

agency. That could have helped to ensure that persons applying for positions that require operating a CMV would have all of their relevant records of violations investigated. It would also have ensured that a SAP evaluated persons who test positive, and that violators completed a recommended rehabilitation program before returning to perform safety-sensitive functions.

The § 382.413(a)(2) requirement to pass along drug and alcohol information received from other previous employers when responding to an employer's investigation under § 382.413 was subsequently incorporated into the FMCSRs as a technical amendment in a final rule published in the **Federal Register** on March 8, 1996, (61 FR 9546). However, because § 382.413(a)(2) constituted a substantive change which should be subject to public notice and comment before becoming a final rule, the agency also included it in the March 14, 1996 NPRM.

In a related change proposed under § 382.405, disclosure of the information pursuant to § 382.413(a) would have required the driver's written authorization, and responding employers would have been required to reply within 30 days of receiving the investigation request.

Under proposed § 382.413(b), the agency would have extended the time period allowed to use a driver in a safety-sensitive function without having received the requisite drug and alcohol information from 14 days to 30 days. After 30 days, the employer would have been prohibited from continuing to use the driver to perform safety sensitive functions without having received, or having documented a good faith effort to obtain, the driver's drug and alcohol history.

## Discussion of Comments to the NPRM

### *Small Business Administration Concerns*

The Small Business Administration (SBA) believes that a substantial number of small entities would be economically impacted by the NPRM, and offered recommendations for minimizing such impacts. In particular, the SBA recommended FMCSA give more attention to the intent of the HazMat Act requirements relative to the Regulatory Flexibility Act certification regarding impacts on small entities, and specifically include estimates of the number and size of entities and the estimated costs they would incur. The SBA also requested that more extensive information be included about the estimated paperwork burden.

*FMCSA Response:* The FMCSA agrees that more extensive attention to regulatory flexibility is appropriate, and has included a more detailed Regulatory Flexibility Act analysis as part of this SNPRM. The agency has also prepared an initial regulatory evaluation and placed a copy of the regulatory evaluation in the docket for this rulemaking as document number 38. A summary of the regulatory evaluation is provided in this SNPRM under the section entitled "Regulatory Evaluation: Summary of Benefits and Costs." FMCSA addresses SBA recommendations for major issues under the following topical discussions.

### *Employer Liability and Driver Rights*

Many comments to the NPRM concerned issues of (1) employer liability for using investigative driver history background information in the hiring decision, (2) employer liability for furnishing the driver history background performance records, and (3) drivers' rights to review and comment on the accuracy this safety performance information and to processes for drivers to seek revision or provision for rebuttal. Seventeen commenters addressed the employer liability issues. Eighteen addressed the drivers' rights issue.

The American Trucking Associations (ATA) wrote:

"The potential liability arising from providing information about a former employee to a prospective employer continues to be a matter of the greatest concern to motor carriers. It has been a major factor inhibiting the effectiveness of the present provisions of § 391.23(c) for the past quarter-century. The general view, based on experience, is that a mere requirement for notification to drivers set forth in proposed § 383.35(f) and 391.21(d), or as currently required in § 391.21, is totally inadequate. We are also concerned with the present provisions and proposed amendments to § 382.413 because a driver-applicant is not specifically advised of the regulatory requirements that the prospective employer obtain the information and the obligation of the previous employer to provide it. \* \* \* Even if the carrier successfully defends its action in providing factual information to the prospective employer, it will have almost surely been put to considerable needless expense to defend itself."

A few commenters feared that providing the driver with full access to information received during the employment history investigation, and not just that proposed in the NPRM under § 391.23(c)(1), would increase the threat of litigation for employers, particularly if that information was the basis for denying the driver employment.

Several commenters proposed various remedies. The Regular Common Carrier Conference (RCCC) and Interstate Truckload Carriers Conference (ITCC) suggested the proposed driver's written release required for alcohol and controlled substances information under § 391.23(c)(1)(iii) and (iv) be required for all investigative information under § 391.23(c)(1). The RCCC believes this modification would greatly reduce the potential liability for unlawfully disclosing investigative information, and ensure that drivers know beforehand their safety performance records will be investigated from prior employers.

In supplemental comments to the docket, the ITCC noted that legislative relief was their preferred option for dealing with employer liability issues. The ITCC further believes the driver's signed release would provide an appropriate measure of protection for employers named as defendants in employment litigation. It pointed out that many employers have already incorporated some sort of release language into the printed employment application. Drivers subscribe to the release when signing the application.

The ITCC further proposed that the agency incorporate language into the final rule stating that the act of applying for employment denotes a driver's implied consent to the release of all information that carriers are required to obtain to make a considered employment decision. The inclusion of such "implied consent" language could be especially useful in satisfying the concerns of carriers accepting applications using non-written means, such as drivers calling 800 numbers provided by the carrier for recruiting new drivers. The ATA and DAC Services, Inc. also recommended including implied consent language in the final rule. The United Motorcoach Association (UMA) supports employer protection for releasing driver investigative information by adding a "hold harmless" clause to the final rule.

In the March 14, 1996, NPRM the agency requested specific comments on whether to define a "reasonable opportunity" for a driver to review and comment on safety performance records and whether this driver right should have time restrictions.

The Advocates for Highway and Auto Safety (AHAS) urged the agency to define "reasonable opportunity" rather than leave implementation of this proposal to the motor carrier industry.

Pinnacle Transport Services (Pinnacle) encouraged the agency to entirely eliminate the proposed right for the driver to review the furnished