

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DEPARTMENT OF TRANSPORTATION**

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

**IN RESPONSE TO FMCSA'S
NOTICE; REQUEST FOR PUBLIC COMMENT**

Docket No. FMCSA-2013-0457

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I. STATEMENT OF INTEREST

These comments are submitted on behalf of Owner-Operator Independent Drivers Association, Inc. (“OOIDA” or “Association”) in response to a notice and request for comments (“Notice”) published by the Federal Motor Carrier Safety Administration, (“FMCSA” or “Agency”), Docket No. FMCSA-2013-0457, 78 Fed. Reg. 72146 (December 2, 2013). The Notice requests comments on changes FMCSA is proposing to the data that it records, maintains and publishes from its Motor Carrier Management Information System (MCMIS) database. FMCSA published this Notice and then immediately filed it with the U.S. Court of Appeals for the District of Columbia Circuit in a current Petition for Review filed by OOIDA against FMCSA. OOIDA challenges, among other things, FMCSA’s practice of continuing to report to the public that a driver or motor carrier violated the safety rules after an adjudication in state court resulted in a dismissal or finding of not-guilty of the alleged violation. *Weaver, et al. v. Ferro, et al.*, No. 13-1172 (D.C. Cir. filed May 10, 2013). OOIDA and several other individuals have also filed a suit in federal district court presenting similar issues: *Owner-Operator Independent Drivers Association, Inc., et al. v. Raymond H. LaHood, et al.* No. 12-1158 (D. D.C. filed July 13, 2012).

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 approximately 150,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 200,000 individual heavy-duty trucks. Single-truck motor carriers represent nearly half of the total of active motor carriers operated in the United States. The mailing address of the Association is:

Owner-Operator Independent Drivers Association, Inc.
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1 NW OOIDA Drive
Grain Valley, Missouri 64029
www.oida.com

The Association actively promotes the views of professional drivers and small-business truckers through its interaction with state and federal government agencies, legislatures, courts, other trade associations, and private businesses to advance an equitable and safe environment for commercial drivers, including those with their own federal motor carrier operating authority. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of professional drivers and small-business truckers in numerous committees and various forums on the local, state, national, and international levels. OOIDA's mission includes the promotion and protection of the interests of independent truckers on any issue which might touch on their economic well-being, their working conditions, or the safe operation of their motor vehicles on the nation's highways.

The Notice describes FMCSA action that has the potential to affect OOIDA members who operate trucks under their own federal motor carrier operating authority as well as OOIDA members who operate trucks under other companies' operating authority. Through its Safety Management System ("SMS") program and Pre-employment Screening Program ("PSP"), FMCSA makes data from its MCMIS database public with the specific intent of influencing the public's decisions to do business with specific motor carriers or to employ specific individuals as drivers. The proposed policy affects the content of that data. OOIDA offers several comments to this Notice. These comments are not intended to constitute a change or abandonment of any position that it has taken in the pending litigation identified above.

II. COMMENTS

A. WHAT IS THIS NOTICE, AND WHAT TYPE OF COMMENTS DOES FMCSA SEEK?

It appears that FMCSA created and published this Notice for the purpose of using it in court to defend against the legal challenges brought by OOIDA and several of its members. This Notice does not propose the text of any new rules, regulations or orders. FMCSA does not address any of the statutory requirements for promulgating a rulemaking that it is required to address under the Administrative Procedures Act, the Regulatory Flexibility Act and its own authorizing statutes and regulations. The Notice is not a new System of Records Notice that must accompany any new data collection and use by a federal agency (5 U.S.C. § 552a(e)(4)). The Notice does not identify how the announced actions address (if intended to address at all) any of FMCSA's specific data-collection responsibilities under the Privacy Act (5 U.S.C. §552a), the Fair Credit Reporting Act (15 U.S.C. § 1681(e), as required under 49 U.S.C. § 31150(b)(1)) or its own authorizing statutes (49 U.S.C. § 31106(a)(3)(F)).

Instead of proposing rules that have the force and effect of law, FMCSA only promises to revise its DataQs guidance manual and change how the data is presented in the SMS and PSP programs. That manual has no legal effect. FMCSA could revise and update that manual at any time in the future - including reversing the actions proposed in this Notice. In short, FMCSA's Notice appears to be of little consequence, legally. The Notice appears to be part of a trend at FMCSA to announce an action that it impresses upon the public to be meaningful, but it does so in a manner that seeks to avoid procedures that might make its actions subject to public accountability and judicial review.

The Notice does not propose or seek specific comment on options for addressing any particular issue, and the Notice does not request public comment on any particular question or

subject area. The Notice announces a new agency practice related to maintenance of its database, but does not indicate any intent to consider or respond to the public's comments. In part, OOIDA offers these comments to the extent that they may be helpful in preserving the rights of its members in pending litigation. But OOIDA also offers these comments in hopes that the Notice is a signal that FMCSA recognizes the fundamental problems with its data management and use, and that it will continue to revise its policies to respect the statutory and constitutional rights of motor carriers and drivers. It is a positive, albeit incremental, step for FMCSA to terminate its practice of reporting of a violation of the law where, in some instances, guilt of such violation is not established in a state court adjudication. But the announced policy does not go far enough to bring the Agency in compliance with its statutory duties for data accuracy.

B. THE NOTICE LEAVES IN PLACE A FLAWED SYSTEM THAT REPORTS INNACCURATE DATA ABOUT DRIVERS AND MOTOR CARRIERS.

FMCSA's problems arise from its attempt to give the DataQs process a function that it was not designed to handle. The very name of the DataQs system itself implies its original purpose, to fix errors in data entry; to identify and correct transposed numbers and spelling errors that may cause the database to attribute motor carrier safety violations to the wrong drivers or motor carriers. These are data quality functions that database managers and FMCSA's MCSAP partners are qualified to perform.

Problems arise, however, when FMCSA uses its DataQs process as a fact-finding, adjudicatory, or an appeals process: functions that the DataQs process was not designed to handle and where those who implement the process have no special qualifications to perform.

The DataQs system refers disputes to the very state agencies contracted by FMCSA under MCSAP to conduct the inspections in dispute. Those agencies often refer the dispute and its final resolution to the officer or inspector who conducted the original inspection and submitted the disputed data. If not referred to the original inspector, the dispute is often resolved by an official who is a colleague or ranking official to that original inspector. This arrangement poses numerous potential conflicts of interests that erect obstacles to the resolution of accuracy problems in FMCSA's database.

FMCSA would greatly simplify its DataQs process, and the burden on its staff and the staff of its MCSAP partners, were it to adhere to its original data quality concept, and simply and objectively delete violations adjudicated and not proven in state court. Instead, through this Notice, it has chosen to add to the morass by creating new layers of discernment and obscure categories of judicial outcomes for the public, FMCSA, and state agency's to argue about on a case by case basis.

**C. FMCSA'S EXCEPTION-RIDDLED DEFINITION OF THE TERM
"CONVICTION" IS INACCURATE AND UNLAWFUL.**

The Notice states that FMCSA will use a definition of the term "conviction" that has caveats and exceptions that are unrelated to a state court's determination of guilt. That obscure definition may serve some internal regulatory function when FMCSA uses MCMIS data to guide its own internal enforcement priorities. But FMCSA seeks broader dissemination of MCMIS data for use by the public in making hiring, insurance, or other business decisions. In that environment data will tend to mislead and confuse its users. FMCSA is redefining the context of its database to fit the inaccurate data – rather than correcting the data itself. By doing this FMCSA perpetuates the MCMIS database's fundamental lack of accuracy and lack of fairness to drivers, and lack of respect for our nation's judicial system.

D. FMCSA’S PROPOSAL TO RETAIN RECORDS OF VIOLATIONS NOT PROVEN IN COURT PERPETUATES ITS USE OF INACCURATE DATA.

FMCSA proposes that if a driver is convicted of a different charge than the one alleged and originally reported to MCMIS, it will “retain” the original violation and continue to report it with a notation “resulted in conviction of different charge.” Under this proposal FMCSA will continue to report the original violation even if the driver was not found guilty of it. This proposal does nothing to cure the fundamental accuracy problems of data used in the SMS and PSP programs. It also raises many questions of interpretation likely to be the focus of future DataQ disputes.

Must the resulting conviction of a different charge be related to the original allegation? Will FMCSA require that the “different charge” be related factually or legally to the original charge? Must the “different charge” be related to the state-adopted FMCSRs or a law related to the operation of the commercial motor vehicle? Must the “different charge” share substantially similar facts to the original violation to be retained and reported? Will FMCSA cease to report the original violation if the “different charge” is completely unrelated to the reported violation? Or will a conviction of *any* state law result in the retention and reporting of the original FMCSR allegation? What standard, if any, will FMCSA require its MCSAP partners to use in DataQ disputes in these circumstances?

OOIDA believes that FMCSA’s proposed solution simply places more responsibility and complexity on the DataQs system than it was designed to handle and that its administrators are qualified to assume. FMCSA would more clearly comply with its duties for the accuracy of its data, and reduce the burdens of inevitable disputes, were it to simply not report violations that

were not proven in court. If FMCSA wishes to accurately report convictions of charges not originally made following an inspection, it should propose a process to do so.

E. FMCSA MUST RECOGNIZE THAT IT HAS PRIMARY RESPONSIBILITY FOR THE ACCURACY OF ITS DATABASE.

Under 49 U.S.C. § 31150(b)(1), FMCSA must ensure that release of data through the Pre-employment Screening Program (PSP) complies with the Fair Credit Reporting Act and all other applicable federal law (including the Privacy Act). These statutes impose high standards for accuracy. Under the Department of Transportation's authorizing statutes, the Secretary has the duty to ensure the accuracy of its data and a process for its correction (49 U.S.C. §§ 31106(a)(3)(F) & (e)). The Privacy Act also imposes upon FMCSA the duty to maintain the accuracy of its data (5 U.S.C §§ 552a(e)(5) & (6)). These statutes require FMCSA to affirmatively determine if a violation was not dismissed or was not proven in a state court of competent jurisdiction and to make appropriate changes to its database and to no longer report the alleged violation. By statute and FMCSA rule (and under their MCSAP contracts) states have an affirmative duty to provide accurate data to FMCSA. 49 U.S.C. § 31102(b)(Q); 49 C.F.R. Part 350. But by statute FMCSA is ultimately responsible to drivers and motor carriers for the accuracy of data. 49 U.S.C. § 31150(b)(1). In addition to the accuracy of the data itself, these responsibilities include providing a place for the driver or motor carrier to insert comments into the database when they disagree with the accuracy of the data. 15 U.S.C. §1681i; 49 C.F.R. § 10.45. FMCSA has yet to provide such a mechanism in its DataQs process.

The Notice discloses that FMCSA will only correct inaccurate data when a driver or motor carrier files a challenge under DataQs. While this process is an important component of the data correction process, by relying upon this process alone FMCSA is abdicating its ultimate responsibility for the accuracy of MCMIS data. The policy change does not cite to or employ

states' statutory, regulatory, or contractual obligations under MCSAP to ensure the accuracy of the data it submits to FMCSA. Because FMCSA has the ultimate duty to ensure accuracy, sound policy considerations require it to impose upon states participating in the MCSAP program standards of accuracy at least as high as those FMCSA must adhere to – without waiting for drivers or motor carriers to initiate a DataQs challenge.

In the Notice, FMCSA cites its rule that prohibits states from masking convictions in state court: 49 C.F.R. § 384.226. But FMCSA has neither demonstrated nor cited to any authority that allows it to dictate or overrule the decisions made by state and local prosecutors or state and local judges dealing with adjudications of state law. FMCSA's decision to define exceptions to the term conviction, and its intent to ignore the decisions of state and local prosecutors and judges, runs roughshod over the legal rights of drivers and motor carriers. If FMCSA has the extraordinary power to direct the decisions of state prosecutors and judges – at least through the certification of a state's CDL program or through other grant programs with other state agencies - then this assertion of power directly contradicts its assertions in previous Federal Register Notices and in its briefing in the pending litigation that “FMCSA cannot change State records without State consent.” (77 Fed. Reg. at 42551). FMCSA has all of the authority it needs to fulfill its lawful responsibilities: to ensure its MCSAP partners adhere to the required standards of accuracy for data stored in MCMIS.

F. FMCSA IMPERMISSABLY FORGIVES ITSELF FROM CORRECTING POTENTIALLY THOUSANDS OF INACCURATE RECORDS PRESENTLY CONTAINED IN THE MCMIS DATABASE.

The Notice details the burdens that FMCSA foresees in attending to its accuracy responsibilities. FMCSA forgives itself from the burden of cleaning up what it estimates to be “potentially thousands” of inaccurate records currently in its database. FMCSA claims that correcting data first submitted after an inspection and then the subject of later adjudication is

“especially difficult” when the “subsequent adjudication happens much later with no practical means for the adjudication results to be transmitted directly to FMCSA.” [Notice at 78 Fed. Reg. p. 72148 col. 3]. FMCSA exaggerates the burden it describes. FMCSA has no problem requiring the sharing of driver-conviction data among states under the CDLIS program (Commercial Drivers License Information System) where that requirement suits its own purposes. It should not complain about the burden of this activity in cases where it has the duty to protect the privacy interest and ensure accurate data concerning drivers and motor carriers. FMCSA cites to no “burden” exception to its statutory responsibilities for data accuracy and OOIDA is aware of none. FMCSA’s only lawful option is to cease using such data in its SMS and PSP systems until it has remedied these known inaccuracies.

III. CONCLUSION

FMCSA’s Notice shows movement in the right direction to correct serious flaws in its MCMIS database. The Notice, however, proposes changes that do nothing to correct the potential thousands of inaccurate records in its current database, and do too little to prevent such inaccuracies in the future. OOIDA proposes the following actions that would constitute a significant step forward in addressing the serious flaws in the structure and use of the MCMIS database:

1. Recognize that responsibility for accuracy is established under the Privacy Act and the Fair Credit Reporting Act. The discharge of that responsibility should be guided by those statutes and regulations adopted by it to discharge those statutory responsibilities, e.g. 49 CFR, Part 10;
2. Impose federal standards of accuracy upon its MCSAP partners so that it only receives data into the MCMIS database that conforms to those federal standards;

3. Purge data submitted by MCSAP states that do not conform to federal standards of accuracy;
4. Scale back the use of the DataQs system to the correction of clerical and factual errors.
5. Initiate a rulemaking proceeding to identify serious driver related safety violations as required by 49 C.F.R. § 31150(a)(3) and (d).
6. Apply the definition of serious driver safety violation to the MCMIS database when disseminating PSP reports, as required under Section 31150(d).

Respectfully submitted,

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