

employers to make sound hiring decisions. The procedures proposed in this SNPRM will enable obtaining more complete driver safety performance information by motor carriers. It will also maximize the use of this information by providing a limitation on liability of those providing and using this information, while subjecting them to administrative controls to protect driver privacy.

The SNPRM specifies minimum safety performance history data that a motor carrier must investigate about a driver's employment history under the proposed § 391.23(d) and (e). It differs from the NPRM by: (1) Refining the list of what information is to be investigated from previous employers, (2) establishing employer protections for providing and using the safety performance history information, (3) clarifying drivers' rights to review, correct or rebut information provided, (4) providing enhanced Regulatory Flexibility Act and Paperwork Reduction Act analyses, and (5) dropping conforming amendments to part 382 because they were already addressed under separate rulemakings discussed in the preamble.

FMCSA has refined the safety performance history data list in response to comments to the docket and because of changes to agency drug and alcohol regulations made by recent rulemakings. Section 4014 of the TEA-21 mandated the new employer liability limitation and driver protections being proposed. Enhanced Regulatory Flexibility analysis is provided in response to comments to the docket from the Small Business Administration.

Impacts of Other Related Rulemakings

Recent Changes in Alcohol and Controlled Substance Regulations

When the NPRM for driver safety performance history was issued in 1996, the detailed regulations governing investigations into an employee's drug and alcohol history were codified at 49 CFR 382.413. Since that time, DOT has revised its major regulations regarding drug use and alcohol abuse. Changes to the DOT drug and alcohol regulations, 49 CFR part 40, were finalized in a document entitled "Workplace Drug and Alcohol Testing Programs; Final Rule" (65 FR 79462, December 19, 2000). A correction to the final rule was published at 66 FR 3884, January 17, 2001; final compliance date details were published at 66 FR 28400, May 23, 2001; and technical amendments to the December 2000 final rule were published at 66 FR 41944, August 9,

2001. These documents are available in DOT docket number OST-1999-6578. The Department's program written by the Office of the Secretary and jointly issued by each of the Operating Administrations was finalized at 66 FR 41955, August 9, 2001. It provides the background for and an overview of the general, common elements of the modal rules. FMCSA finalized conforming amendments to the part 40 changes in its drug and alcohol regulations codified at 49 CFR part 382 and published them in a final rule at 66 FR 43097, August 17, 2001. A copy of that document has been placed in DOT docket number FMCSA-2000-8456.

Among other things, these rules streamlined drug and alcohol testing program requirements for all of the Department's modal entities having drug and alcohol regulations. All DOT regulated employers—not just motor carriers—must investigate the drug and alcohol history of a person intended to be deployed in a safety-sensitive function. Similarly, DOT-regulated employers must immediately respond to such investigations. The specific requirements governing investigations about drug and alcohol information were revised and moved from § 382.413 to 49 CFR § 40.25. The new § 382.413 cross-references § 40.25.

The HazMat Act directs the Secretary to amend § 391.23. Section 114(b)(2) of the HazMat Act requires motor carriers covered by part 391 to investigate certain drug and alcohol information about a driver as well as investigating his/her employment history. The motor carrier drug and alcohol investigation requirements were in existence when the HazMat Act was signed into law (codified at 49 CFR part 382, which applies only to motor carriers subject to the 49 CFR part 383—Commercial Driver's License Standards, Requirements and Penalties).

Because Congress specified no changes for part 382, FMCSA believes Congress also intended that the new § 391.23 requirement specify that motor carriers not otherwise subject to the alcohol and controlled substances testing requirements under part 382, or the CDL standards in part 383, are also required to investigate this data. This would create an extra level of safety by requiring these motor carriers to investigate a driver's alcohol and controlled substances history if the driver previously held a safety sensitive position subject to the part 382 requirements. This includes obtaining information about drivers who may have violated part 382 prohibitions, and may be seeking to work for uncovered motor carriers without having

completed DOT return-to-duty requirements, or who have relapsed subsequent to treatment.

FMCSA believes the new part 40 adequately reflects the spirit of section 114 of the HazMat Act because it directs employers to: (1) Investigate completion of a SAP's rehabilitation referral, (2) immediately respond to drug and alcohol history investigations from new or prospective employers, and (3) retain certain drug and alcohol records for up to 3 years. This is because the § 40.25(b)(5) requirement for "documentation of the employee's successful completion of DOT return-to-duty requirements * * *" describes in a positive voice the intent under the HazMat Act section 114 that motor carriers investigate a driver's possible failure to undertake or complete recommended treatment.

Because the Department has: (1) Recently completed extensive revisions to its alcohol and controlled substances regulations, (2) incorporated provisions that accomplish the intent of section 114, and (3) thoroughly determined the information collection burdens and economic impacts of these changes, the FMCSA believes it is unnecessary to propose changes to part 382. The HazMat Act requirement for modifying § 391.23 to investigate 3-years of possible alcohol and controlled substances information for all drivers hired by motor carriers covered by part 391 is placed in § 391.23(e).

Existing § 382.413 cross-references § 40.25 requirements that an employer investigate an employee's (in the case of FMCSA regulated entities, a driver's) 2-year drug and alcohol history. That investigation would include, among other things, information about the successful completion of DOT return-to-duty requirements for any employee found to have violated DOT alcohol and controlled substances rules (*i.e.*, the alcohol and controlled substances regulations of any DOT agency). The existing requirement in § 40.25 to investigate two years of information is one year less than required by section 114 of the HazMat Act and the proposed § 391.23(e) in this SNPRM. Both require motor carriers to make a 3-year investigation of the alcohol and controlled substances history, and for previous employers to provide that information.

The major difference between § 40.25(b)(5) and § 391.23(e) involves the time period and scope of the alcohol and controlled substances testing records. This SNPRM would require a prospective employer to investigate a previous motor carrier's employer information about violations of only the