the employer, you must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied for, but did not obtain, safety-sensitive transportation work covered by DOT agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to test, you must not use the employee to perform safety sensitive functions for you, until and unless the employee documents successful completion of the return-to-duty process (see paragraphs (b)(5) and (e) of this section).

B. Department of Transportation: 49 CFR 40.321 (total text)

§ 40.321 What is the general confidentiality rule for drug and alcohol test information?

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third

parties without the employee's specific written consent.

(a) A "third party" is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.

(b) "Specific written consent" means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. "Blanket releases," in which an employee 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, companies to which the employee may apply for employment), are prohibited under this pan.

C. Department of Transportation: 49 CFR 40.351 (total text)

§ 40.351 What confidentiality requirements apply to service agents?

Except where otherwise specified in this part, as a service agent the following confidentiality requirements apply to you:

(a) When you receive or maintain confidential information about employees (e.g., individual test results), you must follow the same confidentiality regulations as the employer with respect to the use and release of this information

(b) You must follow all confidentiality and records retention requirements applicable to employers.

(c) You may not provide individual test results or other confidential information to another employer without a specific, written consent from the employee. For example, suppose you are a C/TPA that has employers X and Y as clients. Employee Jones works for X, and you maintain Jones' drug and alcohol test for X. Jones wants to change jobs and work for Y. You may not inform Y of the result of a test conducted for X without having a specific, written consent from Jones. Likewise, you may not provide this information to employer Z, who is not a C/TPA member, without this consent.

(d) You must not use blanket consent forms authorizing the release of employee testing information.

(e) You must establish adequate confidentiality and security measures to ensure that confidential employee records are not available to unauthorized persons. This includes protecting the physical security of records, access controls, and computer security measures to safeguard confidential data in electronic data bases.

D. Federal Motor Carrier Safety Administration: 49 CFR 382.405 (partial text)

... (a) except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401 ...

... (f) Records shall be made available to a subsequent employer upon receipt of a written request from a driver. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the driver's request.

... (h) An employer shall release information regarding a driver's records as directed by the specific written consent of the driver authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's specific written consent as outlined in § 40.321(f) of this title ...

E. Federal Motor Carrier Safety Administration: 49 CFR 382.413 (total text)

Employers shall request alcohol and controlled substances information from previous employers in accordance with the requirements of § 40.25 of this title.

APPENDIX 3

APPENDIX 3

STATUTE TEXT: THE PILOT RECORD SHARING ACT OF 1998 SUBSECTIONS (F) AND (G) OF U.S.C. § 44936

Sec. 44936. **Employment Investigations and Restrictions**

(f) **Records of Employment of Pilot Applicants**. -

(1) In general. - Subject to paragraph (14), before allowing an individual to begin service as a pilot, an air carrier shall request and receive the following information:

(A) FAA records. - From the Administrator of the Federal Aviation Administration, records pertaining to the individual that are maintained by the Administrator concerning -

(i) current airman certificates (including airman medical certificates) and associated type ratings, including any limitations to those certificates and ratings; and

(ii) summaries of legal enforcement actions resulting in a finding by the Administrator of a violation of this title or a regulation prescribed or order issued under this title that was not subsequently overturned.

(B) Air carrier and other records. - From any air carrier or other person that has employed the individual as a pilot of a civil or public aircraft at any time during the 5-year period preceding the date of the employment application of the individual, or from the trustee in bankruptcy for such air carrier or person -

(i) records pertaining to the individual that are maintained by an air carrier (other than records relating to flight time, duty time, or rest time) under regulations set forth in -

(I) section 121.683 of title 14, Code of Federal Regulations;

(II) paragraph (A) of section VI, appendix I, part 121 of such title;

(III) paragraph (A) of section IV, appendix J, part 121 of such title;

(IV) section 125.401 of such title; and

(V) section 135.63(a)(4) of such title; and

(ii) other records pertaining to the individual that are maintained by the air carrier or person concerning

-

(I) the training, qualifications, proficiency, or professional competence of the individual, including comments and evaluations made by a check airman designated in accordance with section 121.411, 125.295, or 135.337 of such title;

(II) any disciplinary action taken with respect to the individual that was not subsequently overturned; and

(III) any release from employment or resignation, termination, or disqualification with respect to employment.

(C) National driver register records. - In accordance with section 30305(b)(8) of this title, from the chief driver licensing official of a State, information concerning the motor vehicle driving record of the individual.

(2) Written consent; release from liability. - An air carrier making a request for records under paragraph (1) -

(A) shall be required to obtain written consent to the release of those records from the individual that is the subject of the records requested; and

(B) may, notwithstanding any other provision of law or agreement to the contrary, require the individual who is the subject of the records to request to execute a release from liability for any claim arising from the furnishing of such records to or the use of such records by such air carrier (other than a claim arising from furnishing information known to be false and maintained in violation of a criminal statute).

(3) 5-year reporting period. - A person shall not furnish a record in response to a request made under paragraph (1) if the record was entered more than 5 years before the date of the request, unless the information concerns a revocation or suspension of an airman certificate or motor vehicle license that is in effect on the date of the request.

(4) Requirement to maintain records. - The Administrator and air carriers shall maintain pilot records described in paragraphs (1)(A) and (1)(B) for a period of at least 5 years.

(5) Receipt of consent; provision of information. - A person shall not furnish a record in response to a request made under paragraph (1) without first

obtaining a copy of the written consent of the individual who is the subject of the records requested. A person who receives a request for records under this subsection shall furnish a copy of all of such requested records maintained by the person not later than 30 days after receiving the request.

(6) Right to receive notice and copy of any record furnished. - A person who receives a request for records under paragraph (1) shall provide to the individual who is the subject of the records

(A) on or before the 20th day following the date of receipt of the request, written notice of the request and of the individual's right to receive a copy of such records; and

(B) in accordance with paragraph (10), a copy of such records, if requested by the individual.

(7) Reasonable charges for processing requests and furnishing copies. - A person who receives a request under paragraph (1) or (6) may establish a reasonable charge for the cost of processing the request and furnishing copies of the requested records.

(8) Standard forms. - The Administrator shall promulgate -

(A) standard forms that may be used by an air carrier to request records under paragraph (1); and

(B) standard forms that may be used by an air carrier to -

(i) obtain the written consent of the individual who is the subject of a request under paragraph (1); and

(ii) inform the individual of -

(I) the request; and

(II) the individual right of that individual to receive a copy of any records furnished in response to the request.

(9) Right to correct inaccuracies. - An air carrier that maintains or requests and receives the records of an individual under paragraph (1) shall provide the individual with a reasonable opportunity to submit written comments to correct any inaccuracies contained in the records before making a final hiring decision with respect to the individual.

(10) Right of pilot to review certain records. - Notwithstanding any other provision of law or agreement, an air carrier shall, upon written request from a pilot who is or has been employed by such carrier, make available, within a reasonable time, but not later than 30 days after the date of the request, to the pilot for review, any and all employment records referred to

in paragraph (1)(B)(i) or (ii) pertaining to the employment of the pilot.

(11) Privacy protections. - An air carrier that receives the records of an individual under paragraph (1) may use such records only to assess the qualifications of the individual in deciding whether or not to hire the individual as a pilot. The air carrier shall take such actions as may be necessary to protect the privacy of the pilot and the confidentiality of the records, including ensuring that information contained in the records is not divulged to any individual that is not directly involved in the hiring decision.

(12) Periodic review. - Not later than 18 months after the date of the enactment of the Pilot Records Improvement Act of 1996, and at least once every 3 years thereafter, the Administrator shall transmit to Congress a statement that contains, taking into account recent developments in the aviation industry -

(A) recommendations by the Administrator concerning proposed changes to Federal Aviation Administration records, air carrier records, and other records required to be furnished under subparagraphs (A) and (B) of paragraph (1); or

(B) reasons why the Administrator does not recommend any proposed changes to the records referred to in subparagraph (A).

(13) Regulations. - The Administrator may prescribe such regulations as may be necessary -

(A) to protect -

(i) the personal privacy of any individual whose records are requested under paragraph (1); and

(ii) the confidentiality of those records;

(B) to preclude the further dissemination of records received under paragraph (1) by the person who requested those records; and

(C) to ensure prompt compliance with any request made under paragraph (1).

(14) Special rules with respect to certain pilots. -

(A) Pilots of certain small aircraft. - Notwithstanding paragraph (1), an air carrier, before receiving information requested about an individual under paragraph (1), may allow the individual to begin service for a period not to exceed 90 days as a pilot of an aircraft with a maximum payload capacity (as defined in section 119.3 of title 14, Code of Federal Regulations) of 7,500 pounds or less, or a helicopter, on a flight that is not a scheduled operation (as defined in such section). Before the end of the 90-day period, the air carrier shall obtain and evaluate such information. The contract between

the carrier and the individual shall contain a term that provides that the continuation of the individual's employment, after the last day of the 90-day period, depends on a satisfactory evaluation.

(B) Good faith exception. - Notwithstanding paragraph (1), an air carrier, without obtaining information about an individual under paragraph (1)(B) from an air carrier or other person that no longer exists, may allow the individual to begin service as a pilot if the air carrier required to request the information has made a documented good faith attempt to obtain such information.

(g) **Limitation on Liability; Preemption of State Law**. -

(1) Limitation on liability. - No action or proceeding may be brought by or on behalf of an individual who has applied for or is seeking a position with an air carrier as a pilot and who has signed a release from liability, as provided for under paragraph (2), against -

(A) the air carrier requesting the records of that individual under subsection (f)(1);

(B) a person who has complied with such request;

(C) a person who has entered information contained in the individual's records; or

(D) an agent or employee of a person described in subparagraph (A) or (B); in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise; or under any Federal or State law with respect to the furnishing or use of such records in accordance with subsection (f).

(2) Preemption. - No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (f).

(3) Provision of knowingly false information. - Paragraphs (1) and (2) shall not apply with respect to a person who furnishes information in response to a request made under subsection (f)(1), that -

(A) the person knows is false; and

(B) was maintained in violation of a criminal statute of the United States.

APPENDIX 4

APPENDIX 4

FMCSA FEDERAL REGISTER REQUEST FOR INPUT
(FR35825 - 35826, 66:131, JULY 9, 2001)

Docket FMCSA - 2001 - 9664 List of Respondents

A. States

1. State of Alabama -- Department of Public Safety
2. State of California – Business, Transportation and Housing Agency, Department of Motor Vehicles
3. State of California -- Business, Transportation and Housing Agency, Department of California Highway Patrol
4. State of Delaware -- Department of Public Safety, Division of Motor Vehicles
5. State of Idaho -- Transportation Department, Division of Motor Vehicles
6. State of Illinois -- Office of the Secretary of State, Driver Services Department
7. State of Maryland -- Motor Vehicle Administration
8. State of Minnesota -- Department of Public Safety, Driver and Vehicle Services
9. State of Missouri -- Department of Revenue, Division of Motor Vehicle and Drivers Licensing
10. State of New York -- Department of Motor Vehicles
11. State of North Carolina -- Division of Motor Vehicles
12. State of Oregon -- Department of Transportation, DMV Services
13. State of Texas -- Department of Public Safety, Drivers License Division
14. Commonwealth of Virginia -- Department of Motor Vehicles
15. State of Wisconsin Department of Transportation, Division of Motor Vehicles

B. Trade Associations and Special Groups

1.	American Association of Motor Vehicle Administrators	Arlington VA
2.	American Bus Association, Inc.	Washington DC
3.	American Trucking Associations	Alexandria VA
4.	Mid-West Truckers Association, Inc.	Springfield IL
5.	National Automobile Dealers Association	McLean VA
6.	National Private Truck Council	Alexandria VA
7.	National Safety Council -- Motor Transportation Division	Itasca IL
8.	California Trucking Association West	Sacramento CA
9.	National School Transportation Association	Alexandria VA
10.	Owner-Operator Independent Drivers Association, Inc	Grain Valley MO
11.	Truckload Carriers Association	Alexandria VA
12.	United Motorcoach Association (UMA)	Alexandria VA

C. Employers

1.	CFI/Contract Freighters, Inc.	Joplin MO
2.	Qwest	Denver CO
3.	Werner Enterprise, Inc.	Omaha NE

D. Unions

1.	Amalgamated Transit Union	Washington DC
2.	International Brotherhood of Teamsters	Washington DC

E. Medical Review Officers/Consortiums/Third Party Administrators/ Miscellaneous Service Providers

1. American Association of Occupational Health Nurses, Inc. (AAOHN) Atlanta GA
2. American Association of Occupational and Environmental Medicine (ACOEM) Washington DC

2A American College of Occupational and Environmental Medicine Medical Review Officer Section No. Sioux City SD

3. American Association of Medical Review Officers (AAMRO) Research Triangle Park NC
4. American Osteopathic College of Occupational and Preventive Medicine (AOCOPM) Marlton NJ
5. Bensinger, DuPont & Associates, Inc. Spokane WA
6. Bio-Med Testing Service, Inc. Salem OR
7. DACS/Drug & Alcohol Concentration Specialists Bowling Green KY
8. DAC Services Tulsa OK
9. Drug and Alcohol Testing Industry Association (DATIA) Alexandria VA
10. JAT MRO, Inc. Jacksonville FL
11. Stuart M. Kagan, MD, Medical Review Officer (No Location Given)
12. Stephan Mann, MD, Medical Review Officer Frederick MD
13. Medical Review Officer Certification Council Schaumberg IL
14. OccuMedix Dresher PA
15. Gordon A. Page, MD, Medical Review Officer Standish MI
16. Substance Abuse Program Administrators Association (SAPAA) Germantown MD

F. Private Individuals/Unknown Affiliations

1.	Michael A. Brown	Charlotte NC
2.	John A. Carkin	Topeka KS
3.	William M. England	Dallas TX
4.	L.C. Filary	Jackson MI
5.	Linn E. Holmes	Sacramento CA
6.	Lisa L. Moon	Chandler AZ