

Federal Bar Building
1815 H Street, NW, Suite 500
Washington, D.C. 20006
Phone 202.659.4799
FAX 202.775.5929

P.O. Box 28999
Milwaukee, WI 53228-0999
7111 West Edgerton Avenue
Milwaukee, WI 53220
Phone 414.423.1330
FAX 414.423.1694
ADMINISTRATION

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KRUKOWSKI
& COSTELLO *PA*

LEGS./REGS. DIV.

Krukowski & Costello, P.C.
Attorneys at Law

Robert A. Hirsch
M. Pia Torretti Gekas

BY MESSENGER:

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May 13, 1996

Office of Chief Counsel (HCC-10)
Federal Highway Administration
U.S. Department of Transportation
Room 4232
400 Seventh Street, SW
Washington, DC 20590-0001

FHWA-97-2277-10

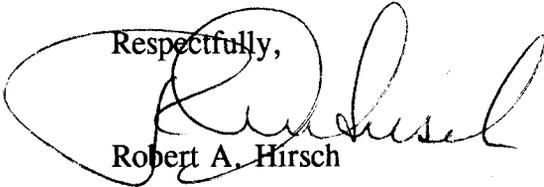
Re: Docket No. MC-96-6, Safety Performance History of New Drivers

To the Chief Counsel:

Enclosed is an original and two (2) copies of the comments of DAC Services in the above-referenced proceeding.

Please date-stamp one of the copies and return it to the undersigned in the self-addressed, stamped envelop which is provided for your convenience.

Respectfully,



Robert A. Hirsch

enclosures

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ORIGINAL

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

FHWA DOCKET NO. MC-96-6, RIN 2125-AD66

SAFETY PERFORMANCE HISTORY OF NEW DRIVERS
[61 FED. REG. 10548]

COMMENTS OF
DAC SERVICES

May 13, 1996

By its Attorneys:
Krukowski & Costello, P.C.
1815 H Street, NW
Suite 500
Washington, DC 20006

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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

FHWA DOCKET NO. MC-96-6, RIN 2125-AD66

SAFETY PERFORMANCE HISTORY OF NEW DRIVERS
[61 FED. REG. 10548]

* * *

COMMENTS OF
DAC SERVICES

* * *

INTRODUCTION

The ability and effectiveness of motor carriers to obtain all pertinent information concerning a driver-applicant's employment history and prospective fitness for driving is absolutely essential to highway safety. For this reason alone, the purpose and objectives of this rulemaking are of critical importance.

However, the substance of this rulemaking affects far more than the issue of highway safety. The rights and obligations of carriers as employers, and of drivers, will also be greatly impacted by the outcome of this proceeding. While motor carriers will most likely always be liable for the actions of an employee who is acting within the scope of his/her employment or in furtherance of the employer's interest, carriers can also be liable for hiring a driver whom they "knew or should have known" was unfit for the job at the time the driver was hired. In the former case, the carrier's liability would be imposed *vicariously*, under the doctrine of "*respondeat superior*." In the latter case, however, the carrier's liability would

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result directly from the carrier's own negligence, based upon the fact that the carrier was negligent in hiring the driver in the first place and that the driver's hiring was the proximate cause of the plaintiff's death or injuries. While in the past motor carriers have most often been sued under the *respondeat superior* theory, increasingly lawsuits are being brought under the "negligent hiring" theory, especially since the negligent hiring theory has at least two advantages over *respondeat superior*. First, unlike *respondeat superior*, the negligent hiring theory provides plaintiffs with the opportunity to recover punitive damages against an employer. Second, suing under the negligent hiring theory enables plaintiffs to introduce evidence of the employee's prior negligence and/or other wrongful acts.¹

Moreover, and as further discussed below, the issues presented by this rulemaking are also implicated by the obligations directly imposed on carriers under the Americans With Disabilities Act (ADA).

In reviewing and analyzing the comments submitted in this rulemaking for the purpose of achieving the Congressional objectives mandated under section 114 of the Hazardous Materials Transportation Act of 1994 (HazMat Act), therefore, it is especially important that the Federal Highway Administration (FHWA) recognize and take into account the broad impact and significant, but in many cases subtle, consequences which the requirements ultimately adopted under this rulemaking could impose on carriers in their capacity as employers, and on drivers as well.

It is equally important that FHWA recognize and take in account the fact that most carriers have advanced from the days of pencils and mail. For reasons of safety and

¹ See 42 UNIV. OF MIAMI L. REV. 681-682 (1988).

efficiency, carriers want and need to be able to screen applicants quickly, yet as fully as possible, while at the same time having the means available to them to ensure the confidentiality of their communications. Manual handling is slower, more labor intense and more costly. As a result, more and more companies are turning to computerized communication systems to obtain and/or give employment histories, motor vehicle records, criminal records, drug and alcohol test information and other relevant information about their applicants. For this reason, FHWA should make every effort possible to ensure that whatever specific information it will require carriers to obtain and/or disclose is susceptible of being communicated via computerized transmission.

SUMMARY OF POSITIONS TAKEN

For the reasons discussed in its comments, DAC takes the following positions with respect to issues raised by the notice of proposed rulemaking in this docket:

- **FHWA should make every effort possible to ensure that whatever specific information it will require carriers to obtain and/or disclose is susceptible of being communicated via computerized transmission.**
- **It is essential for FHWA to include an explicit statement in the final iteration of §391.23 that the information being required is only the minimum. The one consequence to be avoided is fostering a reduction of the employment-related information currently being shared among prospective and former employers.**
- **It is also essential that FHWA make expressly clear in both §391.23(c)(2) and §382.413(e), that information required and/or authorized under either provision can be obtained and/or disclosed by the prospective employer directly through its authorized agent without violating the requirement.**
- **The accident register should not be used to specify the minimum accident information to be obtained. Whatever information carriers will be required to obtain should be specifically set forth in §391.23.**

- Carriers *should not be required* to provide copies of accident reports. Instead, they should be required to provide a brief description of each accident, while leaving to the discretion of the individual carriers the method and manner to be used for describing accident, and the amount of detail that in each case may be appropriate or necessary.
- FHWA *should not require* carriers to obtain information concerning hours-of-service violations, especially while the results of FHWA's current study of driver fatigue remain pending.
- Carriers *should not be required* to obtain rehabilitation information unless they intend to hire the applicant.
- Carriers *should not be required* to obtain information relating to rehabilitation required under the regulations of another DOT agency.
- Carriers *should not be required* to obtain information concerning any drug and/or alcohol-related violation that *cannot* be verified by a positive test result or test refusal.
- Carriers *should not be required* to obtain information relating to drug and alcohol-related violations arising under the regulations of another DOT agency.
- The mandatory "daisy chain" disclosure proposed under §382.413 is fraught with serious problems and *should not be adopted*.
- The broad right of review proposed under §391.23 will have a *chilling effect* on voluntary disclosures of information and *should not be adopted*.
- Drivers should be required to submit requests to review and comment on information within 60 calendar days of being notified of the disposition of the employment application.
- Prospective employers *should only be required* to obtain the information required under the final rule from the *past employers* for which an applicant-driver worked *on or after the effective date of the final rule*.
- The final rule should specify that the three-year period for which information is required begins from the date the information is requested by the prospective employer or its agent.

IDENTIFICATION AND INTEREST OF DAC SERVICES

DAC Services (DAC) is a "consumer reporting agency" that, since 1982, has been assisting motor carriers to hire safe drivers and comply with the existing requirements of Part 391 and Part 382 of the Federal Motor Carrier Safety Regulations (FMCSR). DAC is the largest provider of automated driver screening services in the nation. Over 6000 motor carriers currently subscribe to DAC services, including virtually all of the 200 largest motor carriers in this country.²

Using DAC's services, motor carriers can quickly and efficiently obtain detailed and highly pertinent work-related information on their prospective and current drivers, including: past employment histories, motor vehicle records, driving school records, past drug and alcohol test results and related information, and criminal histories. During 1995, for example, more than 200,000 driver-applicants were screened, on average, each month with DAC's assistance. DAC's services are also endorsed by the American Trucking Associations and 39 state trucking associations.

Moreover, because DAC provides information which affects employment decisions, DAC is considered a "consumer reporting agency." As such, DAC is regulated by, and the accuracy of the information it provides subject to, the stringent requirements of the Fair Credit Reporting Act (FCRA) (15 U.S.C.A. §§1681 *et seq.*). Because of this, the privacy rights of the individual drivers about whom DAC reports are at all times afforded rights and

² The following are among the 6000 plus carriers that subscribe to DAC's services (in alphabetical order): APA Transport, American Freightways, Atlas Van Lines, Bekins Van Lines, Builders Transport, Chemical Leaman Tank Lines, Dart Transit, JB Hunt Transport, KLLM Transport Services, Morgan Drive Away, Old Dominion Freight Line, Prime, Rollins Transportation System, Ryder Dedicated Logistics, Southwest Motor Freight, Swift Transportation, Watkins Motor Lines, Werner Enterprises.

protections under the FCRA which are not otherwise available when employment-related information is disclosed directly between carriers rather than through a consumer reporting agency such as DAC. For FHWA's assistance, a copy of the FCRA is appended to these comments.

DAC and DAC's motor carrier subscribers are strongly committed to public safety. The instant docket and the requirements which it may ultimately impose are, therefore, of significant interest to DAC's 6000-plus motor carrier subscribers and to DAC as their agent.³

COMMENTS

In general, DAC supports the proposed rule. Indeed, both Congress and FHWA are to be commended for recognizing the weaknesses of the current requirements. As FHWA has acknowledged in the preamble to the proposal:

Currently, §391.23(a)(2) of title 49 of the Code of Federal Regulations (CFR) requires motor carriers to make "an investigation of the driver's employment record during the preceding three years," without specifying the type of information to be sought. The current regulation does not require a former employer to respond to the new and prospective employer's inquiry. For this reason, former employers may refuse to respond to such requests, and new and prospective employers are, therefore, unable to obtain important safety information about the driver.

61 Fed. Reg. at 10549. DAC agrees. Both the failure of the current regulation to provide greater specificity as to the minimum safety information which prospective employers should be obtaining, as well as the current regulation's failure to require past employers to disclose information when requested, have proven so problematic that many carriers have found

³ DAC's comments express the concerns and recommendations related to DAC by DAC's carrier subscribers. References to "DAC" and to DAC's "motor carrier subscribers" are used interchangeably throughout these comments.

themselves going through a perfunctory, albeit costly, investigative exercise without realizing any tangible benefit. Indeed, under current §391.23, it has been common for a prospective carrier employer to solicit specific information concerning a driver's past employment only to have the past employer restrict its responses to the driver's "name, rank, and serial number" at the direction of the latter's legal counsel. While the past employer's refusal to provide more detailed information can be cited in the defense of the prospective carrier if sued under the negligent hiring theory, the public's safety is the ultimate loser under this scenario, since prospective employers are being denied information that could be essential to identifying and weeding out applicants who pose substantial risks to safety.

Having expressed our general support for the proposed rule, DAC must nonetheless advise that certain aspects of the proposed requirements are of concern to DAC. DAC's specific concerns are discussed below.⁴

Before addressing our specific concerns, however, DAC believes it is essential to stress, at the outset of these comments, the need for FHWA to include an explicit statement in the final iteration of §391.23, to the effect that, by establishing the information which carriers must at a minimum obtain §391.23 is not intended to limit or otherwise undermine the ability of carriers to request and obtain information in addition to the minimum information required under §391.23. The one consequence of this proceeding to be avoided at all costs is that, in establishing the minimum standard of information to be obtained, the final rule does not result (albeit inadvertently) in establishing the maximum standard as well

⁴ The order in which DAC presents its comments and concerns below is in the order in which the issues are presented in the NPRM and, therefore, should not be construed by FHWA as an implicit prioritization of DAC's concerns. To the contrary, this entire rulemaking is of utmost importance to DAC and its carrier subscribers.

and thereby foster an intended reduction in the employment-related information that is currently being shared among prospective and former employers. Clearly that is not what Congress intends.⁵ While DAC agrees with FHWA's proposal to limit the information to be required to accidents falling within the definition of §390.5 (*i.e.*, "DOT accidents"), such accidents represent a small portion of the total accidents which can involve drivers. For example, as a result of a driver's negligence in backing into a shipper's loading dock a tailight may be broken, or one employee may be injured but (fortunately) not sufficiently enough to require immediate medical attention while another employee is seriously injured. In both of the two former instances, the accident would not be classified a "DOT accident" while in the latter case it would. Similarly, a driver may negligently run off the road and hit a stop sign rather than a telephone pole, thereby avoiding damage sufficient enough to require the vehicle to be towed. The point here is that whether an accident ends up being classified a "DOT accident" or merely an "accident" is more often the result of fortuitous luck than the driver's accident avoidance skills. For many carriers seeking to hire only the best and safest drivers, however, greater emphasis is focused on evidence of a driver's negligent propensities and diminished driving skills (*i.e.* the causative factors) than on the quantifiable results of the individual accidents. Thus, information concerning a driver's involvement in non-DOT accidents can often be as valuable to a carrier in evaluating a driver's safety performance as information concerning DOT accidents. Therefore, while the

⁵ While the preamble to the proposed rule states that "[t]he specified information should not necessarily be regarded as an exclusive list of the information that would be obtained during the driver's employment record investigation", 61 Fed. Reg. at 9549, such statements serve a far better purpose when set forth in the actual regulation where they have some force of law and are available to be seen by all, than in the preamble to the rule where they are *dicta* and seen only by few let alone remembered as having been said.

final rule should only require carriers to obtain information about DOT accidents, the final rule should also make clear that carriers are authorized to obtain additional information as well.

It is also essential that FHWA make expressly clear in both §391.23(c)(2) and §382.413(e), that information required and/or authorized to be released under either section can be obtained and/or disclosed by a prospective employer directly through its authorized agent without violating the requirement.⁶ Increasingly, motor carriers, like most other employers, are contracting with consumer reporting agencies such as DAC to obtain employment history information on driver applicants and applicants for other positions as well. Aside from the efficiencies and cost-effectiveness that can be achieved by using a consumer reporting agency to conduct employment background investigations, because consumer reporting agencies are subject to the Fair Credit Reporting Act (FCRA), the information which is obtained and disclosed is subject to the due process protections imposed by FCRA; protections that are not otherwise available to an employer or applicant when information is disclosed directly between employers. As such, there is a significant benefit to the public, as well as to employers and applicants, whenever employment-related information can be expeditiously disseminated through a consumer reporting agency. The rulemaking should not foreclose this.

Because of the ongoing driver shortage and competition for drivers, motor carriers are

⁶ While the focus of these comments is on consumer reporting agencies and the important role which they serve as the carriers agent for purposes of assisting carriers to comply with the FMCSR, the same issues concerning compliance with the driver qualification requirements arise when a carrier engages the services of a driver leasing company. In that regard, FHWA has said that a "driver service or leasing company may perform annual review [of driving records] if designated by a motor carrier to do so." 58 Fed. Reg. 60734, 60748, *regulatory Guidance for the Federal Motor Carrier Safety Regulations* (November 17, 1993).

under increasing pressure to put applicants into a truck as quickly as possible. More than 5000 employment histories are, at present, being obtained from DAC each day; this number is expected to increase. These reports are available to the carriers almost instantaneously with their request, and can provide significantly more information about a driver's employment history than carriers would be required to obtain under this rulemaking. As a result, these carriers are being provided the opportunity and means to effectively pre-screen drivers before they are put on the highways. The need to put drivers on the highway quickly, however, is forcing many other carriers to put drivers on the highway first and conduct their screening afterward. For the benefit of the public's safety, it is imperative that the requirements adopted in this rulemaking do not result in lesser amounts of information being shared, or foster unnecessary delays and inefficiencies in the process.

Currently §382.107 defines "employer" to include "the employer's agents, officers and representatives", and thus the actions by an employer's authorized agent should properly be considered to be those of the employer. Section §390.5, however, contains no similar reference to "agents, officers and representatives."⁷ However, even though §382.107's definition of employer does include the reference of "agents", on a number of occasions past employers have advised DAC that they will not provide information directly to DAC, even though DAC's role as the prospective employer's authorized agent has been documented. The reason they have given is that §382.413 does not expressly authorize disclosure to the carrier's agent. Not only does this impose additional expense and needless inefficiency on

⁷ For purposes of the broad scope and application of the FMCSR, §390.5's definition of "employer" should not include "agents, officers and representatives."

the prospective employer, both the prospective employer and applicant driver are forced to forfeit an important benefit, the protection they each receive under the FCRA, simply because the information is not being obtained from and disclosed through a consumer reporting agency. It is important, therefore, that the final rule acknowledge the important role which consumer reporting agencies, driver leasing companies, and other such agents play in the employment history area. It is also important that both §391.23 and §382.413 include the following statement: "As used in this section, the term *employer* includes an employer's agents, officers and representatives. Examples of agents include employment reference and other consumer reporting agencies, and driver leasing companies."⁸

Having expressed these general, but nonetheless critical, concerns about the proposed rule, DAC's specific concerns regarding FHWA's proposed implementation of section 114 of the HazMat Act follow.

A. Accident Information. In section 114(a)(1) of the HazMat Act, Congress directed FHWA to initiate the instant rulemaking for the purpose of "specify[ing] the safety information that must be sought [under §391.23] by a motor carrier with respect to a driver." Section 114(b)(1) of the HazMat Act, in turn, states that the safety information which carriers should be required to obtain "shall include *information on . . . any motor vehicle accidents in which the driver was involved during the preceding 3 years*" (emphasis

⁸ The need for this or a similar statement to be set forth in the regulation is well documented. Carriers have for years used DAC's services to obtain state motor vehicle records and other employment-related histories required by §391.23; FHWA has been well aware of this. However, questions concerning whether information obtained through DAC could be used to satisfy §391.23 have from time-to-time been raised not only by individual carriers but by FHWA's field staff as well during their inspections of carrier operations. Consequently, FHWA has had to issue letters on two separate occasions advising that the information obtained through DAC would satisfy §391.23. Copies of the relevant correspondence are provided in Appendix B to these comments.

supplied). In other words, section 114 provides FHWA with general direction but leaves to FHWA the discretion to specify the particular information which carriers will be required to obtain.

To implement section 114, FHWA has proposed revisions to §391.23 and §390.15. Under the revisions proposed to §391.23(c), a prospective carrier employer would be required to obtain "*information on . . . any accidents, as defined by §390.5 of this subchapter, in which the driver was involved during the preceding three years*" (emphasis supplied). The particular accident information which §391.23(c) would require carriers to obtain pursuant, however, is not specified in §391.23(c). Instead, it appears that FHWA is proposing to specify the accident information carriers would have to obtain, by adding new subsection (c) to §390.15.

1. DAC recommends against using the accident register to specify the minimum accident information to be obtained. As proposed, the new §390.15(c) would appear to make the accident information which carriers must obtain under §391.23(c) coextensive with the information which carriers must maintain in their accident register pursuant to §§390.15(b) and (c) ("Motor carriers shall make available . . . all records and information within the accident register that pertain to that driver's accident record."). If FHWA does not intend for §391.23(c) and §§390.15(b) and (c) to be read coextensively, then the language of the proposed regulation needs to be clarified, and the public may need to be given a further opportunity to comment as well. If, however, FHWA intends for §391.23(c) and §§390.15(b) and (c) to be read coextensively, then for the reasons discussed below, DAC recommends against FHWA's adoption of this portion of the proposed rule.

As a general proposition, DAC believes it is essential for FHWA to specify with some measure of particularity the items of information which, at a minimum, a prospective employer would have to obtain, while at the same time leaving carriers with some measure of flexibility to "flesh out" the details. However, based on DAC's own experiences and on conversations DAC has had with its carrier subscribers, DAC believes the seven specific items of information carriers must maintain in their accident register, pursuant to §§390.15(b)(1) and (b)(2)), are far more suited to FHWA's particular enforcement and informational needs than to the individualized employment needs of carriers for purposes of screening applicants. For this reason, DAC recommends against FHWA's use of §390.15 for purposes of specifying the information required to be obtained under §391.23. For purposes of clarity and for the carriers' ease in complying, whatever information carriers will be required to obtain should be specifically set forth in §391.23. For the same reason, DAC recommends against the adoption of proposed §390.15(c), since the duty of past employers to respond within 30 days of a request is appropriately addressed by §391.23(c)(2) of the proposed rule.

2. Carriers should not be required to provide copies of accident reports. DAC is equally concerned that the final rule might require prospective employers to obtain copies of the accident reports that carriers are in general required to maintain pursuant to §390.15(b)(2). Aside from the expense and difficulty many past carrier employers could incur in reproducing and providing legible copies, in many instances the reports are confidential documents containing privileged driver statements and other information which could affect the outcome of personal injury litigation; this would especially be the case with

respect to the accident reports required by the carrier's insurance company, but the privacy laws of the states may also prohibit the summary disclosure of such information. As such, it would be inappropriate for FHWA to require disclosure of such accident reports as a matter of routine. Instead, DAC recommends the final rule direct carriers to provide a brief description of each accident, while leaving to the discretion of the individual carriers the method and manner to be used for describing the accident, and the amount of detail that in each case may be appropriate or necessary. For example, over the past two years DAC has worked closely with a number of its largest subscribers to develop a system of short codes to be used by DAC subscribers when providing DAC with accident information, and later by DAC when disseminating such information to a prospective employer; the codes can be used alone or in combination with others to appropriately describe an accident. The following are examples of DAC's coded descriptions: "backing", "right turn", "head on collision", "jack knife", "hit while parked", "hit while moving", and "ran traffic control." At the same time, DAC also recognizes that other methodologies for describing the pertinent details of an accident are also available. DAC and its carrier subscribers believe the need for carriers to have flexibility in this area is utmost essential. Thus DAC's carrier subscribers would be strongly opposed to a final rule which would attempt to impose the sole method and manner in which the details of an accident would have to be described.

In summary, DAC recommends that proposed §391.23(c) be amended in order to specify the minimum items of accident information which carriers would be require to

obtain, and that the minimum items of information consist of the following:

- (i) Date of accident;
- (ii) City or town in which the accident occurred, or most nearest to where the accident occurred;
- (iii) State in which the accident occurred;
- (iv) Driver's name;
- (v) Number of injuries;
- (vi) Number of fatalities;
- (vii) Whether hazardous materials, other than fuel spilled from the fuel tanks of vehicles involved in the accident, were released; and
- (viii) A brief description of the accident.

B. Hours-of-Service Violations Resulting in an Out-of-Service Order:

1. FHWA should not require carriers to obtain information about a driver's hours-of-service violations which result in an out-of-service order. Section 114(b)(4) of the HazMat Act authorizes FHWA to require prospective employers to obtain information concerning "any other matters determined by the Secretary of Transportation to be *appropriate and useful* for determining the driver's safety performance" (emphasis supplied). Therefore, in addition to the specific information section 114 mandates carriers to obtain, FHWA has proposed to require prospective employers to obtain information concerning a driver's hours-of-service violations which result in an out-of-service order.

However, while FHWA has stated that it "considers a driver's hours-of-service violations to be a major safety indicator", 61 Fed. Reg at 10550, serious questions remain regarding the relationship between fatigue and accident experience as well as about the degree of risk such information may impute to the particular driver.⁹ Having previously

⁹ It is noteworthy in this regard that for purposes of establishing a motor carrier's safety fitness rating, individual hours of service violations would not rise to the level of severity to be considered "acute", but would instead only be classified as "critical" when they occur in a pattern. See FHWA Docket No. MC-96-18, *Rules of Practice for Motor Carrier Proceedings; Investigations; Disqualification and Penalties*, 61 Fed. Reg. 18866, 18870 and 18883.

found an "absence of evidence of a direct relationship between hours of service and a significant reduction in accidents", *see* BMCS Docket No. MC-70-1, *Limits on Hours of Service of Commercial Vehicle Drivers; Termination of Rulemaking*, 46 Fed. Reg. 44198 (September 3, 1981), and because FHWA's current study of driver fatigue is yet to be completed, the proposed requirement is at best premature and any determination *as a matter of law* concerning the appropriateness and usefulness of hours-of-service information vis-a-vis a driver's safety performance should be delayed until at least the study is concluded and the results can be fully and objectively analyzed.

At present, however, a serious question can be raised concerning just how "*appropriate and useful*" such information really is within the purpose of section 114. In many instances, a driver is placed out of service even though it is later shown that a violation did not actually occur. For example, it is not unusual for a driver to be cited for not having a log although the driver was not required to have one under the 100-mile exemption of 49 C.F.R. §395.1(e). Indeed, out-of-service orders in this regard can be somewhat subjective and, from an evidentiary standpoint are no more than a allegation of a violation. Further, a determination of compliance can be, and often is, based solely on the legibility and detail of the log. *See, e.g.*, inspection item 14 of the out-of-service criteria: "A record of duty status that does not accurately reflect the driver's actual activities and duty status (including time and location of each duty status change and the time spent in each duty status) in an *apparent attempt to conceal a violation of an hours of service limitation.*" For these reasons, many of DAC's carrier subscribers have in the past chosen not to obtain such information, believing that it may show more about the carriers for whom the driver previously worked than about

the driver him/herself.

Additionally, many of DAC's carrier subscribers, including many of the largest and more sophisticated, have advised that they are not always made aware when a driver has been placed out of service for an hours-of-service violation. Thus, in many cases the information which they may have may be at best incomplete. At the same time, while information concerning a carrier's out-of-service violations can be obtained by the public as part of the carrier's safety profile, such information relating to the specific drivers involved is no longer available as a matter of routine. Instead, such information can only be obtained by a motor carrier under the Freedom of Information Act (FOIA).¹⁰ However, the time for processing such FOIA requests is currently running a minimum of five to six weeks, and DAC would expect that this time would increase dramatically if all carriers would be required to obtain such information routinely.

For the foregoing reasons, therefore, DAC's carrier subscribers are opposed to FHWA's proposal to require carriers to obtain information concerning hours-of-service violations and accordingly recommend against its adoption, especially while the results of FHWA's current study of driver fatigue remain pending. However, if FHWA continues to believe that such information should be obtained by prospective carrier employers, the source of such information should be FHWA rather than the individual carriers, who at best would have limited information to share, if at all. Indeed, with information flowing from and through the SAFETYNET system, FHWA is the source most likely to have complete and up-to-date information, not the individual carriers.

¹⁰ See Appendix C to these comments.

C. Failure to Undertake or Complete Drug or Alcohol Rehabilitation: In accordance with section 114 of the HazMat Act, the safety information which carriers will be required to obtain must include "*information on . . . any failure of a driver, during the previous 3 years, to undertake or complete a rehabilitation program under section 12020 of the Commercial Motor Vehicle Safety Act (49 App. U.S.C. 2701) after being found to have used, in violation of law or Federal regulation, alcohol or a controlled substance.*"¹¹

The NPRM proposes to implement this statutory requirement by amending both §382.413(a) and §391.23. In the former case, proposed §382.413(a)(1)(ii) would require carriers to obtain from a driver's previous employers information concerning the driver's "[f]ailure to undertake or complete a rehabilitation program prescribed by a substance abuse professional pursuant to §382.605, or the alcohol or controlled substances rules of another DOT agency, during the past three years." A similar requirement would be added under §391.23(c)(1)(iii), except that it would not extend to rehabilitation required under "the alcohol or controlled substances rules of another DOT agency." As discussed below, both proposals present some concerns for DAC. However, before discussing DAC's specific concerns regarding the proposed revisions to §§382.413(a)(1)(ii) and 391.23(c)(1)(iii), some comments regarding the Americans With Disabilities Act (ADA) and the requirements it imposes on carriers concerning drug and alcohol users are in order.

As a general rule under the ADA, employers may not "discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to

¹¹ As FHWA correctly pointed out in the NPRM, section 114 referenced the appropriate section of the Commercial Motor Vehicle Act incorrectly. The correct section is codified at 49 U.S.C. §31306.

job application procedures, the hiring, advancement, or discharge of employee, employee compensation, job training, and other terms, conditions, and privileges of employment" (emphasis supplied).¹² 42 U.S.C. §12112. While the terms "disability" and "qualified individual with a disability" do not include individuals *currently engaging* in the illegal use of drugs, 42 U.S.C. §12114, the EEOC's regulations also provide that an individual *is not to be excluded* from the ADA's protection if he or she:

- (1) "Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs"; or
- (2) "Is participating in a supervised rehabilitation program and is no longer engaging in such use"; or
- (3) "Is *erroneously regarded* as engaging in such use, but is not engaging in such use."

(Emphasis supplied.) 29 C.F.R. §1630.3(b).

In the Equal Employment Opportunity Commission's (EEOC) guidance manual discussing drug and alcohol abuse, the EEOC has advised that "a person who has casually used drugs in the past, but did not become addicted is not an individual with a disability based on past drug use." *Technical Assistance Manual On The Employment Provisions (Title I) Of The Americans With Disabilities Act, VIII-4* (January 1992) (*Technical Assistance Manual*). The EEOC has further advised that "individuals who are not illegally using drugs, but who are erroneously perceived as being addicts and as currently using drugs illegally, are

¹² For purposes of this discussion, it is important to point out that the ADA, unlike the FMCSR, applies solely to the traditional employer-employee relation. Thus, whenever a carrier is using an independent contractor driver that carrier would not be subject to, and those drivers would not be protected by, the ADA. However, similar requirements and protections may arise under state law.

protected by the ADA." *Id.* The EEOC has also said that, "[i]f an employer d[oes] not regard the individual as an addict, but simply as a social user of illegal drugs, the individual would not be 'regarded as' an individual with a disability and would not be protected by the ADA." *Id.*

It must also be noted that the EEOC considers alcohol tests to be medical exams for purposes of the ADA, while drug tests *are not* considered medical exams (*Technical Assistance Manual*, VIII-7); at the same time, however, information disclosed by drug tests relating to or identifying the individual's medical condition would be considered medical information for purposes of the ADA and as such governed by the ADA and EEOC's regulations concerning medical exams and inquiries. Under EEOC's regulations, employers are *strictly forbidden* from conducting medical exams and making inquiries about whether an applicant is disabled or the nature or severity of a disability *unless* a conditional offer of employment has been made. 29 C.F.R. §1630.13. There is one exception to this broad prohibition. As the EEOC's regulations explain:

It *may* be a defense to a charge of discrimination under this part that a challenged action is *required or necessitated* by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a reasonable accommodation) that would otherwise be required by this part.

(Emphasis supplied). 29 C.F.R. §1630.15. By way of caution, however, the EEOC has further advised that this so-called "conflicts" defense "*may be rebutted* by a showing of pretext, or by a showing that the Federal standard *did not require* the discriminatory action, or that there was a non-exclusionary means to comply with the standard that did not conflict with this part" (emphasis supplied). *See* Appendix to 29 C.F.R. Part 1630, 56 Fed. Reg. at 35752 (1991). Thus, were FHWA to mandate that a carrier must ask for and obtain the

required drug and alcohol-testing related information *before* it makes a conditional offer to employ the applicant it would be possible for the ADA's prohibition on pre-offer inquiries to be avoided.

With the foregoing as background, we return our attention to the instant rulemaking and, more specifically, to DAC's concerns regarding proposed §§382.413(a)(1)(ii) and 391.23(c)(1)(iii).

1. Carriers should only be required to obtain rehabilitation information if they intend to hire the applicant. DAC believes that section 114 of the HazMat Act provides FHWA with a general directive concerning rehabilitation information, but that Congress did not intend for section 114 to be read too literally nor implemented without regard to the practical realities of the workplace or the limits and obligations imposed on carriers by the ADA, or to the related provisions of Part 382. As DAC understands FHWA's explanation of how proposed §§382.413(a)(1)(ii) and 391.23(c)(1)(iii) would be implemented, *in all cases* carriers would be required "to investigate whether (1) the driver was ever referred to SAP [*i.e.*, substance abuse professional], (2) the SAP referred the driver to a rehabilitation program, and (3) a SAP's evaluation certified the driver was qualified to return to duty", 61 Fed. Reg. at 10551. In other words, under the proposed rule carriers would be required to obtain this information irrespective of whether the driver in question will be hired at all, and without regard to the ADA's limitations on when such medical information can be obtained, or to the proposed rule's consistency with the requirements of §382.605.

Section 382.605 requires that a driver who tests positive must, at a minimum, be evaluated by a SAP and pass a return-to-duty test before the driver will be permitted to

return to duty; additionally, a driver who is diagnosed with a substance abuse problem must attend and complete rehabilitation and also submit to follow-up testing. However, as FHWA explained when it published Part 382 as a final rule: "Compliance with the prescribed treatment and passing the test(s) will not guarantee a right of reemployment. They will be preconditions the driver must meet in order to perform safety-sensitive functions." 59 Fed. Reg. 7484, 7503 (February 15, 1994). DAC does not understand FHWA to have amended the requirements of §382.605. Neither is DAC aware that FHWA has altered its long-standing position, that decisions on whether to hire, terminate or reinstate a driver who has violated DOT's prohibitions on drugs and alcohol should be left to each carrier to decide and are matters inappropriate for FHWA to decide in a rulemaking. See 53 Fed. Reg. 47134, 47148 (November 21, 1988). For this reason, the imposition of a requirement that would take from each carrier the discretion on whether it needs to obtain rehabilitation information (information appropriate to a carrier's needs only if the carrier intends to hire the applicant) would not only be inconsistent with FHWA's position against intruding into the fundamental employment relationship of carrier and driver, but would also be inconsistent with §382.605 as well, which pegs the need for a carrier to obtain rehabilitation information on that carrier's intention to engage the driver for the performance of safety-sensitive functions.

This issue is further complicated by the fact that the ADA confers a "disability" status on alcoholics and on reformed drug addicts. Carriers should not be forced to obtain information which they may not need but whose possession would increase the carriers' exposure to being sued for discrimination. For example, after giving a driver a conditional offer of employment a carrier could simultaneously receive accident information and

information that the driver had previously been through rehabilitation. Even though the accident information would have been (and is) the basis for the carrier's hiring decision, having the rehabilitation information can open the carrier up to suit under the ADA. Remember that, "individuals who are not illegally using drugs, but who are erroneously perceived as being addicts and as currently using drugs illegally, are protected by the ADA." EEOC *Technical Assistance Manual*, *supra*, VIII-4.

Accordingly, DAC recommends that proposed §§382.413(a)(1)(ii) and 391.23(c)(1)(iii) be revised to require a carrier to obtain rehabilitation information concerning a driver only if the carrier intends to hire that driver.¹³ In addition to eliminating what would otherwise be an inconsistency with §391.23, this would allow carriers to better control what information they receive and when, thereby helping them to avoid being unnecessarily exposed to liability under the ADA.

2. Carriers should not be required to obtain information relating to rehabilitation required under the regulations of another DOT agency. Of further concern regarding the issue of rehabilitation information is the lack of consistency between the requirements of §382.413(a)(1)(ii) and §391.23(c)(1)(iii). Under the former provision, a carrier would be responsible for obtaining information concerning rehabilitation which a driver was required to undertake or complete pursuant to §382.605 "or the alcohol or controlled substances rule of other DOT agencies" (emphasis supplied). In contrast, proposed §391.23(c)(1)(iii) limits the required inquiry to rehabilitation required under §382.605. Given that the safety

¹³ FHWA has similarly restricted the need for carriers to conduct pre-employment drug tests to drivers a carrier intends to hire. See 53 Fed. Reg. at 47138 ("only those persons the motor carrier intends to hire must be tested for drugs prior to driving for the motor carrier").

objectives of both provisions are the same ("prohibit[ing] an employer from using a driver who was found to have illegally used drugs or alcohol in a safety-sensitive function until that driver has received the recommended treatment", 61 Fed. Reg. at 10551), the language and substance of each should likewise be the same. DAC supports the approach of §391.23 and is strongly opposed to §382.413's extension to employers in the other modes. None of the DOT's other agencies have requirements like §382.413, and its practicable enforcement against carriers in the other modes (*i.e.*, forcing them to release information) is questionable at best.

C. Violations of the Prohibitions in Subpart B of 382: Section 114 of the HazMat Act directs that the safety information which carriers will be required to obtain must also include "*information on . . . any use by the driver, during the previous 3 years, in violation of law or Federal regulation, of alcohol or a controlled substance subsequent to completing such a rehabilitation program*" (emphasis supplied).

The NPRM proposes to implement this statutory requirement by amending both §382.413(a) and §391.23 in several ways. First, proposed §382.413(a)(1)(i) would require carriers to obtain from a driver's previous employers information concerning the driver's "*[v]iolations of the prohibitions contained in subpart B of this part, or the alcohol or controlled substances rules of another DOT agency, during the past three years*" (emphasis supplied). Proposed §391.23(c)(1)(iv), on the other hand, tracks directly with section 114, by requiring information to be obtained about "*any use, during the previous three years, in violation of law or Federal regulation.*" Additionally, proposed §382.413(a)(2) would require prospective employers to obtain, and past employers to provide, "any alcohol and

drug information the previous employers obtained from other previous employers" -- *i.e.*, a "daisy chain" in effect. The proposed requirements present a number of concerns to DAC and its carrier subscribers.

1. Carriers should not be required to obtain information concerning drug and alcohol-related violations which cannot be verified by a positive test result or test refusal. DAC's first concern is the apparent inconsistency in the specific information that carriers would be required to obtain under §382.413(a)(1)(i) -- "*violations of the [FHWA's] prohibitions*" and those of the other DOT agencies -- and the information which carriers would be required to obtain under §391.23(c)(1)(iv) -- "*use . . . in violation of law or Federal regulation.*" At a minimum, therefore, if FHWA's intention is that carriers would be required to obtain the same information under either provision, the language of both sections should be identical. However, since the language is not the same DAC must assume that the scope of the information FHWA would require carriers to obtain under §382.413 is broader than what they would be required to obtain under §391.23. DAC is opposed to this.

DAC believes that in referring to "*use*" in section 114 of the HazMat Act, Congress meant drug and/or alcohol "*use*" that can be legally substantiated by a verified positive test (or test refusal) conducted in accordance with the requirements of Part 40. This is what §382.413 currently requires. DAC believes that section 114(b)(3) was merely intended to codify the current requirement of §382.413. "*Violation*", on the other hand, would seem to be broader in scope and, as set forth in subpart B of Part 382, would also include "reporting for duty" (§382.201) and "using alcohol within four hours of performing safety-sensitive functions" (§382.207). While such violations are of no less concern, DAC believes that the

integrity of the overall process, as well as the information to be shared among carriers pursuant to §382.413, requires that a driver's "use" must be documented either by the existence of the driver's verified positive test or by a test refusal, before a "violation" should be considered to have occurred. Indeed, given the extent to which DOT has properly constructed a comprehensive system of procedural safeguards for the expressed purpose of ensuring objective and verifiable test results, it is hard for DAC and its carrier subscribers to understand why FHWA would undermine the protections provided to drivers by mandating the disclosure of information that would be based entirely on subjective opinions.

For the foregoing reasons, as well as for purposes of regulatory clarity, §382.413's current approach, specifically detailing the minimum information to be obtained ("(i) Alcohol tests with a result of 0.04 alcohol concentration or greater; (ii) verified positive controlled substances test results; and (iii) Refusals to be tested.") is clearly preferable to either of the approaches proposed under the rule, including referring to "use" alone. Accordingly, DAC recommends that the current text of §382.413(a) remain as is and that the proposed §382.413(a)(1)(i) not be adopted.

2. Carriers should not be required to obtain information relating to drug and alcohol-related violations arising under the regulations of another DOT agency. DAC also recommends against the inclusion, under proposed §382.413(a)(1)(i), of the violations of other DOT agencies. While DAC agrees that the information could be of some benefit, by requiring motor carriers to obtain information about violations arising under another agency's requirements, the rule would directly expose carriers to liability under the negligent hiring theory for failing to know or even understand that an applicant had been required to comply

with the rules of another agency.

FHWA knows quite well that the testing requirements of the other agencies are not the same as FHWA's, and that they are also extremely complicated in their own right. For example, determining whether, and when, an employee is subject to RSPA's testing regulations has proven extremely difficult for pipeline operators let alone for companies providing ancillary services to the pipeline operators, since the definition of "covered function" under Part 199 is far more complicated than it may appear. Similarly, mechanics and dispatchers are covered by the FTA's requirements and would not be under Part 382, unless a mechanic or dispatcher has a CDL. It makes little, if any, sense to hold motor carriers directly responsible for knowing the requirements of all of the other modal agencies.

Neither is it appropriate to make *motor carriers* accountable for having to know whether an applicant previously worked for a company that was subject to the requirements of another agency and, if so, whether the applicant may have performed a safety-sensitive function which would have made subject to testing under that agency's regulations. It is extremely noteworthy in this regard that "[b]ecause of the significant difference between the testing programs in parts 382 and 391," 61 Fed. Reg. at 10552, FHWA found it justified to conclude that it should "not require new or prospective employers to obtain information maintained by former employers prior to January 1, 1995 for large employers, and January 1, 1996, for small employers." *Id.* The differences between FHWA's requirements and those of the other modes are far greater than the differences that existed between parts 382 and 391.

Accordingly, the proposed extension of §382.413's information requirements relating

to violations of regulations of the other modes (§382.413(a)(1)(i)) and to an applicant's failure to undertake or complete rehabilitation required under the requirements of another agency (§382.413(a)(1)(ii)) should not be adopted.

3. The mandatory "daisy chain" disclosure being proposed under §382.413 is fraught with serious problems and should not be adopted. Another substantial concern that DAC has with the proposed revisions to §382.413 is the inclusion of the "mandatory daisy chain" requirement, obligating past employers to pass on drug and alcohol information which they previously received from other past employers. Such a requirement would impose an administrative nightmare on carriers in terms of having to keep track of test information that falls outside the three-year cutoff period to avoid disclosing information not authorized by the driver. Moreover, compliance with the daisy chain would impose significant costs to administer without any corresponding savings or efficiencies. For example, even though the information that is received from a driver's most recent past employer contains all of the requisite information about the driver's employment with the other known prior employers, the prospective employer will still be required to contact the other prior employers for the same information.

Aside from the administrative nightmare and related costs which this would impose, however, the daisy chain requirement presents substantial tort liability concerns. While DAC appreciates FHWA's good intentions for proposing the daisy chain requirement in the first place, every publication and subsequent republication of a false statement gives rise to separate causes of action for liable and/or slander.¹⁴ As such, requiring past employers to

¹⁴ See generally PROSSER AND KEETON ON TORTS, 771-869 (5th ed. 1984).

pass on -- *i.e.*, to republish -- information received from other past employers will subject carriers to potential immeasurable liability and expense. To comply, carriers would be compelled to verify and reverify¹⁵ every item of information to be passed on just prior to doing so.¹⁶ While the problem of republication could, of course, be eliminated through a grant of preemptive immunity, such relief is clearly beyond the scope of FHWA's jurisdiction and authority to confer. Accordingly, DAC strongly recommends against the adoption of a daisy chain requirement of any kind.

D. Driver's Right to Review and Comment on Information:

1. The broad right of review proposed under §391.23 will have a chilling effect on voluntary disclosures of information and should not be adopted. Section 114 of the HazMat Act directs that, with respect to "the *safety information* that must be sought under that section" (emphasis supplied)¹⁷ -- referring to §391.23 -- "the driver to whom such

¹⁵ Aside from the problems which carriers would experience, the "daisy chain" would also be detrimental to drivers as disputes concerning the accuracy of information being reported through the daisy chain are bound to arise. For example, while facilitating the down-stream disclosure of information, the daisy chain would at the same time prevent a driver from correcting inaccuracies in information whose origin was an employer that has since gone out of business. However, once the information is placed in the driver's employment history "stream" the daisy chain would effectively necessitate the continuing republication of such erroneous information during at least the three-year period. DAC believes this would not be fair to drivers, and doubts that this is a result FHWA intends.

¹⁶ Based on DAC's years of experience in obtaining and disseminating the broad spectrum of employment-related information, it is inconceivable that carriers would willingly comply with such a requirement. Such wide-spread reluctance to disclose information is well-known to FHWA ("Most employers may not willingly respond to such requests for fear of a lawsuit by a driver." 61 Fed. Reg. at 10551). Thus it is not unreasonable to expect that, were the proposed requirement adopted, most carriers would be advised against disclosing by legal counsel, since the risk of being fined by FHWA for noncompliance would present far less of a risk to the carrier than disclosing the information.

¹⁷ Section 114(a)(1), 108 Stat. 1677.

information applies has a reasonable opportunity to review and comment on the information."¹⁸

Under the proposed rule, §391.23(d) would require motor carriers to provide drivers with "a reasonable opportunity to review and comment on *any information obtained during the employment investigation*, including the information described in paragraph (c)(1) of this section" (emphasis supplied). Section 382.413, on the other hand, would be amended to provide for the right of a driver to have a "reasonable opportunity to review and comment on *any information obtained by the employer under paragraph (a) of this section*" (emphasis supplied). Proposed §382.413(h).

DAC's carrier subscribers agree with proposed §382.413(h), but oppose the adoption of proposed §391.23(d) as currently worded. The latter provision goes beyond what Congress has required in section 114 and, if adopted, could have a chilling effect on the willingness of carriers to disclose information adverse to the driver, but nonetheless accurate, because it is not specifically required by §391.23. For example, as previously discussed many prospective employers want to obtain information concerning a driver's non-DOT accident record, and at present most carriers have been willing to share such information. As FHWA has recognized in the NPRM, however, the carriers' fear of being sued will affect the willingness of most employers to share such information voluntarily, notwithstanding the accuracy of the information. 61 Fed. Reg. at 10551. Accordingly, DAC recommends against the adoption of the broadly-worded text of §391.23, as currently proposed. Instead, DAC recommends revising proposed §391.23(d) to make it consistent with section 114 of the

¹⁸ Section 114(a)(2), 108 Stat. 1677.

HazMat Act, as FHWA has done in proposed §382.413(h) ("An employer shall afford the driver a reasonable opportunity to review and comment on any information obtained by the employer *under paragraph (a) of this section*", emphasis supplied.)

2. A time limit should be placed on the right of drivers to review and comment on information. DAC agrees with FHWA's proposal *not to define* "reasonable opportunity" and to instead "leave this to the motor carrier's discretion", 61 Fed. Reg. at 10552. However, the final rule should specify a time limit on the period for review and comment.

In many cases, drivers are never seen or heard from again after submitting their application; nonetheless, a carrier may have begun to process the application without being aware that the driver is no longer interested. In other cases, carriers will hold on to some applications and not begin processing them immediately. Therefore, since prospective employers will be required to advise drivers of their right to review and comment, the burden of requesting the opportunity to review and comment should belong to each driver. Thereafter, in order to bring the issue to some conclusion without undermining the driver's right to a "reasonable opportunity" to review and comment, drivers should be required to submit their request to review and comment within 60 calendar days of being notified of the disposition of the employment application. FHWA already has such a requirement governing pre-employment drug tests, *see* 49 C.F.R. §382.411(a), and there is no reason why the a similar provision should not be applied here.

E. Procedural Matters:

1. Prospective employers should only be required to obtain the information required under the final rule from the past employers for which an applicant-driver worked on or after the effective date of the final rule. The final rule should not require carriers to go back and obtain the minimum information required under §391.23 or §382.413 for drivers currently employed. Such a retroactive implementation would impose a significant burden on carriers. At the same time, since both sections *require* past employers to provide information when requested, it is essential that FHWA expressly indicate that a past employer's obligation to disclose is prospective only. FHWA's failure to include such a statement *in the regulation* could easily, albeit unnecessarily, subject carriers to liability under the negligent hiring theory.¹⁹ It is essential that the final rule does not foster such an adverse result.

2. The final rule should specify that the three-year period for which information is required begins from the date the information is requested by the prospective employer or its agent. While the proposed rule refers to "accidents", "use", and "failure to undertake or complete a rehabilitation program", *et cetera*, "during the past three years", the proposed rule is silent on the date on which the three-year period is to begin. For purposes of clarity and uniformity in compliance, it is essential for the final rule to specify when the three-year period is to begin. As previously pointed out, many carriers will accept an

¹⁹ To be successful under the negligent hiring theory, a plaintiff must prove, among other things, that the employer either knew or should have known through a reasonable investigation that the employee was unfit for employment. While proving this will not always be easy for plaintiffs, the employer's obligation to conduct a thorough background investigation has been held to increase with the sensitivity and safety risk of the position in question. *See, e.g., Welsh Manufacturing Division of Textron v. Pinkerton's Inc. (Welsh)*, 474 A.2d 436 (R.I. 1984).

application but will not act on it immediately. Accordingly, DAC recommends that the final rule specify that "the three-year period begins on the date on which the information is requested by the prospective employer or its agent."

CONCLUSION

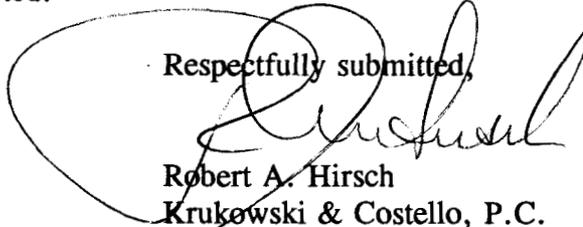
In essence, a requirement governing access to and disclosure of safety and employment-related histories is like a three-legged stool. To safely sit upon the stool, its users must know that each leg is secure and will support them each and every time. Take away one, or more, of its legs and both the stool and its user will fall and most likely be injured. The legs of the stool in this proceeding are the ability of a prospective employer to obtain and review the required information and other relevant information, the willingness of a past employer to disclose the information each and every time it is requested, and an effective means to protect carriers and applicants from being unnecessarily exposed to liability. Take away any one these and, just like the stool, the reliability of the requirement tumbles.

FHWA has expressly recognized the problems which carriers have had in securing relevant safety and other employment-related information under the current requirements of §391.23. To be truly effective in screening driver applicants, therefore, the final rule must provide prospective carrier employers with flexibility and the opportunities to obtain information through the most timely and efficient means possible, plus a reasonable degree of discretion and the means to obtain information beyond the minimum required.

DAC believes the revisions it has recommended FHWA make to the proposed rule will help the requirements FHWA eventually adopts to better achieve these objectives, to the

benefit of the public and carriers alike, while at the same time also helping to ensure that the rights of drivers are also protected.

Respectfully submitted,



Robert A. Hirsch
Krukowski & Costello, P.C.
1815 H Street, NW, Suite 500
Washington, DC 20006
(202) 659-4799
Attorneys for DAC Services

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APPENDIX A

Fair Credit Reporting Act
(15 U.S.C. §§1681, *et. seq.*)

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§ 1677. Effect on State laws

This subchapter does not annul, alter, or affect, or exempt any person from complying with, the laws of any State

(1) prohibiting garnishments or providing for more limited garnishment than are allowed under this subchapter, or

(2) prohibiting the discharge of any employee by reason of the fact that his earnings have been subjected to garnishment for more than one indebtedness.

(Pub. L. 90-321, title III, § 307, May 29, 1968, 82 Stat. 184.)

SUBCHAPTER III—CREDIT REPORTING AGENCIES

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in title 18 section 1030; title 20 section 1080a.

§ 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

(Pub. L. 90-321, title VI, § 602, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1128.)

EFFECTIVE DATE

Section 504(d) of Pub. L. 90-321, as added by Pub. L. 91-508, title VI, § 602, Oct. 26, 1970, 84 Stat. 1136, provided that: "Title VI [enacting this subchapter] takes effect upon the expiration of one hundred and eighty days following the date of its enactment [Oct. 26, 1970]."

SHORT TITLE

This subchapter known as the "Fair Credit Reporting Act", see Short Title of 1970 Amendment note set out under section 1601 of this title.

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

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(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, re-assignment or retention as an employee.

(i) The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

(Pub. L. 90-321, title VI, § 603, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1128.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1692d, 1692e of this title; title 18 section 1030; title 26 sections 6103, 7609; title 31 section 3701; title 38 section 3301; title 42 section 666.

§ 1681b. Permissible purposes of consumer reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

(Pub. L. 90-321, title VI, § 604, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1129.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1681a, 1681e, 1681f, 1692d of this title.

§ 1681c. Reporting of obsolete information prohibited

(a) Prohibited items

Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

(1) cases¹ under title 11 or under the Bankruptcy Act that, from the date of entry of the

order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years.

(2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

(3) Paid tax liens which, from date of payment, antedate the report by more than seven years.

(4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.

(5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.

(6) Any other adverse item of information which antedates the report by more than seven years.

(b) Exempted cases

The provisions of subsection (a) of this section are not applicable in the case of any consumer credit report to be used in connection with—

(1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of \$50,000 or more;

(2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of \$50,000 or more; or

(3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$20,000, or more.

(Pub. L. 90-321, title VI, § 605, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1129, and amended Pub. L. 95-598, title III, § 312(b), Nov. 6, 1978, 92 Stat. 2676.)

REFERENCES IN TEXT

The Bankruptcy Act, referred to in subsec. (a)(1), was act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified to section 1 et seq. of former Title 11, Bankruptcy, prior to its repeal by Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2549, section 101 of which enacted revised Title 11.

AMENDMENTS

1978—Subsec. (a)(1). Pub. L. 95-598 substituted "cases under title 11 or under the Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than 10 years" for "Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than fourteen years".

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment effective Oct. 1, 1979, see section 402(a) of Pub. L. 95-598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1681e of this title; title 20 sections 1080a, 1087cc.

¹ So in original. Probably should be "Cases".

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§ 1681d. Disclosure of investigative consumer reports**(a) Disclosure of fact of preparation**

A person may not procure or cause to be prepared an investigative consumer report on any consumer unless—

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section; or

(2) the report is to be used for employment purposes for which the consumer has not specifically applied.

(b) Disclosure on request of nature and scope of investigation

Any person who procures or causes to be prepared an investigative consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1) of this section, shall² make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) Limitation on liability upon showing of reasonable procedures for compliance with provisions

No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section.

(Pub. L. 90-321, title VI, § 606, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1130.)

§ 1681e. Compliance procedures**(a) Identity and purposes of credit users**

Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer

report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(Pub. L. 90-321, title VI, § 607, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1130.)

§ 1681f. Disclosures to governmental agencies

Notwithstanding the provisions of section 1681b of this title, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former addresses, places of employment, or former places of employment, to a governmental agency.

(Pub. L. 90-321, title VI, § 608, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.)

§ 1681g. Disclosures to consumers**(a) Information on file; sources; report recipients**

Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed: *Provided*, That in the event an action is brought under this subchapter, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished—

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

(b) Exempt information

The requirements of subsection (a) of this section respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this subchapter except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

(Pub. L. 90-321, title VI, § 609, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.)

² So in original. Probably should not appear.

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REFERENCES IN TEXT

For the effective date of this subchapter, referred to in subsec. (b), see section 504(d) of Pub. L. 90-321, set out as an Effective Date note under section 1681 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1681h, 1681j of this title.

§ 1681h. Conditions of disclosure to consumers

(a) Times and notice

A consumer reporting agency shall make the disclosures required under section 1681g of this title during normal business hours and on reasonable notice.

(b) Identification of consumer

The disclosures required under section 1681g of this title shall be made to the consumer—

(1) in person if he appears in person and furnishes proper identification; or

(2) by telephone if he has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

(c) Trained personnel

Any consumer reporting agency shall provide trained personnel to explain to the consumer any information furnished to him pursuant to section 1681g of this title.

(d) Persons accompanying consumer

The consumer shall be permitted to be accompanied by one other person of his choosing, who shall furnish reasonable identification. A consumer reporting agency may require the consumer to furnish a written statement granting permission to the consumer reporting agency to discuss the consumer's file in such person's presence.

(e) Limitation of liability

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, except as to false information furnished with malice or willful intent to injure such consumer.

(Pub. L. 90-321, title VI, § 610, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1131.)

§ 1681i. Procedure in case of disputed accuracy

(a) Dispute; reinvestigation

If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe

that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information. The presence of contradictory information in the consumer's file does not in and of itself constitute reasonable grounds for believing the dispute is frivolous or irrelevant.

(b) Statement of dispute

If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Notification of consumer dispute in subsequent consumer reports

Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Notification of deletion of disputed information

Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.

(Pub. L. 90-321, title VI, § 611, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1132.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1681j of this title; title 20 section 1080a.

§ 1681j. Charges for disclosures

A consumer reporting agency shall make all disclosures pursuant to section 1681g of this title and furnish all consumer reports pursuant to section 1681i(d) of this title without charge to the consumer if, within thirty days after receipt by such consumer of a notification pursuant to section 1681m of this title or notification from a debt collection agency affiliated with such consumer reporting agency stating that

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the consumer's credit rating may be or has been adversely affected, the consumer makes a request under section 1681g or 1681i(d) of this title. Otherwise, the consumer reporting agency may impose a reasonable charge on the consumer for making disclosure to such consumer pursuant to section 1681g of this title, the charge for which shall be indicated to the consumer prior to making disclosure; and for furnishing notifications, statements, summaries, or codifications to person designated by the consumer pursuant to section 1681i(d) of this title, the charge for which shall be indicated to the consumer prior to furnishing such information and shall not exceed the charge that the consumer reporting agency would impose on each designated recipient for a consumer report except that no charge may be made for notifying such persons of the deletion of information which is found to be inaccurate or which can no longer be verified.

(Pub. L. 90-321, title VI, § 612, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1132.)

§ 1681k. Public record information for employment purposes

A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—

- (1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or
- (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

(Pub. L. 90-321, title VI, § 613, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1133.)

§ 1681l. Restrictions on investigative consumer reports

Whenever a consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished.

(Pub. L. 90-321, title VI, § 614, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1133.)

§ 1681m. Requirements on users of consumer reports

(a) Adverse action based on reports of consumer reporting agencies

Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

(b) Adverse action based on reports of persons other than consumer reporting agencies

Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections (a) and (b) of this section.

(Pub. L. 90-321, title VI, § 615, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1133.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1681a, 1681h, 1681j of this title.

§ 1681n. Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

- (1) any actual damages sustained by the consumer as a result of the failure;
- (2) such amount of punitive damages as the court may allow; and
- (3) in the case of any successful action to enforce any liability under this section, the

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costs of the action together with reasonable attorney's fees as determined by the court.

(Pub. L. 90-321, title VI, § 616, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1681h of this title.

§ 1681o. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

- (1) any actual damages sustained by the consumer as a result of the failure;
- (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub. L. 90-321, title VI, § 617, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1681h of this title.

§ 1681p. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

(Pub. L. 90-321, title VI, § 618, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

§ 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

(Pub. L. 90-321, title VI, § 619, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

§ 1681r. Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not author-

ized to receive that information shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

(Pub. L. 90-321, title VI, § 620, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

§ 1681s. Administrative enforcement

(a) Federal Trade Commission; powers

Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this subchapter shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C. 45(a)] and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof [15 U.S.C. 45(b)] with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this subchapter and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this subchapter. Any person violating any of the provisions of this subchapter shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this subchapter.

(b) Other administrative bodies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies and persons who use consumer reports from such agencies shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of:

(A) national banks, by the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), by the Federal Reserve Board; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the

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Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 5(d) of the Home Owners Loan Act of 1933 [12 U.S.C. 1464(d)], section 407 of the National Housing Act [12 U.S.C. 1730], and sections 6(l) and 17 of the Federal Home Loan Bank Act [12 U.S.C. 1426(l) and 1437], by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions:

(3) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of title 49, by the Interstate Commerce Commission with respect to any common carrier subject to such subtitle;

(5) the Federal Aviation Act of 1958 [49 App. U.S.C. 1301 et seq.], by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that Act; and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

(c) **Enforcement under other authority**

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(Pub. L. 90-321, title VI, § 621, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1134, and amended Pub. L. 98-443, § 9(n), Oct. 4, 1984, 98 Stat. 1708.)

REFERENCES IN TEXT

The Federal Trade Commission Act, referred to in subsec. (a), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (§ 41 et seq.) of chapter 2 of this title. For complete classification of this Act to the Code, see section 58 of this title and Tables.

The Federal Credit Union Act, referred to in subsec. (b)(3), is act June 26, 1934, ch. 750, 48 Stat. 1216, as amended, which is classified generally to chapter 14 (§ 1751 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see section 1751 of Title 12 and Tables.

The Federal Aviation Act of 1958, referred to in subsec. (b)(5), is Pub. L. 85-726, Aug. 23, 1958, 72 Stat. 737, as amended, which is classified generally to chapter 20 (§ 1301 et seq.) of Title 49, App., Transportation. For complete classification of this Act to the Code, see Short Title note set out under section 1301 of Title 49 App. and Tables.

The Packers and Stockyards Act, 1921, referred to in subsec. (b)(6), is act Aug. 15, 1921, ch. 64, 42 Stat. 159, as amended, which is classified to chapter 9 (§ 181 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 181 of Title 7 and Tables.

CODIFICATION

"Subtitle IV of title 49" was substituted for "the Acts to regulate commerce" and "such subtitle" was substituted for "those Acts" in subsec. (b)(4) on authority of Pub. L. 95-473, § 3(b), Oct. 17, 1978, 92 Stat. 1466, the first section of which enacted subtitle IV of Title 49, Transportation.

AMENDMENTS

1984—Subsec. (b)(5). Pub. L. 98-443 substituted "Secretary of Transportation" for "Civil Aeronautics Board".

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-443 effective Jan. 1, 1985, see section 9(v) of Pub. L. 98-443, set out as a note under section 5314 of Title 5, Government Organization and Employees.

TRANSFER OF FUNCTIONS

All functions, powers, and duties of the Civil Aeronautics Board under subsec. (b)(5) of this section were transferred to the Secretary of Transportation by section 1553(a)(5) of Title 49, Appendix, Transportation, effective Jan. 1, 1985.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 49 App. section 1553.

§ 1681t. Relation to State laws

This subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(Pub. L. 90-321, title VI, § 622, as added Pub. L. 91-508, title VI, § 601, Oct. 26, 1970, 84 Stat. 1136.)

SUBCHAPTER IV—EQUAL CREDIT OPPORTUNITY

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in title 12 section 1464; title 42 section 3608.

§ 1691. Scope of prohibition

(a) **Activities constituting discrimination**

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) **Activities not constituting discrimination**

It shall not constitute discrimination for purposes of this subchapter for a creditor—

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertain-

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Note 5

dence that representative knew or had reason to know of falsity, or that he otherwise acted maliciously or willfully. *Wiggins v. Equifax Services, Inc.*, D.D.C.1993, 848 F.Supp. 213.

6. Generally

Fair Credit Reporting Act (FCRA) creates civil liability for consumer reporting agencies

and users of consumer reports that fail to comply with its requirements. *Wiggins v. Philip Morris, Inc.*, D.D.C.1994, 853 F.Supp. 458.

This subchapter regulates conduct of consumer reporting agencies and users of consumer reports. *Kiblen v. Pickle*, 1982, 653 P.2d 1338, 33 Wash.App. 387.

§ 1681a. Definitions; rules of construction

[See main volume for text of (a) to (i)]

(j) Definitions relating to child support obligations

(1) Overdue support

The term "overdue support" has the meaning given to such term in section 666(e) of Title 42.

(2) State or local child support enforcement agency

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(As amended Pub.L. 102-537, § 2(b), Oct. 27, 1992, 106 Stat. 3531.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1992 Amendments

Section 2(d) of Pub.L. 102-537 provided that: "The amendments made by this section [enacting section 1681a-1 of this title, amending this section, and enacting a provision set out as a

note under section 1601 of this title] shall take effect on January 1, 1993."

1992 Amendments

Subsec. (j). Pub.L. 102-537, § 2(b), added subsec. (j).

CROSS REFERENCES

Consumer reporting agency, defined as having same meaning as under this section for purposes

of, access to classified information, see 50 USCA § 438.

LAW REVIEW COMMENTARIES

Legislative framework for reducing fraud in the credit repair industry. James P. Nehf, 70 N.C.L.Rev. 781 (1992).

NOTES OF DECISIONS

Consumer 14

2. Consumer report—Generally

Definition of "consumer report" under Fair Credit Reporting Act does not depend upon use to which information contained therein is put; instead purpose for which information was collected governs whether report is "consumer report." *St. Paul Guardian Ins. Co. v. Johnson*, C.A.5 (Tex.) 1989, 884 F.2d 881.

Consumer may establish that particular credit report is "consumer report" falling within coverage of the Fair Credit Reporting Act if person who requests report actually uses report for one of the consumer purposes set forth in the Act, consumer-reporting agency which prepares report expects report to be used for one of the consumer purposes set forth in the Act, or consumer-reporting agency which prepared report originally collected the information contained in report expecting it to be used for one of the consumer purposes set forth in the Act. *Ippolito v. WNS, Inc.*, C.A.7 (Ill.) 1988, 864 F.2d 440, certiorari dismissed 109 S.Ct. 1975, 490 U.S. 1061, 104 L.Ed.2d 623.

Information city officials requested and received from credit bureau concerning discrimination plaintiff was "consumer report," and thus its use was proscribed by Fair Credit Reporting Act, though officials claimed information was obtained purely in connection with investigation of plaintiff's claim of financial damages in his suit against city. *Maloney v. City of Chicago*, N.D.Ill.1987, 678 F.Supp. 703.

If report is compiled solely for purpose of aiding in investigation of consumer's business or for determining consumer's eligibility for commercial credit, it is not a "consumer report" to which this subchapter would be applicable, even if the report contains information about the consumer; if, however, the report is collected for one of purposes listed in subsec. (d) of this section, defining a "consumer report," it is a consumer report, regardless of reason for which it is subsequently disseminated. *Boothe v. TRW Credit Data*, D.C.N.Y.1981, 523 F.Supp. 631.

Check guarantee and reporting service on bank checks of consumers, engaged in by service for benefit of merchant subscribers, fell within definition of "consumer report" within purview of this section and Kansas Fair Credit Report-

based on experience with consumers is not "consumer reporting agency" within meaning of Fair Credit Reporting Act (FCRA). *DiGianni v. Stern's*, C.A.2 (N.Y.) 1994, 26 F.3d 346.

Drug rehabilitation counselor who prepared report for employer on results of drug test conducted on employee's urine as part of a one-time referral was not a "consumer reporting agency" within meaning of Fair Credit Reporting Act (FCRA). *Hodge v. Texaco, Inc.*, C.A.5 (La.) 1992, 975 F.2d 1093.

Department store was not "consumer reporting agency" where it did no more than furnish information about consumers' account to credit reporting agency. *Rush v. Macy's New York, Inc.*, C.A.11 (Fla.) 1985, 775 F.2d 1554.

Acts by creditors in reporting to three credit reporting agencies notice of consumer's outstanding debts for purchases made by unknown third party who illegally obtained credit cards in consumer's name and notice of their lawsuit against consumer to collect debt did not convert creditors into "credit reporting agencies," within meaning of Fair Credit Reporting Act (FCRA). *Podell v. Citicorp Diners Club, Inc.*, S.D.N.Y. 1994, 859 F.Supp. 701.

Employers were "users" of credit information and not "consumer reporting agencies" with respect to information which they received about employee from credit reporting agency and on which they based their discharge of the employee. *Wiggins v. District Cablevision, Inc.*, D.D.C. 1994, 853 F.Supp. 484.

Debt collection agency, which was not in the business of assembling or evaluating consumer credit information, but rather sought to collect bad accounts, was not a "consumer reporting agency," within meaning of Fair Credit Reporting Act. *Mitchell v. Surety Acceptance Corp.*, D.Colo.1993, 838 F.Supp. 497.

Bank which did not assemble or evaluate consumer credit information to distribute to third

parties, but merely furnished information to credit reporting agency was not a "consumer reporting agency" within meaning of Fair Credit Reporting Act. *Alvarez Melendez v. Citibank, D.Puerto Rico* 1988, 706 F.Supp. 67.

Bank which did not furnish reports concerning consumer credit information or other information on consumers to third parties was not a "consumer reporting agency" which could be held liable for any violation of Fair Credit Reporting Act. *Williams v. Amity Bank, D.Conn.* 1988, 703 F.Supp. 223.

Where bank is furnishing information based solely on its own experience with a consumer, the information is not a consumer report and bank is not in those circumstances a consumer reporting agency within meaning of this subchapter. *Freeman v. Southern Nat. Bank, D.C.Tex.*1982, 531 F.Supp. 94.

Retail department store was not "consumer reporting agency," and thus could not be held liable for violation of Fair Credit Reporting Act, where it did no more than furnish credit report on customer to credit reporting agency. *Laracuente v. Laracuente*, 1991, 599 A.2d 968, 252 N.J.Super. 384.

Bank did not fall within definition of "consumer reporting agency" in Fair Credit Reporting Act (FCRA). *Nikou v. INB Nat. Bank, Ind.* App. 5 Dist.1994, 638 N.E.2d 448.

14. Consumer

Corporate seller of precious stones and corporation's president were not "consumers" so as to be protected by this chapter or State Consumer Reporting Agency Acts, A.R.S. § 44-1691, subds. 1, 6, though corporation also bought precious stones. *Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau of Maricopa County, Inc.*, 1981, 637 P.2d 733, 130 Ariz. 523.

§ 1681b. Permissible purposes of consumer reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

- (1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

[See main volume for text of (2) and (3)]

(As amended Pub.L. 101-73, Title IX, § 964(c), Aug. 9, 1989, 103 Stat. 506.)

HISTORICAL AND STATUTORY NOTES

1989 Amendment

Par. (1). Pub.L. 101-73, § 964(c), inserted "or a subpoena issued in connection with proceedings before a Federal grand jury" before the period at the end thereof.

Separability of Provisions

If any provision of Pub.L. 101-73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101-73 and

the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101-73, set out as a note under section 1811 of Title 12, Banks and Banking.

Legislative History

For legislative history and purpose of Pub.L. 101-73, see 1989 U.S.Code Cong. and Adm. News, p. 86.

WEST'S FEDERAL PRACTICE MANUAL

Consumer Credit Protection, see § 3431 et seq.

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Tenants alleging that check guarantee service violated this subchapter failed to make sufficient factual showing that provision of this section to the effect that every consumer reporting agency shall maintain reasonable procedures designed to limit furnishing of consumer reports to purposes listed under this subchapter had been violated. *Alexander v. Moore & Associates, Inc.*, D.C.Hawaii 1982, 553 F.Supp. 948.

10. Federal Trade Commission

In determining whether a credit reporting agency has violated this section requiring the agency, whenever it prepares a consumer report, to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates," the essential task of the Federal Trade Commission is to ascertain whether the procedures followed by the agency pose an unreasonable risk of producing error. *Equifax Inc. v. F.T.C.*, C.A.11, 1982, 678 F.2d 1047.

11. Inferences

Evidentiary basis was insufficient to support a rational inference that consumer reporting agency's quality control audit procedures, including the tabulation of adverse information and the agency's challenged use of that tabulation, would likely result in inaccurate information; accordingly, the Federal Trade Commission's finding that the agency failed to use reasonable procedures to assure maximum possible accuracy in its consumer reports, in violation of this section,

was not based upon reasonable inferences drawn from the record evidence and would be set aside. *Equifax Inc. v. F.T.C.*, C.A.11, 1982, 678 F.2d 1047.

12. Request for disclosure

Consumer's phone conversation with receptionist of credit reporting agency during which he asked receptionist if agency was investigating him, to which receptionist responded that she did not know but would have someone return his call did not constitute a "request for disclosure" of information in agency's files within meaning of section of Fair Credit Reporting Act requiring such disclosure only upon proper request and identification of consumer. *Clay v. Equifax, Inc.*, C.A.11 (Ala.) 1985, 762 F.2d 952.

13. Strict liability

Fair Credit Reporting Act (FCRA) does not hold consumer reporting agencies strictly liable for dissemination of inaccurate information. *Wiggins v. Equifax Services, Inc.*, D.D.C.1993, 848 F.Supp. 213.

14. Notice from consumer

Credit reporting agency is not, as a matter of law, liable under Fair Credit Reporting Act (FCRA) for reporting inaccurate information obtained from a court's judgment docket, absent prior notice from consumer that information may be inaccurate. *Henson v. CSC Credit Services*, C.A.7 (Ind.) 1994, 29 F.3d 280.

§ 1681f. Disclosures to governmental agencies

WEST'S FEDERAL PRACTICE MANUAL

Tax assessment, third-party recordkeeper, subpoena, see § 254.10.

LIBRARY REFERENCES

C.J.S. Credit Reporting Agencies; Consumer Protection § 1 et seq.

§ 1681g. Disclosures to consumers

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

[See main volume for text of (1) to (3)]

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterization of the consumer, included in the file at the time of the disclosure.

[See main volume for text of (b)]

(As amended Pub.L. 103-325, Title III, § 339, Sept. 23, 1994, 108 Stat. 2237.)

HISTORICAL AND STATUTORY NOTES

Legislative History

For legislative history and purpose of Pub.L. 103-325, see 1994 U.S. Code Cong. and Adm. News, p. 1881.

LIBRARY REFERENCES

C.J.S. Credit Reporting Agencies; Consumer Protection § 1 et seq.

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pretenses, was a "user" of that report even though subscriber was merely acquiring report for another; therefore, because subscriber's violation of this subchapter was willful, as it knew of purpose for acquiring report, and knew it had

nothing to do with granting credit to individual, yet obtained report from agency without disclosing purpose to agency, subscriber was liable to individual under this subchapter. *Boothe v. T R W Credit Data*, D.C.N.Y.1982, 557 F.Supp. 66.

§ 1681s. Administrative enforcement

[See main volume for text of (a)]

(b) Other administrative bodies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies and persons who use consumer reports from such agencies shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) of the Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) Section 8 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

[See main volume for text of (3)]

(4) subtitle IV of Title 49, by the Interstate Commerce Commission with respect to any common carrier subject to such subtitle;

(5) the Federal Aviation Act of 1958, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that Act; and

[See main volume for text of (6)]

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

[See main volume for text of (c)]

(As amended Pub.L. 95-473, § 3(b), Oct. 17, 1978, 92 Stat. 1466; Pub.L. 98-443, § 9(n), Oct. 4, 1984, 98 Stat. 1708; Pub.L. 101-73, Title VII, § 744(l), Aug. 9, 1989, 103 Stat. 439; Pub.L. 102-242, Title II, § 212(c), Dec. 19, 1991, 105 Stat. 2300; Pub.L. 102-550, Title XVI, § 1604(a)(6), Oct. 28, 1992, 106 Stat. 4082.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Federal Reserve Act, referred to in subsec. (b)(1)(B), is Act Dec. 23, 1913, c. 6, 38 Stat. 251, as amended, which is classified principally to chapter 3 (section 221 et seq.) of Title 12, Banks and Banking. Section 25 of the Federal Reserve Act is classified to subchapter I (section 601 et seq.) of chapter 6 of Title 12. Section 25(a) of the Federal Reserve Act is classified to subchapter II (section 611 et seq.) of chapter 6 of Title 12. For complete classification of this

Act to the Code, see References in Text note set out under section 226 of Title 12 and Tables.

Codification

"Subtitle IV of Title 49" was substituted for "the Acts to regulate commerce" and "such subtitle" was substituted for "those Acts" in subsec. (b)(4) on authority of Pub.L. 95-473, § 3(b), Oct. 17, 1978, 92 Stat. 1466, the first section of which enacted subtitle IV of Title 49, Transportation.

APPENDIX B

(Relevant FHWA Correspondence)

- * May 22, 1991 letter from James E. Scapellato to Kent Ferguson (2 pages)
- * July 6, 1984 letter from Gerald J. Davis to Charles Dees (1 page)

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U.S. Department
of Transportation
**Federal Highway
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

MAY 22 1991

Refer to: HCS-10

Mr. Kent Ferguson
Index Specialist
DAC Services
4110 S. 100th E. Avenue
Suite 200
Tulsa, Oklahoma 74146-3639

Dear Mr. Ferguson:

This is in reference to your May 3 and May 6 telephone conversations with Safety Specialist Star Fugi of our Oregon Division Office concerning past employer computer printouts and whether such printouts satisfy Section 391.23(c) of the Federal Motor Carrier Safety Regulations.

DAC Services, Inc., is a computer information service which provides its members with, among other items, drivers' past employment records. After receiving basic identifying information on a particular driver applicant from the prospective employer, DAC queries its data base and subsequently (instantaneously, in most cases) produces a printout of that driver applicant's past employment record with other DAC motor carrier members. The date and time of the computer printout are shown on the hard copy received by the prospective employer.

Your question is whether such a printout satisfies Section 391.23(c), which requires the prospective employer to investigate the driver applicant's past employment record. This section states, in part, that "the investigation may consist of personal interviews, . . . or any other method of obtaining information that the carrier deems appropriate. Each motor carrier must make a written record with respect to each past employer who was contacted. The record must include the past employer's name and address, the date he was contacted [emphasis added], and his comments with respect to the driver. . . ."

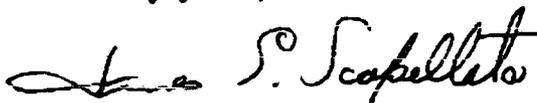
The printouts clearly show the past employer's name and address and comments regarding the driver's employment record. Because the printout shows the date of inquiry to the data base, and because DAC is acting as an agent for the motor carrier, the printout also satisfies the "date of contact" condition

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required by Section 391.23(c) for each past employment record that is found in the data base and printed on the prospective employer's copy. Please note that for past employers not found in the data base, the prospective employer will still have to conduct its own past employment investigation and prepare the appropriate documentation.

I hope this information is helpful.

Sincerely yours,



James E. Scapellato, Director
Office of Motor Carrier Standards

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U.S. Department
of Transportation
**Federal Highway
Administration**

Bureau of Motor Carrier Safety

400 Seventh St., S.W.
Washington, D.C. 20590

July 6, 1984

In Reply Refer To:
HMC-21

RECEIVED JUL 10 1984

Mr. Charles Dees
President
d-a-c Services
P.O. Box 33181
Tulsa, Oklahoma 74153

Dear Mr. Dees:

Thank you for your letter of June 18 concerning the State driving record investigation required by Section 391.23 of the Federal Motor Carrier Safety Regulations.

The Bureau of Motor Carrier Safety has no objection to the use of your company's forms in transcribing the driver's record from computer tapes and providing the record to the motor carrier. As the States are maintaining driver data on magnetic tapes, it is important that your forms provide a legible copy of the information to the motor carrier that is maintained on the State data tapes. It is our understanding that your records are not deleting information found on the State tapes.

Your interest in motor carrier safety is appreciated.

Sincerely yours,

Gerald J. Davis
Chief, Regulations Division

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APPENDIX C

(FHWA Response to FOIA Request)

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U.S. Department
of Transportation
**Federal Highway
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

In accordance with the Freedom of Information Act (FOIA), 5 U.S.C. §552, we have attached a Motor Carrier Profile. The information contained in the Motor Carrier Profile represents all the data that has been reported to the Federal Highway Administration's (FHWA) Office of Motor Carriers through the requirements of State and Federal Programs. Included in it are the safety inspections conducted by various states in conjunction with SAFETYNET.

While technically subject to exemption (b)(7)(C) of the FOIA (protection against an unwarranted invasion of personal privacy), the names of the truck drivers involved in the individual accidents and inspections have been released since this information is already in your possession. As the personal information is now a part of the official FHWA file, however, we encourage discretion in its use. Moreover, we reserve the right to withhold this information in the future.

Please note that "The MCMIS Motor Carrier Safety Profile User Documentation" is also enclosed to explain the information contained in the Motor Carrier Profile.

Thank you for your interest in motor carrier safety.

Sincerely,


Joy L. Dunlap
Transportation Specialist
Resource Management Division

Enclosures

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