BEFORE THE

UNITED STATES DEPARTMENT OF TRANSPORTATION

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

COMMENTS OF THE OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO A NOTICE TO MODIFY A SYSTEM OF RECORDS

PRIVACY ACT OF 1974: SYSTEM OF RECORDS

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FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

I. INTRODUCTION

A. Procedural Statement

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. ("OOIDA" or "Association") in response to the "Notice to modify a system of records" published by the Department of Transportation, Federal Motor Carrier Safety Administration ("FMCSA" or "the Agency") on December 15, 2009 at 74 Fed. Reg. 66391, pertaining to, among other things, the FMCSA Pre-Employment Screening System ("PSP"), required by 49 U.S.C. § 31150, and the records relied upon for the operation of the PSP.

B. The Interest of the Owner-Operator Independent Drivers Association, Inc.

OOIDA is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small business motor carriers and professional drivers. The more than 158,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United States while approximately 96 percent of active motor carriers operate 20 or fewer trucks. The address of the Association is:

Owner-Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.ooida.com

The Association actively promotes the views of small business truckers and professional drivers through its interaction with state and federal government agencies, legislatures, the courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of small business truckers in numerous committees and various forums on the local, state, national, and international levels. FMCSA has obligations under the Privacy Act of 1974 and under the Fair Credit Reporting Act ("FCRA") to implement the PSP in a manner which is responsive to individual driver concerns about the accuracy of data being disseminated in their name. Failure by the Agency to develop the PSP accordingly negatively affects every driver, including members of OOIDA, for which the Agency maintains records.

II. SUMMARY

OOIDA has long supported responsible background screening of drivers seeking employment, and has long opposed irresponsible screening of drivers premised upon inaccurate, imprecise, incomplete, and ambiguous data.

OOIDA understands that Congress has required that FMCSA make certain records available to motor carriers to aid in the background screening of applicants for driving positions. *See* 49 U.S.C. § 31150. OOIDA is deeply concerned that the effort to make Agency records available will also make information available other than those Congress contemplated, and fail to fully incorporate the robust data dispute and correction mechanisms of the FCRA, as mandated by the same statute.

III. COMMENTS OF THE ASSOCIATION

On December 15, 2009, the FMCSA published in the Federal Register a Notice to modify a system of records ("Notice to Modify"). The Notice to Modify listed four categories of records, shared with eleven systems. These comments address only the records in the system identified as "Pre-Employment Screening System" records, and by implication the other system of records and the two categories of records feeding into the PSP, e.g. "Driver Information Resource ("DIR")," "Crash Data," and "Driver/Vehicle Safety Violations and Inspection Data." These are the types of records implicated by 49 U.S.C. § 31150, Safety Performance History Screening.

A. RECORDS TO BE INCLUDED IN THE PSP SYSTEM

What records are to be disclosed? By the general language in the "Categories of Records in MCMIS[1]" section of the Notice to Modify, e.g. "*Driver/Vehicle Safety Violations and Inspection Data*—This data is collected during roadside inspections of drivers and vehicles…," FMCSA implies that the PSP system is designed to report all data associated with inspections, and not just data associated with "serious driver-related safety violations" that resulted in an out-of-service order. Does FMCSA intend to disclose to background screeners records of violations that do not result in out-of-service orders?

49 U.S.C. § 31150(a) requires that among the records to be made available to background screeners are "(3) Serious driver related safety violation inspection reports." "Serious driver-related safety violations" are defined in § 31150(d) as "a violation by an operator of a commercial motor vehicle that the Secretary determines **will** result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected" (emphasis added.). But not all violations result in out-of-service orders.

[1] Motor Carrier Management Information System

Pursuant to 49 C.F.R. § 383.5: "Out-of-service order means a declaration by an authorized enforcement officer of a Federal, State, Canadian, Mexican, or local jurisdiction that a driver, a commercial motor vehicle, or a motor carrier operation, is out-of-service pursuant to §§ 386.72, 392.5, 395.13, 396.9, or compatible laws, or the North American Uniform Out-of-Service Criteria." The four cited sections deal respectively with imminent hazards, alcohol, hours-of-service and inspections. Violations under these four sections appear to be the only ones for which an out-of-service order is mandatory, and thus the only ones "the Secretary determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle…." Other violations do not require an out-of-service order and, in practice, many findings of violations do not result in out-of-service orders. Thus the question: What records does FMCSA intend to include in the PSP system?

OOIDA is greatly concerned that the PSP system will be reporting impermissible data, including reports of violations other than those resulting in an out-of-service order. OOIDA regularly receives complaints from its members to the effect that they have been "black balled" in the trucking industry by inaccurate data reported during background screening procedures. Unless the FMCSA informs the public with more specificity than is found in the December 15 Notice to Modify precisely what reports of violations are in the PSP "system," it is not possible to comment with confidence on the remainder of the Notice to Modify.

B. FAILURE TO IDENTIFY THE "SYSTEM"

In the section of the Notice to Modify entitled "MCMIS SHARES PII WITH THE FOLLOWING FMSCA SYSTEMS OR SYSTEM COMPONENTS," FMCSA states with regard to the PSP system,

> "The specific objectives of the PSP are aligned with the requirements of 49 U.S.C. 31150. The PSP will provide driver crash and inspection records from the

> DIR to requesting motor carriers that have a driver's consent. The PSP also allows a sole proprietor (owner/operator) to review his/her own driver-related data in the DIR."

This quoted disclosure fails to discharge the FMCSA's duties under the Privacy Act of 1974. To start with it fails to identify the principle FMCSA "system" to which and through which record sharing will occur, i.e. the "gateway" provided by NIC Technologies, Inc. pursuant to contract DTMC 75-09-C-00026. That NIC Technologies is a "system" of FMCSA is beyond dispute. Per 5 U.S.C. § 552a(a)(5), "the term 'system of records' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." That the gateway is under the control of the Secretary of Transportation is evident from Congress' declaration at 49 U.S.C. § 31150(a) that "The Secretary of Transportation shall provide persons conducting pre-employment screening services for the motor carrier industry electronic access to… reports contained in the Motor Carrier Management Information System…." That the Secretary elected to discharge his duties through a contract with a private entity does not make the "system" any less one of the U.S. Department of Transportation. The Privacy Act, at 5 U.S.C. § 552a(m)(1), requires no less: "When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system." Even NIC recognizes its role as operating a FMCSA "system." To quote the October 19, 2009 press release by NIC, "The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, has awarded NIC Technologies, LLC, the contract for a National Motor Carrier Pre-Employment Screening System." Thus the failure of FMCSA

to identify NIC Technologies as a system with which it shares PSP data is a violation of the notice requirements of the Privacy Act.

C. FAILURE TO PROVIDE DATA ACCESS TO ALL DRIVERS

The PSP-system-sharing disclosure quoted above is defective in another way. FMCSA states that a "sole proprietor" may review their record. But the PSP system applies not just to sole proprietors, but to all drivers, including employee drivers. The reports from the MCMIS system to be available to screening motor carriers are:

(1) Commercial motor vehicle accident reports.
(2) Inspection reports that contain no driver-related safety violations.
(3) Serious driver-related safety violation inspection reports.

(49 U.S.C. § 31150(a)).

Except for (2) above, which is not driver-related at all, these are records of drivers, not just of drivers who happen to be sole proprietors. The public comment process is undermined if the Notice to Modify implies that the population to be affected by the system of records which is its subject is smaller than it in fact is. That limited notification undermines the public comment process intended to inform the regulatory process. In its failure provide notice of all those entitled to access to their records, FMCSA has violated the Privacy Act.

D. FAILURE TO MAKE ALL PSP RECORDS AVAILABLE TO DRIVERS APPLYING FOR WORK

Turning to the substance of what is available for review, the PSP-system-sharing disclosure quoted above states that a sole proprietor can "review his/her own **driver-related** data in the DIR." (Emphasis added.) If "(2) Inspection reports that contain **no driver-related** safety violations" (Emphasis added.) are going to be reported to prospective employers screening an applicant for a job, then those same records need to be available to the applicant for review and comment. The relevance of such records may be slight, but 49 U.S.C. § 31150 requires their

disclosure. Applicants, including OOIDA members, are entitled to check and correct anything that is going to be disclosed to a prospective employer. That is the only way the FCRA and Privacy Act provisions can safeguard the applicant.

E. FAILURE TO IDENTIFY AS "ROUTINE USE" THE USE OF PSP RECORDS FOR BACKGROUND SCREENING

Turning to the section of the Notice to Modify entitled "ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF USE," one is struck by the thunderous silence regarding disclosures in support of the PSP system. There is no reference to the "routine use" of disclosure in service of background screening of job applicants, nor of the "category of user": prospective employers. There also is no reference to another "category of user," the motor carriers and individuals who are the subjects of the PSP records. They "use" them to check for accuracy and as a subject of critique and commentary.

F. FAILURE TO IDENTIFY NIC TECHNOLOGIES AS A CONSUMER REPORTING AGENCY

The next section of the Notice to Modify is entitled, "DISCLOSURE TO CONSUMER REPORTING AGENCIES." The Notice to Modify states "None." This is a patently false statement. NIC Technologies is a "credit reporting agency" as defined by 15 U.S.C. § 1681a (f). A "consumer reporting agency" is "any person which, for monetary fees,... regularly engages... in the practice of assembling... information on consumers for the purpose of furnishing consumer reports to third parties...." A "consumer report" is "any... communication of any information by a consumer reporting agency bearing on a consumer's... character, general reputation, personal characteristics, or mode of living which is used or expected to be used... for the purpose of serving as a factor in establishing the consumer's eligibility for... employment purposes." (15

U.S.C. § 1681a (d)). "Employment purposes" "means... the purpose of evaluating a consumer for employment...." (15 U.S.C. § 1681a (h)). The PSP makes accessible the reports from others contained in its Driver Information Resource ("DIR") regarding accidents and inspections. Statements regarding "accidents" and "serious driver-related safety violations" are "consumer reports" when published by a company in the business of selling such statements to prospective employers, i.e. by a "consumer reporting agency." Thus NIC Technologies is a "consumer reporting agency," required to comply with the FCRA. Disclosure of this is important because the drivers, "consumers" under the FCRA, have rights against any credit reporting agency publishing consumer reports. The drivers need to know to whom to turn, and whom to hold accountable, when difficulties arise.

G. FAILURE TO DISCLOSE APPLICABILITY OF FCRA PROCEDURES TO PSP DATA

A later section of the Notice to Modify is entitled, "CONTESTING RECORD PROCEDURES." In toto, it states, "Individuals seeking to contest their information in this system should apply to the System Manager by following the same procedure as indicated under 'Notification Procedure."' The Notification Procedure simply requires a written communication to the System Manager. For PSP records there is much more to be disclosed. PSP records must be disclosed "in accordance with the Fair Credit Reporting Act" (5 U.S.C. § 31150(b) (1)). The FCRA at 15 U.S.C. § 1681i is entitled, and sets forth, the "Procedure in case of disputed accuracy." It sets forth procedures for notifying the furnishers of statements about motor carriers and drivers, deadlines, duties of both the credit reporting agency and the furnisher (*see also* § 1681s-2), notice of the process and results of any reinvestigation, and the right of the "consumer" to "file a brief statement" if any dispute is not resolved, which brief statement must be reported along with whatever the furnisher provides (15 U.S.C. § 1681c (f)). With regard to PSP records,

the Notice to Modify should, at a minimum, incorporate these procedures by citation and reference. Only such a disclosure will fully inform drivers of the panoply of their rights and remedies.

IV. CONCLUSION

It is respectfully requested that the part of the Notice to Modify which deals with the PSP records be amended to more fully incorporate the requirements of the Privacy Act, the FCRA and SAFTEA-LU Act into its PSP system of records.

Respectfully submitted,

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