No. _____

In The Supreme Court of the United States

THOMAS O. FLOCK, DENNIS K. THOMPSON, THOMAS H. GOODEN, C. DOUGLAS HEISLER, WALTER A. JOHNSON, AND GAYLA S. KYLE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

49 U.S.C. § 31150 requires the Secretary of Transportation to provide motor carriers, for the purpose of pre-employment screening, with access to reports of driver-related safety violations determined by the Secretary to be serious. The statute does not authorize the Secretary to release reports of driver-related violations not determined by the Secretary to be serious. Nevertheless, the Secretary has released and continues to release reports of all driver-related violations without regard to their seriousness.

The Privacy Act requires that, before an agency disseminates any information, it must "publish in the Federal Register . . . a notice of the existence and character of the system of records . . . [including] the categories of records maintained in the system." 5 U.S.C. § 552a(e)(4)(C). The System of Records Notice (SORN) published by the agency here did not identify reports of non-serious driver violations for inclusion in the agency's system of records. The questions presented are:

1. Whether the First Circuit erred by holding, in conflict with the Third, Fifth, Eleventh, and D.C. Circuits, that ambiguity required for granting *Chevron* deference may be established on the basis of congressional silence perceived where the statute expressly authorized the agency to do one thing but did not expressly forbid it from doing another?

QUESTIONS PRESENTED – Continued

2. Whether the First Circuit erred by granting *Chevron* deference to an agency's statutory interpretation advanced for the first time as a defense in litigation? The Circuits are deeply split and confused as to whether or under what circumstances to grant *Chevron* or *Skidmore* deference or no deference at all under these circumstances.

3. Whether the First Circuit erred, in conflict with the Fifth and Sixth Circuits, by approving the release of documents that were not identified in the agency's System of Records Notice?

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Thomas O. Flock

Dennis K. Thompson

Thomas H. Gooden

C. Douglas Heisler

Walter A. Johnson

Gayla S. Kyle

Respondents:

United States Department of Transportation

Federal Motor Carrier Safety Administration

United States of America

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The October 21, 2016 opinion of the United States Court of Appeals for the First Circuit, affirming the decision of the United States District Court for the District of Massachusetts, is reported at 840 F.3d 49 and is reproduced at pages 1-13 of the appendix to this Petition. The September 30, 2015 Order of the District Court granting Respondents' motion to dismiss is reported at 136 F. Supp. 2d 138 and is reproduced at pages 14-42 of the appendix to this Petition.

JURISDICTION

The Federal Courts have subject matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552a(g)(1)(D). The causes of action alleged in the Petitioners' Complaint arise under 5 U.S.C. § 552a and 49 U.S.C. § 31150.

The United States Court of Appeals for the First Circuit issued its Opinion on October 21, 2016. Petitioners timely filed a petition for rehearing *en banc*. The First Circuit denied Petitioners' petition for rehearing *en banc* in an Order dated December 16, 2016. App. 43-44.

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 49 U.S.C. § 31150, 5 U.S.C. § 552a, 74 Fed. Reg. 66391, 75 Fed. Reg. 10554-02, and 77 Fed. Reg. 42548, all of which are reproduced at App. 67-113. This case also involves 5 U.S.C. § 706, 49 U.S.C. §§ 113, 31102, and 31136, and 49 C.F.R. §§ 350, 392.5, and 395.13, the relevant portions of which are reproduced below:

5 U.S.C. § 706. Scope of review

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

49 U.S.C. § 113. Federal Motor Carrier Safety Administration

* * *

(f) Powers and duties. – The Administrator shall carry out –

> **(1)** duties and powers related to motor carriers or motor carrier safety vested in the Secretary by chapters 5, 51, 55, 57, 59, 133 through 149, 311, 313, 315, and 317 and by section 18 of the Noise Control Act of 1972 (42 U.S.C. 4917; 86 Stat. 1249-1250); except as otherwise delegated by the Secretary to any agency of the Department of Transportation other than the Federal Highway Administration, as of October 8, 1999; and

(2) Additional duties and powers prescribed by the Secretary.

49 U.S.C. § 31102. Motor carrier safety assistance program

(a) In general. – The Secretary of Transportation shall administer a motor carrier safety assistance program funded under section 31104.

(b) Goal. – The goal of the program is to ensure that the Secretary, States, local governments, other political jurisdictions, federally recognized Indian tribes, and other persons work in partnership to establish programs to improve motor carrier, commercial motor vehicle, and driver safety to support a safe and efficient surface transportation system. . . .

(c) State plans. –

* * *

(2) Contents. – The Secretary shall approve a State plan if the Secretary determines that the plan is adequate to comply with the requirements of this section, and the plan – . . .

(Q) ensures that the State will cooperate in the enforcement of financial responsibility requirements under sections 13906, 31138, and 31139 and regulations issued under those sections. . . .

49 U.S.C. § 31136. United States Government regulations

* * *

(d) Minimum safety standards. – Subject to section 30103(a) of this title, the Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that –

(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely . . .

* * *

(e) Procedures and considerations. –

* * *

(3) A regulation under this section shall be prescribed under Section 553 of title 5 (without regard to sections 556 and 557 of title 5).

49 C.F.R. § 350.101

(a) What is the MCSAP? The MCSAP is a Federal grant program that provides financial assistance to States to reduce the number and severity of accidents and hazardous materials incidents involving commercial motor vehicles (CMVs). The goal of the MCSAP is to reduce CMV – involved accidents, fatalities, and injuries through consistent, uniform, and effective

CMV safety programs. Investing grant monies in appropriate safety programs will increase the likelihood that safety defects, driver deficiencies, and unsafe motor carrier practices will be detected and corrected before they become contributing factors to accidents. The MCSAP also sets forth the conditions for participation by States and local jurisdictions and promotes the adoption and uniform enforcement of state safety rules, regulations, and standards compatible with the Federal Motor Carrier Safety Regulations (FMCSRs) and Federal Hazardous Material Regulations (HMRs) for both interstate and intrastate motor carriers and drivers.

49 C.F.R. § 392.5

(a) No driver shall –

(1) Use alcohol, as defined in § 382.107 of this subchapter, or be under the influence of alcohol, within 4 hours before going on duty or operating, or having physical control of, a commercial motor vehicle; or

(2) Use alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty, or operating, or in physical control of a commercial motor vehicle; or

(3) Be on duty or operate a commercial motor vehicle while the driver possesses wine of not less than one-half

of one per centum of alcohol by volume, beer as defined in 26 U.S.C. 5052(a), of the Internal Revenue Code of 1954, or distilled spirits as defined in section 5002(a)(8), of such Code. . . .

(c) Any driver who is found to be in violation of the provisions of paragraph (a) or (b) of this section shall be placed out-of-service immediately for a period of 24 hours.

49 C.F.R. § 395.13

(a) Authority to declare drivers out of service. Every special agent of the Federal Motor Carrier Safety Administration (as defined in appendix B to this subchapter) is authorized to declare a driver out of service and to notify the motor carrier of that declaration, upon finding at the time and place of examination that the driver has violated the out of service criteria as set forth in paragraph (b) of this section.

(b) Out of service criteria.

(1) No driver shall drive after being on duty in excess of the maximum periods permitted by this part.

(2) No driver required to maintain a record of duty status under § 395.8 or § 395.15 of this part shall fail to have a record of duty status current on the day of examination and for the prior seven consecutive days.

———♦———

STATEMENT OF THE CASE

I. Statutory & Regulatory Background

The activities of commercial motor vehicle operators (drivers) are subject to federal safety regulations promulgated by the Federal Motor Carrier Safety Administration (FMCSA). These Federal Motor Carrier Safety Regulations (FMCSRs) are codified in 49 C.F.R., Parts 350-399. The FMCSRs are enforced primarily by individual states which, in exchange for federal grants under the Motor Carrier Safety Assistance Program (MCSAP), *see* 49 U.S.C. § 31102; 49 C.F.R. Part 350, incorporate the federal standards into state law. States participating in MCSAP are required to report enforcement actions to FMCSA. 49 U.S.C. § 31102(c)(2)(Q). Reports of such state enforcement actions are maintained by FMCSA in a database known as the Motor Carrier Management Information System (MCMIS). The MCMIS database contains reports of all enforcement actions submitted by the states, without regard to the relative seriousness of individual infractions.

49 U.S.C. §§ 31150(a)(1)-(3) authorize the Secretary of Transportation[1] to provide access to a limited subset of inspection records maintained in the MCMIS database to persons conducting pre-employment

[1] Responsibility for exercising this statutory authority has been assigned to the Federal Motor Carrier Safety Administration (FMCSA), an agency within the Department of Transportation. 49 U.S.C. § 113(f). Unless the context requires otherwise, references to the "Secretary" refer to each of the Respondents.

screening services for motor carriers under FMCSA's Pre-Employment Screening Program (PSP). App. 65.

Prior to the enactment of Section 31150, Congress had not authorized the release of reports of driver violations to private parties except under the slow and often cumbersome procedures available under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.[2] PSP was designed to provide potential employers of drivers with speedy electronic access to a limited subset of driver reports, and, only then, subject to specific limitations. App. 4, 20. Section 31150 limits access under PSP to: (1) commercial vehicle accident reports, (2) inspection reports that contain no driver-related safety violations, and (3) serious driver-related safety violation reports. 49 U.S.C. § 31150(a); App. 65. The statute provides that the process for granting access to MCMIS driver records under Section 31150(a) "shall be designed to assist the motor carrier industry in assessing an individual operator's crash and *serious safety violation inspection* history as a pre-employment condition." 49 U.S.C. § 31150(c) (emphasis added); App. 66. The statute further requires FMCSA to ensure that the release of information under PSP be in accordance with various federal statutes related to privacy, including the Privacy Act, 5 U.S.C. § 552a. 49 U.S.C. § 31150(b)(1); App. 65. The Privacy Act

[2] The inefficient, untimely, and burdensome FOIA request process was thoroughly documented by the U.S. House of Representatives Committee on Oversight and Government Reform last year. Staff of H. Comm. on Oversight & Gov't Reform, 114th Cong., FOIA is Broken: A Report (2016), http: https://oversight.house.gov/wp-content/uploads/2016/01/FINAL-FOIA-Report-January-2016.pdf.

authorizes an agency to maintain in its records only such information as is "relevant and necessary to accomplish a purpose . . . required to be accomplished by statute. . . . " 5 U.S.C. § 552a(e)(1); App. 55.

The statute defines "serious driver-related violation" to mean "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." 49 U.S.C. § 31150(d); App. 66. Such a restriction is imposed through an "out-of-service order." The only driver-related violations for which the Secretary or his delegate have authorized enforcement officials to issue an out-of-service order are for the use of alcohol under 49 C.F.R. § 392.5(c) and for specific violations of the Hours of Service rules under 49 C.F.R. § 395.13. The Secretary has never conducted a rulemaking proceeding or any other formal administrative action intended to have the force and effect of law addressing his claimed authority to release reports of driver violations not identified in Section 31150(a)(1)-(3). Nevertheless, FMCSA has disseminated numerous PSP reports that contain references to alleged driver-related safety violations that have not been determined by the Secretary to be serious within the meaning of Section 31150(d) and that do not satisfy the definition of "serious" in that section.

The Secretary claimed to implement PSP in accordance with the requirements of the Privacy Act, which requires that records to be disseminated be identified as part of a "system of records" and made

known to the public. When establishing a "system of records," an agency must "publish in the Federal Register . . . a notice of the existence and character of the system of records . . . [including] the categories of records maintained in the system." 5 U.S.C. § 552a(e)(4)(C); App. 55-56. This notice is known as a System of Records Notice (SORN). When the Secretary published his SORNs for the PSP program, he identified for dissemination only the limited subset of MCMIS records described in Section 31150(a)(1)-(3). 75 Fed. Reg. 10554-02, 10555-02 (March 8, 2010), App. 80, 85-87; 77 Fed. Reg. 42548, 42550, 42549, 42552 (July 19, 2012), App. 95, 99. FMCSA's 2010 and 2012 Privacy Impact Assessments (PIAs), specifically written for the PSP program, state that the driver safety information extracted from the MCMIS database for inclusion in PSP reports is limited to the classes of information identified in Section 31150(a):

> "In accordance with 49 U.S.C. § 31150(a), the CMV *driver safety information extracted from MCMIS* and made available for pre-employment screening *comes from the following reports*: commercial motor vehicle accident reports; inspection reports that contain no driver-related safety violations; and *serious driver-related safety violation inspection reports*."

2010 PIA (Apr. 14, 2010), https://cms.dot.gov/individuals/privacy/pia-pre-employment-screening-program-psp-0; *accord* 2012 PIA (Oct. 23, 2012), at 4, https://www.transportation.gov/sites/dot.gov/files/docs/FMCSA_PSP_

PIA_Final.pdf. Thus, even if the Secretary had the authority to disseminate records beyond those specifically identified in Section 31150(a), his implementation of the PSP program was narrower than the statutory authority he now asserts. Petitioners contend that the release of additional records not identified for dissemination in the PSP SORN violates the Privacy Act's requirement to "publish . . . a notice of . . . the categories of records maintained in the system." 5 U.S.C. § 552a(e)(4)(C); App. 55-56.

II. Factual Background & Proceedings Below

Petitioners are professional commercial vehicle operators whose driving activities have been the subject of reports unlawfully released for dissemination by FMCSA. Petitioners filed suit under the Privacy Act. The Complaint alleges that FMCSA violates the Privacy Act by maintaining and disseminating records other than those specifically enumerated in Section 31150(a) because such records are neither relevant nor necessary to accomplish the statutory goals established in Section 31150(c). App. 119-20. FMCSA further violated the Privacy Act by failing to publish a SORN specifying that these additional records would be included in the PSP system of records. The Complaint alleges that Petitioners have been adversely affected or aggrieved within the meaning of 5 U.S.C. § 552a(g)(1)(D) sufficient to establish their standing under Article III. App. 138-41, 144-45. The Complaint also alleges that the Secretary acted willfully when

disseminating PSP reports, App. 134-41, and that Petitioners have suffered actual damages within the meaning of 5 U.S.C. § 552a(g)(4)(A), App. 61.

The District Court found that Petitioners had standing, App. 32, and that Section 31150 was ambiguous, *id.* at 40, and deferred to FMCSA's erroneous interpretation that the agency was permitted to release unlimited categories of reports under *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), App. 42. A three-judge panel of the Court of Appeals for the First Circuit conducted a *de novo* review of the District Court's *Chevron* determination. App. 1-13. The First Circuit affirmed the district court's ruling, holding that the statute established a floor, not a ceiling, and that the Secretary's decision to release additional categories of reports was a permissible exercise of his discretion. *Id.* at 9-11.

The Circuit Court believed that the case could be decided easily on the merits and therefore it "assume[d] without deciding that Appellants have adequately pled standing under both Article III and the Privacy Act." *Id.* at 8. This approach conflicts with a federal court's obligation to address questions regarding Article III standing as a prerequisite to addressing the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-99 (1998). It is clear, however, that the First Circuit merely mischaracterized two merits issues under the Privacy Act—the requirements that a plaintiff prove willfulness and allege actual damages—as involving questions of standing.

In *Doe v. Chao*, this Court distinguished the elements under the Privacy Act necessary to establish constitutional standing from the allegations required to state a claim for damages:

> Nor does our view deprive the language recognizing a civil action by an adversely affected person of any independent effect, for it may readily be understood as having a limited but specific function: the reference in § 552a(g)(1)(D) to "adverse effect" acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue.

540 U.S. 614, 624 (2004) (citations omitted). Thus, the Court in *Chao* concluded "an individual subject to an adverse effect has injury enough to open the courthouse door, but without more has no cause of action for damages under the Privacy Act." 540 U.S. at 624-25. The requirement to demonstrate willfulness and prove actual damages under § 552a(g)(4)(A) invokes merits issues that must be proven in order to recover damages.

The district court correctly found that allegations in the complaint that the impermissible dissemination of Plaintiffs' records disparaged their qualifications and had a negative economic impact on them, "[a]t the pleading stage . . . adequately allege[d] an adverse effect sufficient to meet the constitutional standing requirements." App. 32. The Complaint adequately

alleges willfulness and actual damages, *id.* at 134-41, and the First Circuit's assumption that these merits allegations—which were mischaracterized as standing allegations—were adequately pled raises no concerns regarding the issue of standing. Because the Secretary moved to dismiss under Fed. R. Civ. P. 12(b)(6), reviewing courts must assume these allegations to be true. The First Circuit's mischaracterization of these merits allegations as involving standing poses no obstacle to this Court's review of the issues for which certiorari is sought. Petitioners' concrete and particular allegations of injury-in-fact meet the standard this Court set out in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), and *Chao.*

REASONS FOR GRANTING THE PETITION

The decision by the First Circuit has created a problem of exceptional importance in the area of administrative law. The opinion departs from prevailing circuit precedent in the Third, Fifth, Eleventh, and D.C. Circuits, drastically expanding *Chevron* deference and creating a paradigm in which an administrative agency is empowered to do literally anything unless Congress has explicitly ordered it not to act. The opinion validates an abuse of executive authority that undermines any reasonable check on the power of administrative agencies to carry out delegated authority. If the ruling is allowed to stand, it will permit administrative agencies to make substantive policy decisions without congressional delegation, direction, or consent, simply because Congress had not foreseen and had not

explicitly foreclosed every possible avenue by which an agency might exceed the scope of the specific authority delegated to it by statute.

Additionally, the First Circuit's willingness to accept the Secretary's claim for *Chevron* deference, raised for the first time as a defense in this litigation, departs from prevailing precedent in the Fifth, Sixth, Ninth, Eleventh, and Federal Circuits.

Furthermore, FMCSA's dissemination of reports of driver-related violations not determined by the Secretary to be serious constitutes a blatant violation of the Privacy Act, presenting important questions regarding the privacy rights of several million commercial motor vehicle drivers and the ability of administrative agencies to bypass the requirements of federal privacy law. Here, the First Circuit completely disregarded its responsibility to ensure that the Privacy Act's notice requirements under 5 U.S.C. § 552a(e)(4)(C) were properly implemented, placing it in conflict with the Fifth and Sixth Circuits, which have scrupulously honored that responsibility.

Today, in a deeply divided nation, tensions between the political branches of our government abound. Congress enacts statutes that confer authority upon federal agencies to act in certain ways, just as it withholds authority to act in other ways. The President and the executive departments are charged with the faithful execution of these laws as passed by Congress. When the boundaries between the exercise of legislative and executive powers are crossed, it is the role of the

judiciary to restore those boundaries by independently saying what the law is in cases brought before it. *Spokeo*, 136 S. Ct. at 1546-47. "The obligation of the judiciary [is] not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, Kennedy, & Alito, JJ., dissenting). The First Circuit's decision departs from rules of statutory interpretation consistently applied by other circuits that have rejected the proposition that Congressional silence creates ambiguity. Left unchecked, the decision blurs the boundary between the political branches and opens the door to encroachment by the executive branch into the authority of Congress to write legislation.

The First Circuit's *Chevron* Step One analysis is stunningly superficial and seriously flawed. App. 8-10. The statute here is perfectly clear. The purpose of the PSP program is to permit motor carriers to gain timely access to reports of serious driver-related violations. Section 31150(c). Limiting disclosure to such records is entirely consistent with that goal. Congressional silence as to dissemination of reports not needed to achieve the express purpose of the statute does not create ambiguity.

Even if there were ambiguity, *Chevron*'s second step requires a reviewing court to evaluate whether the agency's statutory interpretation is reasonable. The Circuit Court here did not examine the correctness of the Secretary's position as a matter of statutory interpretation, but instead based its "reasonableness"

decision on its conclusion that reporting on non-serious violations would help achieve FMCSA's broader mission to "promote highway safety." App. 9-10.

Joining in the fray, as the First Circuit did, by picking and choosing between the policy preference set forth in the statute and the one preferred by FMCSA is not a proper judicial function. *Chevron*, 467 U.S. at 865. The responsibility for "resolving the struggle between competing views of public interest [is] not a judicial one[]." *Id*. at 866. The rule of law requires the courts to accept limitations imposed by statute. Picking and choosing between conflicting policy preferences of the political branches represents a serious departure from the principles of checks and balances enshrined in the Constitution. *Id*. "The fact is that statutes are products of compromise, the sort of compromise necessary to overcome the hurdles of bicameralism and presentment. And it is [the court's] obligation to enforce the terms of that compromise as expressed in the law itself, not to use the law as a sort of springboard to combat all perceived evils lurking in the neighborhood." *TransAm Trucking, Inc. v. Admin. Review Bd., U.S. Dep't of Labor*, 833 F.3d 1206, 1217 (10th Cir. 2016) (Gorsuch, J., dissenting).

The First Circuit's misguided analytical framework confers unlimited discretion on any executive action upon which the label of "safety" is placed, wholly disregarding privacy protections conferred by Congress on regulated parties. Its opinion represents an abdication of the role of courts to apply the rule of law when asked to restore balance between the political

branches. Certiorari will allow the Court to reaffirm the importance of following time-honored precedent and well-understood rules of law when addressing conflicts between the political branches.

ARGUMENT

I. The First Circuit Split with the Third, Fifth, Eleventh, and D.C. Circuits When It Found Ambiguity on the Basis of Perceived Congressional Silence

In § 31150, Congress spoke plainly, and expressly, identifying the categories of records it intended for dissemination in the PSP program. The First Circuit found silence, and thus ambiguity, in § 31150 based solely on the *absence* of a reference in the statute to "non-serious" violations:

> We conclude that § 31150 does not unambiguously restrict the agency's discretion to make records including non-serious driver-related safety violations available to potential employers with driver consent. . . . There is no specific language in the statute which precludes the agency from making other driver-related information available. . . . We therefore agree with the district court's conclusion at *Chevron* Step One that Congress has not spoken to the precise question of non-serious violations.

App. 9-10. The implication of this holding is that the specific statutory authorization to disseminate reports of "serious driver-related violations" constitutes

authority to release reports of all types of violations provided that Congress did not specifically withhold such authority. Thus, the failure of Congress to expressly withhold broader authority was viewed by the First Circuit as ambiguity under *Chevron* Step One.

The Third, Fifth, Eleventh, and D.C. Circuits have specifically and unequivocally rejected such a grant of regulatory authority under *Chevron* Step One based upon the absence of a prohibition forbidding the agency to act in other ways. As the Fifth Circuit held:

> We do not merely presume that a power is delegated if Congress does not expressly withhold it, as then "agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." Thus, an administrative agency does not receive deference under *Chevron* merely by demonstrating that "a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.*, when the statute is not written in 'thou shalt not' terms)."

Contender Farms, L.L.P. v. U.S. Dep't of Agric., 779 F.3d 258, 269 (5th Cir. 2015) (quoting *Texas v. United States*, 497 F.3d 491, 503 (5th Cir. 2007), and *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*)) (internal quotation marks omitted).

The D.C. Circuit has also held that *Chevron* ambiguity is not created merely because the enabling statute does not negate the availability of additional authority to act in a specific way:

> To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.* when the statute is not written in "thou shalt not" terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent. *See, e.g.*, *Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) ("'[I]t is only legislative *intent to delegate* such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*.'") (quoting *Kansas City v. Department of Housing & Urban Dev.*, 923 F.2d 188, 191-92 (D.C. Cir. 1991)) (emphasis added). Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

Ry. Labor, 29 F.3d at 671; *accord Cent. United Life Ins. Co. v. Burwell*, 827 F.3d 70, 74 (D.C. Cir. 2016); *W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588, 593 (D.C. Cir. 2015); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

The Third and Eleventh Circuits join in this chorus of disapproval for the proposition that congressional silence is a suitable basis for finding ambiguity under *Chevron* Step One. *Bayou Lawn & Landscape Servs. v. Sec. of Labor*, 713 F.3d 1080, 1084-85 (11th Cir.

2013); *Prestol Espinal v. Attorney Gen. of the U.S.*, 653 F.3d 213, 220-21 (3d Cir. 2011).

Carried to its logical conclusion, the First Circuit's opinion eliminates any reasonable check on the decisions of administrative agencies to enact policies beyond the scope of their delegated authority and contrary to the intent of Congress. If FMCSA is empowered to release categories of reports not enumerated in Section 31150—that is, to take action not authorized by Section 31150 or any other statute—merely because Section 31150 does not explicitly *prohibit* the agency from doing so, then it necessarily follows that an agency may take any action that Congress has not taken care to bar explicitly. This conclusion flips the relationship between the Executive and the Legislature on its head. "It is axiomatic that an administrative agency's power to . . . [act] is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), not to an unfathomable well of authority that Congress has *not* delegated or mentioned at all. The First Circuit's opinion ignores this axiom. In the Circuit Court's opinion, administrative agencies are bodies of nearly unlimited power, accountable to neither Congress—which is helpless to forestall a clever agency from reading ambiguity into what Congress thought was a clear directive—nor the courts, which defer blindly to the agency's misguided interpretation.

This case presents no mere gap-filling exercise in which the Judiciary ordinarily would defer to the discretion of the agency. The foundation for an agency's

invocation of *Chevron* deference is "premised upon a delegation of interpretive and policymaking authority from Congress to implementing agencies." Johnathan H. Adler, *Restoring* Chevron*'s Domain*, 81 Mo. L. Rev. 983, 990 (2016). "Courts properly defer [to an agency's interpretation of a statute] only where it is clear the Congress has delegated interpretive authority to the agency or where the questions are inescapably matters of policy—meaning there are no judicially manageable standards for resolving them." Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 NYU J.L. & Liberty 475, 503 (2016). For example, in *Long Island Care at Home, Ltd. v. Coke*, this Court held that the Department of Labor properly enacted regulations that turned on the agency's interpretation of the ambiguous terms "domestic service employment" and "companionship services"—statutory "gaps" which Congress explicitly permitted the agency to fill. 551 U.S. 158, 165-68 (2007). The proper definitions of these terms raised complicated questions, "[s]atisfactory answers" to which, the Court held, "may well turn upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency, such as the DOL, possesses." *Id.* at 167-68.

In this instance, however, Congress enacted a statute with a clear mandate and no room for agency interpretation. Section 31150 does not empower FMCSA to release "reasonable" categories of safety reports, or reports that the Secretary deems to be in the public interest; it authorizes only the dissemination of three

narrow categories of reports: (1) commercial vehicle accident reports, (2) inspection reports that contain no driver-related safety violations, and (3) reports of driver-related safety violations that the Secretary has deemed to be serious. But the statute itself eliminates any potential ambiguity by defining "serious" to include only violations "that the Secretary determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected." 49 U.S.C. § 31150(d). The Secretary has determined that only violations involving the use of alcohol, 49 C.F.R. § 392.5(c), and specific violations of the Hours of Service rules, 49 C.F.R. § 395.13, must be corrected before the driver may continue to drive. The First Circuit's decision to defer to the agency's erroneous interpretation of the statute, based on an ephemeral mission statement aimed at promoting highway safety, is at odds with the clear instructions provided by Congress. The court and the agency "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994). "[I]t is a well-documented mistake . . . to assume that a statute pursues its putative (or even announced) purposes to their absolute and seemingly logical ends. Especially to ends as ephemeral and generic as 'health and safety.'" *TransAm Trucking*, 833 F.3d at 1217 (Gorsuch, J., dissenting) (citations omitted).

The First Circuit's opinion goes to the heart of administrative law. Congress ordered the agency to do one thing, but it did another. The First Circuit found erroneously that this action was permissible. This decision not only endorses "the wholesale transfer of legal interpretation from courts to agencies," but the wholesale transfer of legislative power from Congress to agencies. *See* Ginsburg & Menashi, *supra*, at 507. If there is to be any reasonable check on the power of the Executive to make laws, this Court must correct that error.

II. The First Circuit Ignored Traditional Methods of Statutory Construction That Reveal a Clear Sense of Congressional Intent for Section 31150

The starting point for any *Chevron* Step One analysis asks whether the language of the statute shows that Congress spoke directly to the issue. Reviewing courts are required to use traditional tools of statutory construction in order to determine whether Congress has spoken directly to the issue. *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012); *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 552 (D.C. Cir. 2009). If the statutory language is unclear, "courts will resort first to canons of statutory construction and . . . [lastly] to legislative history." *Lawrence + Mem'l Hosp. v. Burwell*, 812 F.3d 257, 264 (2d Cir. 2016).

Apart from the slow and cumbersome general disclosure provisions of the Freedom of Information Act,

Section 31150 represents the first time that Congress has authorized the dissemination of driver safety data, and its focus was narrow, balancing access to serious safety-related information with driver privacy. Congress specifically stated that access to records under Subsection (a) "shall be designed to assist the motor carrier industry in assessing an individual operator's crash and *serious* safety violation inspection history as a precondition to employment." 49 U.S.C. § 31150(c) (emphasis added). Further, Congress went to the trouble in Subsection (d) to define a "serious driver related safety violation." *Id*. § 31150(d). Permitting the dissemination of other types of reports, including reports of violations not determined by the Secretary to be serious, is significantly discordant with the narrow program design commanded by Subsection (c). There is no support for an inference that Congress intended to allow the agency to do anything more than what Congress explicitly instructed it to do. Congress was responding to an industry demand for timely, electronically deliverable information to assist motor carriers in hiring drivers. The legislative history demonstrates that Section 31150's narrow scope was premised on concerns related to privacy and data reliability. A conference report accompanying legislation creating the PSP program recognized drivers' privacy interests in the MCMIS data: "Prohibiting the release of this [MCMIS] driver safety information unless expressly authorized or required by law protects driver privacy." H.R. Rep. No. 109-12, at 441 (2005). Congress further noted that "data quality issues affecting the MCMIS database may constrain its usefulness for certain

purposes beyond internal review and screening." H.R. Rep. No. 109-203, at 984 (2005). The constraints imposed under the narrow definition of "serious" can hardly be characterized as Congressional silence; rather, the legislative history demonstrates that Congress, guided by privacy and reliability concerns, intended to make available only a limited portion of MCMIS data for pre-employment screening.

Chevron deference is "called for only when the devices of judicial construction have been tried and found to yield no clear sense of Congressional intent." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004). Here, Congress has provided a clear sense of its intent. It "expressly authorized" dissemination of only specific reports identified in Section 31150(a) to enable motor carriers to evaluate potential employees' "crash and serious safety violation history as a preemployment condition." 49 U.S.C. § 31150(c).

The First Circuit's opinion fundamentally misunderstands the role of an administrative agency. "[A]gencies are creatures of Congress; 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, J., dissenting) (quoting *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986)). For this reason, courts regularly invalidate agency action that oversteps the affirmative authority granted by Congress, even without the explicit prohibition of further action. *See, e.g.*, *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643-44 (D.C. Cir. 2000) (holding that national banks could not sell

crop insurance despite no explicit statutory prohibition); *Halverson v. Slater*, 129 F.3d 180, 185-89 (D.C. Cir. 1997) (holding that a statute empowering the Secretary of Transportation to delegate powers to Coast Guard officials did not empower him to delegate powers to non-Coast Guard officials). The First Circuit's decision splits from this laudable principle uniformly applied in other circuits.

These cases dealing with agency overstepping simply invoke the well-established and long-standing canon of statutory interpretation known as *expressio unius est exclusio alterius*, that is, the expression of one subject, object, or idea implies the exclusion of other subjects, objects, or ideas. *Iselin v. United States*, 270 U.S. 245, 250 (1926) (holding that, where Congress subjected specific categories of ticket sales to taxation but failed to cover another category, either by explicit or general language, extending coverage would be an improper "enlargement" rather than a proper "construction" of statute).

Applying *expressio unius* here, the statute affords no opportunity for the court to stray from the plain words enumerating the permissible categories of information identified by Congress; and more emphatically, unambiguously defined violations which might be included as "serious driver-related."

Thus, the plain meaning of the statutory language, viewed through the lens of the *expressio unius* canon, leaves no doubt that Congress spoke directly to the issue, leaving no basis for invoking *Chevron* deference.

III. The Circuits Are Split Regarding Whether Deference May Be Accorded to a Statutory Interpretation Asserted for the First Time as a Defense in Litigation

The Secretary's interpretation of Section 31150 was proposed by FMCSA counsel for the first time as a defense in this case. Defs.' Mem. in Supp. of Mot. to Dismiss 10-15, No. 14-CV-13040-FDS, ECF No. 14. This interpretation was not advanced in any formal or informal "authoritative" method of agency action—for example, rulemaking under the Administrative Procedures Act (APA), adjudication, or official guidance documents. The First Circuit's decision to accord *Chevron* deference to the agency's interpretation under these circumstances deepens an already wide split among the Circuits regarding how much deference is due to an agency's statutory interpretation first advanced in litigation.

The degree of deference given by reviewing courts has generally grown with the expansion of the administrative state and a growing reliance by the judiciary on administrative expertise coupled with increasing concern for judicial activism. Through the New Deal, the Court adhered to its duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). However, "by the end of the 1930s, the courts had assumed [a] deferential posture with respect to all agencies." Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 434 (2007). This Court held in *Skidmore v. Swift & Co.* that the degree of

deference should be based upon an analysis of four factors: "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944). In *Chevron*, this Court held that agency interpretation of ambiguous statutes warranted controlling deference. *Chevron*, 467 U.S. at 843. In *United States v. Mead Corp.*, this Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. 218, 226-27 (2001). "Delegation of such authority," the Court held, "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. *Skidmore* deference "was made applicable to those interpretations that, after *Mead*, no longer qualified for *Chevron* deference." Bradley George Hubbard, Comment, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. Chi. L. Rev. 447, 453 (2013); *see Mead*, 533 U.S. at 234-35. *Mead* added several other factors to the *Skidmore* framework: "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position," *Mead*, 533 U.S. at 228, as well as "the value of uniformity in its

administrative and judicial understandings of what a national law requires," *id.* at 234. Finally, in *Bowen v. Georgetown Univ. Hosp.*, this Court held that "[w]e have never applied the principle of [*Chevron* and its progeny] . . . to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." 488 U.S. 204, 212 (1988). However, this Court has never resolved the question of how much deference, if any, is due an agency interpretation of a statute advanced for the first time as a defense in litigation.

The Circuits are deeply split, and confused, as to how much deference should be afforded to agency statutory interpretations first advanced in litigation. Five Circuits have accorded *Skidmore* deference to agency litigation interpretations.[3] Hubbard, *supra*, at 460-63. "Unfortunately, these courts generally fail to explain why such interpretations warrant *Skidmore* deference. Rather, their analyses follow a two-step process. First, they reject the agency's argument for *Chevron* deference. . . . Second, these courts cite *Mead* or its progeny" to afford deference to the extent that the agency's interpretation has the power to persuade. *Id.* at 461; *see,*

[3] These include the Second Circuit, *SEC v. Rosenthal*, 650 F.3d 156, 160 (2d Cir. 2011); *Lopez v. Terrell*, 654 F.3d 176, 182 (2d Cir. 2011), the Sixth Circuit, *Rosales-Garcia v. Holland*, 322 F.3d 386, 403 n.22 (6th Cir. 2003) (*en banc*), the Eleventh Circuit, *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1250 (11th Cir. 2003), the D.C. Circuit, *City of Dania Beach v. FAA*, 628 F.3d 581, 586 (D.C. Cir. 2010); *Brown v. United States*, 327 F.3d 1198, 1205-06 (D.C. Cir. 2003); *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001), and the Federal Circuit, *Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336, 1340-41 (Fed. Cir. 2006).

e.g., *Lopez*, 654 F.3d at 183; *Caribbean Ispat*, 450 F.3d at 1340-41; *Rosales-Garcia*, 322 F.3d at 403; *Landmark Legal*, 267 F.3d at 1136.

By contrast, at least six Circuits have denied *Skidmore* deference to agency litigation interpretations, at least where the interpretation is not an "official agency interpretation."[4] Hubbard, *supra*, at 436-66. The conflict and confusion among the Circuits has been exacerbated by at least two intracircuit splits, in which the Sixth and Eleventh Circuits have issued conflicting opinions relating to whether an agency's litigation interpretation of a statute warrants deference.[5]

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[4] *See Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) ("We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation. . . . We afford *Skidmore* deference to official agency interpretations without the force of law."); *see also Presidio Historical Ass'n v. Presidio Trust*, 811 F.3d 1154, 1166 (9th Cir. 2016); *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1078 (9th Cir. 2015); *United States v. Able Time, Inc.*, 545 F.3d 824, 836 (9th Cir. 2008); *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1032 (9th Cir. 2007); *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 n.11 (9th Cir. 2001). In addition to the Ninth Circuit, the Third, Fifth, Sixth, Seventh, and Eleventh Circuits have denied deference to agency interpretations first advanced in litigation. *Yusupov v. Attorney Gen. of the U.S.*, 518 F.3d 185, 200 n.23 (3d Cir. 2008); *R&W Technical Servs. Ltd. v. Commodity Futures Trading Comm'n*, 205 F.3d 165, 171 (5th Cir. 2000); *OfficeMax, Inc. v. United States*, 428 F.3d 583, 597-98 (6th Cir. 2005); *In the Matter of UAL Corp. (Pilots' Pension Plan Termination)*, 468 F.3d 444, 449-50 (7th Cir. 2006); *Romano-Murphy v. C.I.R.*, 816 F.3d 707, 715-16 (11th Cir. 2016).

[5] *Compare Rosales-Garcia v. Holland*, 322 F.3d 386, 403 n.22 (6th Cir. 2003) (*en banc*) ("An interpretation contained in a brief

With its opinion below, the First Circuit stands alone in giving controlling deference under *Chevron* to agency litigating positions. *See* App. 10-11. The Court applied a *Chevron* analysis to find ambiguity because Congress did not prohibit the release of reports of violations not determined to be serious, and the Court accepted the agency's interpretation because releasing more information about drivers ostensibly promoted FMCSA's overall safety mission. *See id*. The First Circuit's novel application of *Chevron* in a context where no other Circuit has afforded an agency more than *Skidmore* deference deepens an already wide Circuit split and further muddies already murky waters regarding whether and to what extent courts should defer to an agency's interpretation of a statute first asserted as a defense in litigation.

Reviewing courts should never defer to agency interpretations that are not authoritative and not the product of an accountable deliberative process. This is especially true in the present case, because Congress

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. . . is . . . not entitled to *Chevron* deference . . . although the government's position is entitled with respect pursuant to *Skidmore*. . . . "), *with OfficeMax, Inc. v. United States*, 428 F.3d 583, 597-98 (6th Cir. 2005) ("*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted."); *compare Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1250 (11th Cir. 2003) ("[M]ost courts would not completely ignore an agency's interpretation of its organic statutes—even if that interpretation is advanced in the course of litigation rather than a rulemaking or agency adjudication."), *with Romano-Murphy v. C.I.R.*, 816 F.3d 707, 715-16 (11th Cir. 2016) ("We owe no deference to an agency's mere litigating position. . . .") (internal quotation marks and citation omitted).

has specifically required FMCSA to proceed by APA rulemaking in matters relating to safety. 49 U.S.C. § 31136(a)(1), (c). At most, FMCSA's litigating position should receive no more deference than what is given to any other advocate in litigation. Thus, the reviewing court should have interpreted the PSP authorizing statute *de novo*, using the traditional canons of construction. Such non-deferential review is consistent with the statutory directive of the APA that the reviewing court, not agency counsel, shall decide questions of law. 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."). *De novo* review is also consistent with due process and separation of powers because giving any deference would undermine the roles allocated to the executive and judiciary.

On the merits, applying the "no deference" principle to the First Circuit's opinion here requires reversal. First, there is no dispute that the interpretation of FMCSA's authority to release reports of non-serious violations was adopted for the first time as a defense in litigation. It was not issued contemporaneously in 2005, when Section 31150 was enacted. *Safe, Accountable, Flexible, Efficient Transportation Equity Act: Legacy for Users*, Pub. L. No. 109-59, 119 Stat. 1144 (Aug. 10, 2005). There are no agency letters or guidance documents adopting the agency's broad interpretation, nor any other authoritative and accountable

process by which the agency has implemented its interpretation. The Code of Federal Regulations shows that the Secretary has designated only two types of driver-related violations for which "out-of-service" orders are authorized: alcohol violations under 49 C.F.R. § 392.5(c) and hours of service violations under 49 C.F.R. § 395.13. Such violations must be corrected before the driver may operate the vehicle. Both out-of-service and alcohol regulations were promulgated prior to the enactment of Section 31150. At no time has the Secretary promulgated any rule, rendered any adjudication, or taken any other action having the force and effect of law that addresses the currently claimed ambiguity in Section 31150. FMCSA's broader interpretation of the statute was never presented to or considered by Congress. Indeed, the broad interpretation is flatly inconsistent with the agency's SORN, App. 83, 85-87, which announced, precisely tracking the statute, that only reports of serious violations would be released under PSP. The FMCSA rationale lacks any persuasive value because it did not interpret the PSP authorizing statute according to the accepted canons of construction, relying instead on a pure policy argument that for purposes of improving motor carrier safety, "more" information is "better." This disregards the plain meaning of the limitation to releasing reports of "serious" violations, the legislative history indicating that Congress intended to limit disclosure under PSP to only certain types of records, the canon of *expressio unius est exclusio alteris*, and the context of the delegated authority. While FMCSA was given the delegated authority to alter the list of "serious" violations

by expanding the list of out-of-service status incidents, FMCSA was not granted discretionary authority to release reports of non-serious violations. The Secretary has been given the authority to administer statutes by issuing regulations having the force and effect of law. 49 U.S.C. § 322(a). Indeed, 49 U.S.C. § 31136(a)(1) mandates rulemaking in matters involving vehicle safety and operations issues.

> A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.

Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016). The Secretary did not use this rulemaking authority to address the purported ambiguities that were advanced for the first time as a defense in this litigation.

IV. The First Circuit Has Split with the Fifth and Sixth Circuits by Approving the Release of Documents Under the Privacy Act That Were Not Disclosed in the Agency's System of Records Notice

The Privacy Act requires that an agency that maintains a system of records for dissemination publish in the Federal Register a "notice of the existence and character of the system of records" that includes "the categories of records maintained in that system."

5 U.S.C. § 552a(e)(4)(C); App. 55-56. The Petitioners complain that the system of records notice (SORN) published by the Secretary failed to identify reports of driver-related violations not determined by the Secretary to be serious and that dissemination of such records violated the Privacy Act. *See* App. 144-45. The First Circuit opined that FMCSA complied with the Privacy Act's notice requirement because "[n]either of the[ ] SORNs purported to *exclude* non-serious driver-related safety violations from the [PSP] database." *Id.* at 5-6. Under the First Circuit's opinion, drivers must assume that any records can be distributed unless a SORN specifically excludes those records from dissemination.

The First Circuit paid little attention to the purpose of the Privacy Act and the importance of the SORN requirement in providing notice to individuals of what records in the hands of the government could be disclosed to outsiders. *See* App. 1-13. In contrast, other Circuits have expounded on the importance and purpose of the Privacy Act. "The Privacy Act safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records." *Bartel v. F.A.A.*, 725 F.2d 1403, 1407 (D.C. Cir. 1984) (citations omitted). It does so in part "by allowing an individual to participate in ensuring that his records are accurate and properly used." *Id.* The Eighth Circuit also explains, "the obvious rationale for [§ 552(a)(e)(4)] is to facilitate access to government records by informing individuals that they may be the subject of federal recordkeeping."

Voelker v. IRS, 646 F.2d 332, 334-35 (8th Cir. 1981). Then, "[t]o be able to intelligently challenge the government's recordkeeping practices . . . [it] is critical to the Privacy Act's effectiveness" that agencies permit individuals "to examine governmental records to determine their scope and accuracy." *Id.* at 334. The D.C. Circuit and Eighth Circuit both recognize that the Privacy Act functions properly only if records are properly identified.

The rulings of two Circuits directly contradict the First Circuit's interpretation of the Privacy Act. The Sixth Circuit recognized the import of the Privacy Act's SORN requirement when it adopted a district court's careful reading of the Federal Register notice as its own. *Risch v. U.S. Postal Serv.*, 244 F.3d 510, 511 (6th Cir. 2001). The district court had examined the precise language of the agency's SORN in order to confirm that disclosed documents were properly described therein. *Risch v. Henderson*, 128 F. Supp. 2d 437, 439-40 (E.D. Mich. 1999), *aff'd sub nom. Risch v. U.S. Postal Serv.*, 244 F.3d 510. In affirming the decision below, the Sixth Circuit held that it "cannot improve upon [the district court's] excellent opinion. . . ." *U.S. Postal Serv.*, 244 F.3d at 511. In contrast, the First Circuit has interpreted the Privacy Act to permit disclosure of any record unless excluded from doing so by language in the SORN.

The Fifth Circuit has stated that the Privacy Act "enables an individual to prevent records obtained by an agency for a particular purpose from being used for any other purpose." *Chapman v. NASA*, 682 F.2d 526,

528 (5th Cir. 1982). "[S]ection 552a(e)(1) would bar the use made" of documents when the use had not been disclosed "by regular Federal Register publication" as required by "section 552a(e)(4)(C), (D), and (I)." *Id.* at 530. The Fifth Circuit likened the improper maintenance of records to an "'ambush'" that "misled and lulled [employees] into a false sense of security." *Id.* at 529.

Where the Fifth and Sixth Circuits hold that the purpose of the SORN is to inform what may be disclosed, the First Circuit reads the purpose to be to inform only what may not be disclosed. This split among the circuits creates great uncertainty as to important rights granted under the Privacy Act.

A SORN is intended to inform individuals of the categories of documents maintained by an agency and subject to disclosure. The First Circuit here authorizes an agency to disseminate virtually anything unless its disclosure was specifically excluded by the SORN. This holding is clearly erroneous and splits with the sensible approach taken by the Fifth and Sixth Circuits. When the Secretary implemented the PSP program, he authorized only the dissemination of records identified in Section 31150(a). The release of additional records not identified for dissemination in the PSP SORN violates the requirement to "publish . . . a notice of . . . the categories of records maintained in the system," 5 U.S.C. § 552a(e)(4), (e)(4)(C), and conflicts with the decisions of at least two other Circuits.

Congress established the publication requirement for a reason: privacy is of the utmost importance, especially in the digital age, and it is imperative that citizens have an opportunity to know when their personal information might be disseminated by their government. Moreover, it is important for citizens to be able to assess the accuracy of that information before it is released and to challenge any inaccurate information, if necessary. The Fifth and Sixth Circuits recognize these important safeguards. By effectively eliminating the publication requirement, however, the First Circuit erases these safeguards and threatens the continued privacy and security of the citizenry. This Court should grant certiorari to resolve this Circuit split, which carries profound implications for the privacy of any person whose information is or might someday be included in a system of records maintained by an administrative agency.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 15-2310

THOMAS O. FLOCK, ET AL.,
Plaintiffs, Appellants,
v.
UNITED STATES DEPARTMENT
OF TRANSPORTATION, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. F. Dennis Saylor, IV, *U.S. District Judge*]

Before

Lynch, Stahl, and Thompson,
Circuit Judges

(Filed Oct. 21, 2016)

Paul D. Cullen, Sr., with whom *Joyce E. Mayers*, *Paul D. Cullen, Jr.*, *The Cullen Law Firm, PLLC*, and *John A. Kiernan*, *Bonner, Kiernan, Trebach & Crociata, LLP*, were on brief for appellants.

Caroline D. Lopez, Attorney, Appellate Staff Civil Division, U.S. Department of Justice, with whom *Kathryn B. Thomson*, General Counsel, Department of Transportation, *Paul M. Geier*, Assistant General

Counsel for Litigation, *Peter J. Plocki*, Deputy Assistant General Counsel for Litigation and Enforcement, *Joy K. Park*, Senior Trial Attorney, with whom *Charles J. Fromm*, Acting Chief Counsel, and *Debra S. Straus*, Senior Attorney, Federal Motor Carrier Safety Administration, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Carmen M. Ortiz*, United States Attorney for the District of Massachusetts, and *Matthew M. Collette*, Attorney, Appellate Staff Civil Division, U.S. Department of Justice, were on brief for appellee.

October 21, 2016

STAHL, *Circuit Judge*. As part of its regulatory mandate to maintain and enhance safety on the nation's highways, the Federal Motor Carrier Safety Administration (FMCSA) maintains a database of inspection history and safety records pertaining to commercial motor vehicle operators. These reports, which are provided to the agency by individual states in exchange for federal funding, can be made available for a small fee to employers seeking to gather records on prospective drivers whom they might wish to employ. In order for such reports to be disseminated, the agency must obtain driver consent, consistent with the requirements of the Privacy Act, 5 U.S.C. § 552a *et seq*.

Appellants in this case are a group of drivers who allege that disseminating certain information contained in the database, in particular, driver-related

safety violations that are not deemed by the Secretary of Transportation to have been "serious," exceeds the agency's statutory mandate under 49 U.S.C. § 31150, which governs the agency's disclosure obligations. Appellants brought suit against the FMCSA and the Department of Transportation in the U.S. District Court for the District of Massachusetts, arguing that § 31150 unambiguously prohibited the agency from disclosing non-serious driver-related safety violations. They further argued that, although they had signed consent forms, these were ambiguous as to whether they authorized disclosure of non-serious violations or, in the alternative, were coercive in that the drivers had no choice but to sign the forms if they ever wanted to apply for future jobs. Appellants therefore argue that the potential disclosure to employers of non-serious driver-related safety violations violates the Privacy Act.

The district court granted the FMCSA's motion to dismiss, reasoning that § 31150 was ambiguous as to the agency's authority to include non-serious driver-related safety violations in the database and that the agency's interpretation of the statute was entitled to deference and ultimately permissible under *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This appeal followed. After oral argument and careful consideration, we AFFIRM.

I. Facts & Background

The FMCSA, a sub-agency of the Department of Transportation (DOT), is tasked with the maintenance

of safety in motor carrier transportation. FMCSA works with individual states to collect motor carrier safety data, including crash reports and safety violations, through roadside inspections. Collected data is stored in a database known as the Motor Carrier Management Information System (MCMIS).

In 2005, Congress mandated, through 49 U.S.C. § 31150, that the agency grant motor carrier employers access to certain minimum information from the MCMIS database in order to provide potential employers with a fast and reliable method for obtaining information about prospective employees. That statute provides, in relevant part:

> The Secretary of Transportation shall provide persons conducting pre-employment screening services for the motor carrier industry electronic access to the following reports contained in the [MCMIS database] . . . 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).

The purpose of the database is "to assist the motor carrier industry in assessing an individual operator's crash and serious safety violation inspection history as a preemployment condition." 49 U.S.C. § 31150(c). "Serious" driver-related safety violations are defined in the statute as a violation which "the Secretary [of Transportation] determines will result in the operator

being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected." 49 U.S.C. § 31150(d). The statute does not explicitly state whether the agency is required to make available non-serious driver-related safety violations. Driver consent is required before records can be disseminated to a potential employer. 49 U.S.C. § 31150(b).

On March 8, 2010, the agency issued a System of Records Notification (SORN) proposing the establishment of a system of records for a Pre-Employment Screening Program (PSP), which was designed to give prospective employers rapid access to crash and inspection data about potential driver employees. The SORN indicated that payment of a $10 fee would be required to access the PSP, and also explained that the PSP would contain MCMIS data regarding the most recent five years' crash data and the most recent three years' inspection information. Consistent with 49 U.S.C. § 31150(b)(2) and 5 U.S.C. § 552a, driver consent was also required before such information could be disclosed. The consent form states, in relevant part, "I understand that I am consenting to the release of safety performance information including crash data from the previous five (5) years and inspection history from the previous three (3) years." On July 19, 2012, the FMCSA issued another SORN, reaffirming that the PSP would include the most recent five years' crash and most recent three years' inspection data, adding that this would "includ[e] serious safety violations for an individual driver." 77 Fed. Reg. 42548-02. Neither of

these SORNs purported to exclude non-serious driver-related safety violations from the database.

Appellants, professional commercial vehicle operators, brought suit against the DOT, the FMCSA and the United States, alleging that the FMCSA had prepared and made available for dissemination to potential employers one or more PSP reports that included non-serious driver-related safety violations. According to Appellants, the inclusion and possible dissemination of non-serious violations runs afoul of the Privacy Act, which contains "a comprehensive and detailed set of requirements for the management of confidential records held by Executive Branch agencies." *F.A.A.* v. *Cooper*, 132 S. Ct. 1441, 1446 (2012). The Privacy Act limits all administrative agency disclosure of personal records, subject to various exceptions, one of which is the consent of the person to whom the record pertains. 5 U.S.C. § 552a(b).

FMCSA moved to dismiss the case for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and alternatively argued that the plaintiffs lacked standing and that the case should be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The district court held that the complaint adequately alleged an impending future injury for Article III purposes, and elected to reach the merits without deciding whether the plaintiffs had adequately alleged standing under the Privacy Act. On the merits, the district court held that 49 U.S.C. § 31150 was ambiguous as to the question of non-serious driver-related safety violations, and

that FMCSA's interpretation of the statute was ultimately permissible under *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This appeal followed.

II. Discussion

We review a district court's grant of a motion to dismiss for failure to state a claim *de novo*. *Woods* v. *Wells Fargo Bank, N.A.*, 733 F.3d 349, 353 (1st Cir. 2013). This requires us to "construe all factual allegations in the light most favorable to the non-moving party to determine if there exists a plausible claim upon which relief may be granted." *Wilson* v. *HSBC Mortgage Servs., Inc.*, 744 F.3d 1, 7 (1st Cir. 2014). To survive a motion to dismiss, the complaint must state a claim for relief that is plausible on its face. *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007).

A. Standing

As a threshold matter, the FMCSA argues that Appellants have not properly pled standing under Article III or under the Privacy Act. In order to satisfy the requirements of Article III standing, a party must allege sufficient facts to demonstrate injury-in-fact, a causal relationship between the injury and the challenged conduct, and redressability of that injury. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Allegations of future injury must be sufficient to show that such injury is "certainly impending" in order to constitute injury-in-fact. *Clapper* v. *Amnesty Int'l USA*, 133

S. Ct. 1138, 1147 (2013). In addition to the constitutional standing requirements, in order to bring a claim for damages under the Privacy Act, Appellants must demonstrate that the FMCSA's actions had an "adverse effect" on them in a way that caused "actual damages," and that the FMCSA's actions were "intentional or willful." 5 U.S.C. § 552a(g)(1)(D); *id.* § 552a(g)(4)(A).

The district court found that the complaint "adequately alleges an adverse effect sufficient to meet the constitutional standing requirements," while noting that "[w]hether the complaint adequately alleges an injury sufficient to state a claim under the Privacy Act is a different question, which the Court does not reach." Because we believe this case can be decided easily on the merits, we assume without deciding that Appellants have adequately pled standing under both Article III and the Privacy Act.

B. The Agency's Interpretation under *Chevron*

When agency action is grounded in an interpretation of the agency's organic statute, we apply the familiar framework set forth by the Supreme Court in *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, we first ask whether Congress has spoken to the precise question at issue. "If the intent of Congress is clear," using the "traditional tools of statutory construction, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S.

at 842-43. If Congress has not unambiguously expressed its intent as to the precise question at issue, the agency's interpretation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. Under the second prong, the agency's construction is accorded substantial deference, and courts are not to substitute their own judgment for that of the agency. *See United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001) ("[A] reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise.").

Determining whether ambiguity exists within a statute requires us to apply the "ordinary tools of statutory construction." *City of Arlington, Tex.* v. *F.C.C.*, 133 S. Ct. 1863, 1868 (2013). First and foremost, this requires beginning with a textualist approach, as the "plain meaning" of statutory language controls its construction. *Summit Inv. & Dev. Corp.* v. *Leroux*, 69 F.3d 608, 610 (1st Cir. 1995) (internal citation omitted).

We conclude that § 31150 does not unambiguously restrict the agency's discretion to make records including non-serious driver-related safety violations available to potential employers with driver consent. The statute is silent as to non-serious violations. Appellants argue that by including three specific categories of reports that the agency must make available, Congress imposed a ceiling on the agency's disclosure authority, excluding categories of reports not specifically enumerated. However, § 31150's command that

the agency "shall provide" certain reports can just as easily be read as a floor, an articulation of the agency's minimum disclosure obligations, rather than a ceiling. *See Mass. Trs. Of E. Gas & Fuel Assocs*. v. *United States*, 377 U.S. 235, 244 (1964) (noting that "the word ['shall'] does not of linguistic necessity denote a maximum"). There is no specific language in the statute which precludes the agency from making other driver-related information available to prospective employers, provided they have driver consent. We therefore agree with the district court's conclusion at *Chevron* Step One that Congress has not spoken to the precise question of non-serious violations.

Finding, as we have, that the statute is ambiguous as to the precise question of non-serious driver-related safety violations, we will not disturb an agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. The agency's interpretation easily passes muster under this test for two reasons. First, reading the statute as a floor comports with the broader statutory purpose of § 31150 and the agency's mandate to promote highway safety. Given that the focus of the database is on the motor carrier industry, by providing information on driver safety records to potential employers, it is hard to see how this goal would be undermined by the disclosure of *more* information. *See* 49 U.S.C. § 31150(c) ("The process for providing access to [the MCMIS database] shall be designed to assist the motor carrier industry in assessing an individual operator's crash and serious safety violation inspection

history as a pre-employment condition."). Indeed, the disclosure of other non-serious driver-related safety violations, such as speeding tickets or other fines, would presumably help achieve Congress's objective in empowering the FMCSA to promote highway safety.

Second, the agency's reading does not leave driver-employees without protection, as both the Privacy Act and § 31150(b)(2) require driver consent before the relevant MCMIS records can be disclosed. There is no suggestion that the agency has disclosed any information without driver consent, and nothing in the record which leads us to conclude that the agency's reading of the statute is impermissible.

To conclude, we agree with the district court that the agency's interpretation is a reasonable and permissible construction of the statute and is entitled to *Chevron* deference.

C. Consent Forms under the Privacy Act

One final argument raised in this appeal is whether the mandatory consent form signed by Appellant drivers are illegitimate as a result of being ambiguous or coercive. The parties argued this issue before the district court, but the court did not make a ruling.[1] The form reads as follows: "I understand that I am

[1] By failing to raise the arguments about the consent form in their opening brief, appellants may have waived this argument on appeal. However, because the consent form argument fails on the merits, we need not address the issue of waiver.

consenting to the release of safety performance information including crash data from the previous five (5) years and inspection history from the previous three (3) years." Appellants make two arguments that the consent forms are invalid, neither of which we find convincing.

First, they argue that the consent forms can only be read as authorizing disclosure of violations specifically enumerated in § 31150. Since we conclude that the agency's reading of the statute as a floor, rather than a ceiling, is permissible, Appellants' argument on this score, that "crash data from the previous five (5) years and inspection history from the previous three (3) years" should be read as including only "serious" driver-related safety violations, is unavailing. A plain reading of the consent form reveals nothing that would suggest that only violations deemed by the Secretary of Transportation to be "serious" would be released to a potential employer.

Second, Appellants argue that the consent forms are coercive, since drivers have no choice but to sign off on the release of their records in order to seek future employment, and that signing this form "would certainly doom any prospect for employment." This argument fails for two reasons. First, Appellants do not allege, nor is it suggested, that employment with motor carriers is contingent on participation in the PSP. The language of § 31150 itself makes clear that the use of the PSP by employers is entirely optional. *See* 49

U.S.C. § 31150(c) ("Use of the process shall not be mandatory and may only be used during the preemployment assessment of an operator-applicant."). Second, even assuming that the majority of motor carrier employers would seek to use the MCMIS database, Appellants have failed to show that their chances for employment are doomed entirely as a result of employers having access to their driving records which include non-serious violations. Finally, it bears repeating that broader access to such information in the motor carrier industry, from the standpoint of improving highway safety, is consistent with Congressional intent in passing § 49 U.S.C. § 31150.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THOMAS O. FLOCK, DENNIS K. THOMPSON, THOMAS H. GOODEN, C. DOUGLAS HEISLER, WALTER A. JOHNSON, and GAYLA S. KYLE,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 14-13040-FDS**
UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, and UNITED STATES OF AMERICA,	)	
Defendants.	)	

[CORRECTED] MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS

(Filed Oct. 2, 2015)

SAYLOR, J.

This is a class action involving the allegedly unlawful release by the federal government of motor carrier driver safety violation reports. The plaintiffs, all of whom are motor carrier drivers, have brought suit against the United States, the United States

Department of Transportation, and the Federal Motor Carrier Safety Administration ("FMCSA").

For many years, the FMSCA has maintained a database of information on the safety records of commercial motor carrier drivers as part of its Motor Carrier Management Information System ("MCMIS"). In 2005, Congress enacted a new statute, codified at 49 U.S.C. § 31150, stating that the FMSCA "shall provide" to prospective employers of motor carrier drivers "electronic access" to three specific categories of reports. The statute requires, however, that the applicant-driver provide written consent. Beginning in 2010, the FMSCA implemented new regulations that established a Pre-Employment Screening Program ("PSP"). Under the PSP, prospective employers can obtain electronic access to data from the MCMIS system. The available data is broader than the three categories identified in § 31150. The PSP likewise requires driver consent before dissemination of the information.

The plaintiff drivers have filed suit, in substance alleging that the dissemination of that additional information violates their rights under the Privacy Act, 5 U.S.C. § 552a.

Defendants have moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim. For the following reasons, the motion to dismiss will be granted.

I. Background

A. The FMCSA

The FMCSA is an "administration of the Department of Transportation" that is charged with considering "the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation." 49 U.S.C. § 113. It regulates the activities of commercial motor vehicle operators, among other ways, through promulgation of the Federal Motor Carrier Safety Regulations ("FMCSR") in the Code of Federal Regulations. *See* 49 C.F.R. §§ 350-99. The FMCSR are enforced primarily by individual states, which in return for federal grants under the Motor Carrier Safety Assistance Program ("MCSAP"), adopt the regulations and enforce them under state law. *See* 49 U.S.C. § 31102; 49 C.F.R. § 350; *see also National Tank Truck Carriers, Inc. v. Federal Highway Admin.*, 170 F.3d 203, 205 (D.C. Cir. 1999) (noting that "the individual states are the primary enforcers of the highway safety regulations at roadside inspection"). States accepting federal grants under MCSAP are required to collect and report motor carrier safety data to the FMCSA. *See* 49 U.S.C. § 31102(b)(2)(Q); 49 C.F.R. § 350.201.

States conduct roadside inspections and other activities and report the motor carrier safety data collected during such activities to FMCSA. 49 U.S.C. § 31102(b)(2), 49 C.F.R. part 350. During roadside

inspections, state officers are required to document any violations of the FMCSR or related state laws. Details of the roadside inspections, including any violations and the identity of the motor carrier, the driver, and the commercial motor vehicle, are recorded on a standard roadside inspection form. *See* 49 U.S.C. § 31102(b)(2)(H), 49 C.F.R. § 350.201(h) and (i).

The information collected by the states is electronically submitted to the Motor Carrier Management Information System ("MCMIS"), a database operated and maintained by the FMCSA. *See* 65 Fed. Reg. 83124 (Dec. 29, 2000) (citing 49 U.S.C. §§ 502, 504, 506, 508 and 49 C.F.R. § 1.73). MCMIS thus contains, among other things, "information on commercial truck drivers' safety records, such as accident reports and other safety violations." *Weaver v. Federal Motor Carrier Safety Admin.*, 744 F.3d 142, 143 (D.C. Cir. 2014); (Compl. ¶ 1); *see* 49 U.S.C. § 31106. The MCMIS database has been maintained by the FMCSA since at least 2000, and a similar data system was maintained by FMCSA's predecessor agency, the Federal Highway Administration, for many years prior to that date. *See* 65 Fed. Reg. 83124.

B. The Privacy Act

The Privacy Act of 1974, codified in part at 5 U.S.C. § 552a, contains "a comprehensive and detailed set of requirements for the management of confidential records held by Executive Branch agencies." *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1446 (2012). Subject to a

variety of exceptions, the Privacy Act provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency. . . ."

There are two exceptions that are potentially relevant here. The first is that an agency may disclose a record "pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains. . . ." 5 U.S.C. § 552a(b). The second is that an agency may disclose a record contained in a system of records if the record would be for a "routine use," which means, "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected. . . ." *Id.* §§ 552a(b)(3), 552a(a)(7).

According to the Privacy Act, "[e]ach agency that maintains a system of records shall . . . maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President. . . ." *Id.* § 552a(e)(1). In addition, "[e]ach agency that maintains a system of records shall . . . publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records. . . ." *Id.* § 552a(e)(4). The Act defines "system of records" as "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." *Id.* § 552a(a)(5). For information to be disclosed

under the "routine use" exception, an agency must publish in its system of records notice "each routine use of the records . . . including the categories of users and the purpose of such use." *Id.* § 552a(e)(4)(D).

The Privacy Act authorizes individuals to bring civil actions against an agency whenever that agency "fails to comply" with the Act's requirements "in such a way as to have an adverse effect on an individual." *Id.* § 552a(g)(1)(D). For violations "in which the court determines that the agency acted in a manner which was intentional or willful," individuals may recover the sum of "actual damages . . . , but in no case shall a person entitled to recovery receive less than the sum of $1,000," and costs and reasonable attorney fees. *Id.* § 552a(g)(4). The term "actual damages" does not include damages for mental or emotional distress. *F.A.A. v. Cooper*, 132 S. Ct. at 1446.

C. The Enactment of Section 31150

The government contends that prior to 2005, a prospective employer of a motor carrier driver who sought information about the safety record of that driver could obtain access to the MCMIS database in one of two ways. First, the employer could obtain the driver's written consent and transmit that document to the FMCSA. Because the Privacy Act of 1974 permits the release of such information with the relevant person's consent, the FCMSA would then provide the requested information. *See* 5 U.S.C. § 552a(b). Second,

the employer could file a request with the FMCSA under the Freedom of Information Act, 5 U.S.C. § 552.

In 2005, Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act. Pub. L. 109-59, 119 Stat. 1728 (Aug. 10, 2005). Part of the new statute, now codified at 49 U.S.C. § 31150, mandated the creation of an electronic system to provide certain types of information on motor carrier drivers to prospective employers. The apparent purpose of the statute was to establish a more expeditious, and perhaps more reliable, method for employers to obtain background information on prospective employees.

Subsection (a) of the statute provides that the FMCSA "shall provide persons conducting preemployment screening services for the motor carrier industry electronic access to the following reports contained in the [MCMIS]:

> (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).

Subsection (b) provides: "Before providing a person access to [MCMIS] under subsection (a), the [FMCSA] shall –

(1) ensure that any information that is released to such person will be in accordance with the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and all other applicable Federal law;

(2) ensure that such person will not conduct a screening without the operator-applicant's written consent;

(3) ensure that any information that is released to such person will not be released to any person or entity, other than the motor carrier requesting the screening services or the operator-applicant, unless expressly required by law; and

(4) provide a procedure for the operator-applicant to correct inaccurate information in [MCMIS] in a timely manner."

49 U.S.C. § 31150(b).

Subsection (c) provides: "The process for providing access to [MCMIS] shall be designed to assist the motor carrier industry in assessing an individual operator's crash and serious safety violation inspection history as a preemployment condition. Use of the process shall not be mandatory and may only be used during the preemployment assessment of an operator-applicant." 49 U. S.C. § 31150(c). And subsection (d) defines "serious driver-related violation [sic]" 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." 49 U.S.C. § 31150(d).[1]

D. The Pre-Employment Screening Program

On March 8, 2010, the FMCSA issued a System of Records Notice ("SORN") in which it proposed "to establish a system of records under the Privacy Act . . . for its Pre-Employment Screening Program (PSP), as required by 49 U.S.C. § 31150." 75 Fed. Reg. 10554, 2010 WL 752157 (Mar. 8, 2010).[2] The notice stated that the "system of records will make crash and inspection data about commercial motor vehicle (CMV) drivers rapidly available to CMV drivers (operator-applicants) and prospective employers of those drivers (motor carriers), via a secure Internet site, as an alternative to requiring them to submit a Freedom of Information Act (FOIA) request or Privacy Act request to FMCSA for the data." *Id.* The notice explained that payment of

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[1] Section (a) of the statute refers to "Serious driver-related safety violation inspection reports." 49 U.S.C. § 31150(a). The caption to section (d) reads "Serious driver-related safety violation defined." *Id.* § 31150(d). The definition itself, however, is of the term "serious driver-related violation," thus omitting the word "safety." *Id.* Neither side has suggested that the omission is meaningful in this context.

[2] In the SORN to establish the PSP as a system of records under the Privacy Act, the database is referred to as the "Pre-Employment Screening Program." 75 Fed. Reg. 10554. However, in the SORN to modify MCMIS, the PSP is referred to as the "Pre-Employment Screening System." 74 FR 66391-04. It does not appear that the difference has any significance. Throughout this memorandum and order, the Court will use the acronym "PSP" to refer to the Pre-Employment Screening Program.

a fee will be required to access the PSP, but noted that "[m]otor carriers may continue to request the information from FMCSA under FOIA, and operator-applicants may continue to receive their own safety performance data free of charge by submitting a Privacy Act request to FMCSA." *Id.* According to the March 8 notice, the PSP would specifically contain "a current MCMIS data extract containing the most recent five (5) years' crash data and the most recent three (3) years' inspection information." *Id.*

In a section entitled "Routine Uses of Records Maintained in the System, Including Categories of Users and Purposes of Use," the notice stated that "[a]uthorized motor carriers may access an individual operator-applicant's crash and inspection data in PSP with the operator-applicant's written consent and payment of a fee." *Id.*[3] The SORN had an effective date of April 7, 2010. *Id.*

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[3] On April 14, 2010, FMCSA published a Privacy Impact Assessment covering its PSP. (Compl. ¶ 38). The Privacy Impact Assessment states that "FMCSA provides the PSP contractor with an updated MCMIS data extract containing driver crash data from the previous five (5) years and inspection data from the previous three (3) years." (Pl. Mem. Ex. B (2010 Privacy Impact Assessment at 2 (Apr. 14, 2010), http://www.dot.gov/citizens/privacy/pia-pre-employment-screening-program-psp). In addition, the Privacy Impact Assessment states:

> In accordance with 49 U.S.C. § 31150(a), the CMV *driver safety information extracted from MCMIS* and made available for pre-employment screening *comes from the following reports*: commercial motor vehicle accident reports; inspection reports that contain no

On July 19, 2012, the FMCSA issued a Federal Register Notice concerning the modification of the PSP system of records, to be effective August 21, 2012. 77 Fed. Reg. 42548, 2012 WL 2920621 (July 19, 2012). According to the notice, the "record displays a snapshot in time, based on the most recent MCMIS data extract loaded into the PSP system." *Id.* That record "contains the most recent five years of crash data and the most recent three years of roadside inspection data, including serious safety violations for an individual driver." *Id.* The purpose of the database is to "satisfy requirements mandated by Congress" in 49 U.S.C. § 31150 and to "improve the quality of safety data and help employers make more informed decisions when hiring commercial drivers." *Id.* In the 2012 modification, the routine uses were "updated to permit disclosure of PSP records to industry service providers directly involved in the hiring of commercial motor vehicle (CMV) drivers on behalf of motor carriers and/or CMV drivers." *Id.* The modification notes that "[t]he system owner information has been modified to include only contact information for the PSP system of records and no longer includes information for the MCMIS and Freedom of Information Act (FOIA) systems, which are separate and distinct system of records." *Id.*

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driver-related safety violation; and *serious driver-related safety violation inspection reports.*

(Pl. Mem. Ex. B (2010 Privacy Impact Assessment at 2 (Apr. 14, 2010), http://www.dot.gov/citizens/privacy/pia-pre-employment-screening-program-psp) (emphasis added); *see also* Pl. Mem. Ex. C (2012 Privacy Impact Assessment at 4, http://www.dot.gov/sites/dot.gov/files/docs/FMCSA_PSP_PIA_Final.pdf)).

To access the PSP system, drivers and motor carriers pay a $10 fee per report. (Compl. ¶ 43). However, as noted in the March 8 notice, "[m]otor carriers may continue to request the information from FMCSA under FOIA and operator-applicants may continue to receive their own safety performance data free of charge by submitting a Privacy Act request to FMCSA." 75 Fed. Reg. at 10555.

The parties appear to agree that by accessing the PSP system, prospective employers can obtain, among other things, inspection reports that contain non-serious driver-related safety violations. An example of a "serious" driver-related safety violation is the use of alcohol. *See* 49 C.F.R. § 392.5. Examples of non-serious driver-related safety violations include speeding and failing to wear a seat belt. Examples of non-driver-related safety violations include excessive weight and improper vehicle registration.

E. Consent Forms

The parties appear to agree that the written consent of the relevant driver is required to access information on the system. The PSP is administered by an independent contractor. In July 2012, that contractor implemented a written consent form for all PSP account holders. Although written consent was always required prior to a PSP release of records, the written consent form apparently represented the first time that FMCSA mandated the form of the document. The mandatory written consent form provides that

prospective employers "cannot obtain background reports from FMCSA unless you [that is, the driver] consent in writing." (Pl. Mem. Ex. A). The form once executed authorizes prospective employers "to access the FMCSA Pre-Employment Screening Program (PSP) system to seek information regarding . . . commercial driving safety record and information regarding . . . safety inspection history." (*Id.*). The form states, "I understand that I am consenting to the release of safety performance including crash data from the previous five (5) years and inspection history from the previous three (3) years." (*Id.*). Drivers who sign the form acknowledge that they "have read the above Notice Regarding Background Reports provided to [them] by Prospective Employer and [they] understand that if [they] sign this consent form, Prospective Employer may obtain a report of [their] crash and inspection history." (*Id.*). The form states that if prospective employers use "any information [they] obtain[ ] from FMCSA in a decision to not hire [a driver] or to make any other adverse employment decision regarding [him or her], the [p]rospective [e]mployer will provide [him or her] with a copy of the report upon which its decision was based. . . ." (*Id.*).

F. The Present Case

Plaintiffs Thomas Flock, Dennis K. Thompson, Thomas H. Gooden, C. Douglas Heisler, Walter A. Johnson, and Gayla S. Kyle are "professional commercial vehicle operators." (Compl. ¶ 7). They allege that their "driving activities have been the subject of reports

unlawfully released for dissemination" by FMCSA under the PSP "within a two-year period immediately prior to the filing of this complaint." (*Id.*). The complaint alleges that FMCSA "has prepared and made available for dissemination to potential employers" of plaintiffs "one or more PSP reports that include references" to certain alleged driver-related violations. (*Id.* ¶¶ 23-28). It further alleges that the "FMCSA has disparaged" plaintiffs' "qualifications for employment as . . . commercial motor vehicle driver[s] in a manner not authorized by law." (*Id.*). According to the complaint, the disparagement of plaintiffs' "qualifications as . . . commercial motor vehicle operators ha[ve] had . . . negative economic or pecuniary impact[s] on [their] abilit[ies] to earn . . . living[s] as commercial motor vehicle" operators. (*Id.*).

The complaint also alleges that the "only avenue available to [p]laintiff[s] . . . to acquire current and accurate information with respect to FMCSA's unlawful conduct is to purchase . . . cop[ies] of [their] PSP report[s] from [d]efendant." (*Id.*). It alleges that plaintiffs are required to pay a fee of $10 . . . each time they seek to gain access to current copies of their PSP reports. (*Id.*).

The complaint thus alleges economic injury when drivers are forced to pay a fee of $10 in order to acquire a copy of the PSP report. According to the complaint, FOIA is not an adequate substitute for the PSP because FOIA does not provide drivers with current and accurate information. The complaint further alleges

economic injury by alleging that the unlawful dissemination of reports by the FMCSA diminishes the economic value of the services of individual driver candidates for employment.

G. Procedural Background

Plaintiffs filed the complaint in this action on July 18, 2014. They filed the claim on behalf of themselves and a class "consisting of all individuals in the United States for whom FMCSA has collected, maintained and transmitted for dissemination under the [PSP] inspection reports that contain references to alleged safety violations not determined by the Secretary of Transportation to be serious driver-related safety violations." (Compl. ¶ 54). The complaint alleges a single claim under 5 U.S.C. § 522a(g)(1)(D) for violation of the Privacy Act based on the unauthorized dissemination of inspection reports under defendants' PSP program. (*Id.* ¶¶ 6-165).

Defendants have moved to dismiss the complaint on the grounds that it fails to allege (1) an injury sufficient to establish standing to sue, (2) an actionable violation of the Privacy Act, and (3) actual damages as required by the Privacy Act. Because the Court finds that the complaint does not state a cause of action for violation of the Privacy Act, it will not reach the third issue.

II. Legal Standard

On a motion to dismiss, the Court "must assume the truth of all well-plead[ed] facts and give . . . plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if the facts as alleged do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (alterations omitted) (internal quotation marks omitted).

III. Analysis

A. Whether Plaintiffs Have Standing

Standing is a threshold question in every case; "[i]f a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case." *United States v. AVX Corp.*, 962

F.2d 108, 113 (1st Cir. 1992). To satisfy the case-or-controversy requirement of Article III of the United States Constitution, plaintiffs bear the burden of establishing that they (1) have suffered an "injury-in-fact," (2) that the injury is "fairly traceable' to the actions of the defendant[s]," and (3) that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). These elements must be proved "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

An "injury-in-fact" "is defined as 'an invasion of a legally protected interest which is (a) concrete and particularized; (b) actual or imminent, not conjectural or hypothetical.'" *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012) (quoting *Lujan*, 504 U.S. at 560).

Defendants contend that plaintiffs do not allege that they have suffered a concrete injury. Specifically, defendants point to the fact that the complaint "merely alleges that each plaintiff has suffered 'disparage[ment] of . . . [his or her] qualifications for employment.'" (Def. Mem. at 9). They contend that the complaint does not allege that any plaintiff's ability to earn a living as a commercial motor-vehicle operator have actually been impaired, or that the PSP program actually sent any information to plaintiffs' prospective employers.

The complaint alleges that "[t]he intentional and willful disparagement of driver qualifications violates the rights of commercial motor vehicle drivers under

the Privacy Act. Such disparagement has a negative economic or pecuniary impact on [p]laintiff [d]rivers and others similarly situated." (Compl. ¶ 49). The complaint further alleges that "[a]ccording to informal surveys of motor carriers conducted by FMCSA, reports of driver-related safety violations have a negative impact on the ability of individual driver candidates to command compensation and benefits when they are hired." (*Id.* ¶ 50). It also alleges that "[t]he status of a driver's PSP report also has an influence on the willingness and ability of individual commercial motor vehicle drivers to seek out better employment opportunities with motor carriers. Individuals with reports of driver-related safety violations on their PSPs are discouraged from seeking out better employment opportunities." (*Id.* ¶ 51). According to the complaint, "[t]he employment prospects of [p]laintiff [d]rivers and others similarly situated have been diminished and they have been economically harmed by the actions of FMCSA *in unlawfully disseminating* driver safety records not authorized by statute for dissemination under the PSP program." (*Id.* ¶ 52) (emphasis added).

The complaint thus alleges (1) that the FMCSA had no authority to disseminate certain records through the PSP, (2) that the records in the PSP have been impermissibly disseminated, and (3) that the dissemination of the records has disparaged the qualifications of plaintiffs, causing them to suffer negative economic or pecuniary impact. "[A]n individual subjected to an adverse effect has injury enough to open the courthouse door, but without more has no cause of

action for damages under the Privacy Act." *Doe v. Chao*, 540 U.S. 614, 624-25 (2004). At the pleading stage, the complaint adequately alleges an adverse effect sufficient to meet the constitutional standing requirements. *See id*.[4] Whether the complaint adequately alleges an injury sufficient to state a claim under the Privacy Act is a different question, which the Court does not reach.

B. Whether the Complaint Alleges a Violation of Privacy Act

As noted, § 31150 identifies three types of reports in the MCMIS database that the FMCSA is required to make available for pre-employment screening purposes through an electronic access system: (1) commercial vehicle accident reports, (2) inspection reports "that contain no driver-related safety violations," and (3) "serious driver-related safety violation inspection reports."

Plaintiffs contend, among other things, that "[the] FMCSA exceeds its authority under Section 31150 and violates the Privacy Act . . . when it releases to potential employers reports of driver-related violations not determined by the Secretary to be reports of "serious"

[4] The complaint also appears to allege as an injury that plaintiffs have been forced to pay $10 in order to access their PSP reports. However, that injury is not caused by the alleged violation of the Privacy Act, and therefore would not be redressable by a ruling in plaintiffs' favor.

violations. (Pl. Mem. at 1). More particularly, they contend as follows:

> In 2005, Congress, for the first and only time, authorized FMCSA to disseminate to potential employers a limited subset of records of driver-related safety enforcement violations. 49 U.S.C. § 31150(a). The purpose of this PSP program is to encourage motor carriers to avoid applicants with less favorable safety records when hiring drivers. The wisdom of this approach to improving highway safety is not an issue here. Congress has approved this approach. In doing so, however, Congress placed clear and unambiguous limitations on FMCSA's authority. The statute provides that access to such information under the PSP program "shall be designed to assist the motor carrier industry in assessing an individual operator's crash and serious safety violation inspection history as a preemployment condition." *Id.* at (c). When FMCSA operates beyond its statutory authority by disseminating records other than crash records or records of serious driver related violations, its actions are neither relevant nor necessary to accomplish the goals established in Section 31150(c). Such actions violate the Privacy Act.

(*Id.* at 3-4).

Defendants contend that although § 31150 "identifies three types of MCMIS records that the Agency is required to make available for pre-employment screening purposes through an electronic access system, . . . the statute is silent on the agency's existing and

long-standing authority to provide safety records with a driver's consent." (Def. Mem. at 11). They contend that "motor carrier employers, with a driver's written consent, have always been able to obtain a driver's complete safety and inspection record from MCMIS under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, pursuant to regulations issued by the Secretary pursuant to these federal laws." (*Id.* at 12). They further contend that § 31150 "facilitated such pre-employment screening by establishing a more reliable and expeditious means of conducting background investigations, albeit one that is voluntary." (*Id.* at 13). According to defendants, the "FMCSA interpreted Congress' intent to facilitate informed hiring decisions . . . as adding to, rather than limiting, the Agency's existing statutory authority to release driver safety information." (*Id.*). Thus, according to defendants, although § 31150 "mandates that the Secretary afford access to potential employers for serious violations . . . , nothing in [§] 31150 purports to limit the Secretary's existing authority and exercise of discretion to provide more complete driver safety records with the potential employee's written consent and in accordance with Federal laws." (*Id.* at 14). And because of § 31150's "silence and resulting ambiguity concerning whether it provided a floor or a ceiling for the types of information that could be provided, FMCSA was justified in interpreting the congressional mandate to allow it to continue to provide comprehensive safety records for pre-employment purposes with the driver's consent and in compliance with existing Federal laws." (*Id.* at 14-15). Because plaintiffs consented in writing

to the release of all information contained in the PSP reports at issue, defendants contend that there could not be a Privacy Act violation. Finally, they contend that their interpretation of § 31150 should be accorded *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

In short, according to defendants, § 31150 sets a floor: the FMSCA *must* release the three identified categories of reports, but *may* release additional information (including inspection reports that contain non-serious driver-related safety violations). According to plaintiffs, the FMSCA *must* release the three identified categories of reports, but *may not* release additional information (and, specifically, may not release inspection reports that contain non-serious driver-related safety violations).

1. Whether the Statute Is Ambiguous

There does not appear to be a dispute that defendants have the authority to create the MCMIS database and keep "information on commercial truck drivers' safety records, such as accident reports and other safety violations." *Weaver*, 744 F.3d at 143 (D.C. Cir. 2014); *see* 49 U.S.C. § 31106. Prior to the enactment of § 31150 in 2005, the FMCSA had the authority under the Privacy Act to release safety-related information from the MCMIS system to any prospective employer with the consent of the prospective driver-employee. The prospective driver-employee would have been an "individual to whom the record pertains" who

could consent to the release. *See* 5 U.S.C. § 552a(b).[5] Although the parties dispute whether, prior to the enactment of § 31150, the FMCSA also had authority to release safety-related information under the "routine use" prong of the Privacy Act, that dispute need not be resolved.[6]

Thus, under the Privacy Act, prior to 2005 the FCMSA could disclose safety-related information to prospective employers concerning a driver with the consent of the driver. Congress then enacted § 31150. That statute requires the release of certain safety-related information to prospective employers concerning a driver, but only if the driver consents. *See* 49 U.S.C. § 31150(b)(2) (the FMCSA must ensure that a prospective employer "not conduct a [preemployment] screening without the operator-applicant's consent"). In other words, disclosure with the driver's consent was permitted under the Privacy Act; § 31150 likewise requires consent as a condition of disclosure.[7]

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[5] Defendants also contend that it could have released the information pursuant to a FOIA request. Because the parties have not addressed the issue at any length, and because it does not appear necessary to address the relationship of FOIA and § 31150 to render a decision, the Court will only address the Privacy Act issue.

[6] Plaintiffs contend that defendants could not have previously disseminated MCMIS information under the "routine use" exception because the FMCSA cites to no relevant published "systems of records notice" under 5 U.S.C. § 552a(e)(3) or "routine use" under 5 U.S.C. § 552a(e)(3)(c).

[7] Arguably, the Court could simply stop there. If the Privacy Act permits disclosure of information with the driver's consent, and if the program challenged here does not permit disclosure

The next question is what Congress intended to accomplish by enacting § 31150. Clearly, it did not intend to permit the disclosure of some new category of information, or disclosure to some new type of person, that the law had previously prohibited. Put another way, the statute does not grant new authority to the FMCSA to disclose information that could not have been disclosed prior to 2005, even with the driver's consent.

Instead, the purpose of the statute appears to be to *require* the FMCSA to allow prospective employers "electronic access" to certain information in the MCMIS database. *See* 49 U.S.C. § 31150(a) ("The Secretary of Transportation *shall* provide persons . . . electronic access to the following reports . . .") (emphasis added). Presumably, requiring the FMCSA to create a system of electronic access was intended primarily to benefit the employer; it is surely faster than obtaining paper copies, and (particularly with the mandated requirement to permit an opportunity for corrections), produces more accurate information. Indeed, the statute expressly states that "[t]he process for providing access to [MCMIS] *shall be designed to assist the motor carrier industry* in assessing an individual operator's crash and serious safety violation inspection history as a preemployment condition." *Id.* § 31150(c) (emphasis added).

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without the driver's consent, it is by no means clear how the challenged program could violate the Privacy Act. Nonetheless, the Court will proceed with an analysis of § 31150.

Congress also included certain protections for the drivers, as set forth in the four "conditions on providing access" in § 31150(b) (requiring compliance with the Fair Credit Reporting Act and other federal law, requiring driver consent, prohibiting further disclosure, and providing a procedure for corrections). One of the conditions is that the FMCSA provide an opportunity to the driver to correct any inaccurate information. § 31150(b)(4). And one of those conditions is that the driver consent in writing to the disclosure. *Id.* § 31150(b)(2).

Prospective employers are therefore not obtaining new, formerly-off-limits information (they could have obtained the information anyway), nor are they able to obtain information surreptitiously (the driver's consent is required). The question then becomes whether the three identified categories of reports that "shall" be subject to electronic access are intended to be a floor ("you must, at a minimum, provide these reports") or a ceiling (or, more accurately, a ceiling and a floor) ("you must provide these reports, and you may not provide any other information").

As noted, § 31150(a) requires that employers have access to three categories of information, two of which are "inspection reports that contain no driver-related safety violations" and "serious driver-related safety violation inspection reports." Thus, at least one category of inspection reports – those that contain non-serious driver-related safety violations – is not covered by the statute.

Did Congress intend to *prohibit* the release of that additional information, even with the driver's consent? If so, it chose an odd way of expressing its intent. The statute contains no clear language prohibiting or limiting the release of those reports. Such language would have been easy enough to draft; indeed, the statute itself contains other language expressly limiting the release of certain information. *See* § 31150(b)(2) (providing that the agency must "ensure that any information that is released to [a prospective employer] *will not be released to* any person or entity" other than the employer or the driver) (emphasis added). And the statutory backdrop against which § 31150 was enacted – the Privacy Act – permits the release of virtually any such information with the driver's consent.[8]

Did Congress intend to *require* that certain minimum information be made available electronically, but to *permit* the release of additional information? Again, it did not clearly say so. Again, it would have been easy

[8] That interpretation could also produce arguably illogical results. For example, a prospective employer could have access to a report that a vehicle was overweight, with no other reported violations. § 31150(a)(2). It could also have access to a report that a vehicle was overweight and that the driver was intoxicated (a "serious" violation). *See* § 31150(a)(3). But it would not have access to a report that a vehicle was overweight *and* that the driver was speeding (a "non-serious" violation). In other words, the employer could gain access to the vehicle violation report *only* if it did not contain the purportedly prohibited non-serious driver information. Of course, statutes are sometimes illogical, and the courts are not empowered to overlook clear statutory language simply to reach a more coherent result.

to draft such language had that been the clear intention of Congress; for example, the first sentence of the statute could have provided that the FMCSA "shall provide persons . . . electronic access to *at least* the following reports contained in the [MCMIS]: . . . "

Under the circumstances, the Court concludes that the statute is susceptible of at least two rational interpretations. It is therefore ambiguous, and the remaining question is whether the agency's construction of the statute is entitled to deference.

2. Whether FMCSA's Interpretation Is Entitled to *Chevron* Deference

In *Chevron*, the Supreme Court established a two-step analysis for reviewing an agency's construction of a statute that it administers. 467 U.S. at 842-43. The analysis begins with "whether Congress has directly spoken to the precise question at issue." If Congress's intent is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If Congress has not expressed its intent unambiguously, or if Congress has left a gap for the agency to fill, the agency's interpretation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44; *see also Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004). Under the second step, the agency's construction is accorded substantial deference. *Chevron*, 467 U.S. at 844; *see also United States*

v. Mead Corp., 533 U.S. 218, 227-28 (2001) ("considerable weight should be accorded to executive department's construction of a statutory scheme it is entrusted to administer'") (internal citations omitted). This Court should not simply substitute its judgment for that of the agency. *See Mead*, 533 U.S. at 229 ("a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise").

The first question under *Chevron* is whether Congress has directly spoken to "the precise question at issue." Again, the precise question is whether Congress intended to limit the authority of the FMCSA to disclose certain types of records from the MCMIS database, or only to ensure that certain types of records are made available in electronic form. The statute appears to be directly on point, but as noted, Congress has not expressed its intent unambiguously.

The question then becomes whether the agency interpretation is entitled to deference – that is, whether the agency interpretation is arbitrary, capricious, or manifestly contrary to the statute. Certainly the FMCSA's interpretation of § 31150 is not manifestly contrary to the wording or purpose of the statute, at least as Congress has drafted it. Nor is it arbitrary or capricious. While a contrary reading is entirely plausible, the construction adopted by the agency is rational and coherent, and in keeping with its statutory authority to promote highway safety. Prospective employers

will have access to a variety of driver safety information, even violations that do not rise to the level of "serious." It is also in harmony with the requirements of the Privacy Act, which permits the disclosure of a record when "the individual to whom the record pertains" gives his or her consent. *See* 5 U.S.C. § 552a(b). Whether the same result would occur if the FMCSA were to release information without the consent of the affected drivers, as "routine use" or otherwise, is a decision that the Court does not reach.

In summary, defendants' interpretation of 49 U.S.C. § 31150 – that it does not limit its authority to disclose inspection reports from the MCMIS database concerning non-serious driver-related safety violations – is a reasonable and permissible construction of the statute that is entitled to deference under *Chevron*. Accordingly, defendants did not violate the requirements of § 31150, nor the requirements of the Privacy Act, the complaint fails to state a claim upon which relief can be granted.

IV. Conclusion

For the foregoing reasons, defendants' motion to dismiss is GRANTED.

SO ORDERED.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
Dated: October 2, 2015 United States District Judge

United States Court of Appeals
For the First Circuit

No. 15-2310

THOMAS O. FLOCK; DENNIS K. THOMPSON; THOMAS H. GOODEN; C. DOUGLAS HEISLER; WALTER A. JOHNSON; GAYLA S. KYLE

Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION; UNITED STATES

Defendants-Appellees

Before

Howard, Chief Judge, Torruella, Stahl, Lynch, Thompson, Kayatta and Barron,

Circuit Judges.

ORDER OF COURT

Entered: December 16, 2016

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to

the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Margaret Carter, Clerk

cc:
John Albert Kiernan
David A. Cohen
Paul D. Cullen Jr.
Paul Damien Cullen Sr.
Joyce E. Mayers
Anita Johnson
Dina Michael Chaitowitz
Matthew M. Collette
Karen Schoen
Caroline D. Lopez
Debra S. Straus

5 U.S.C. § 552a. Records maintained on individuals

Effective: December 19, 2014

(a) Definitions. – For purposes of this section –

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(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;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program" –

(A) means any computerized comparison of –

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of –

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include –

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches –

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel;

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986;

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(ix) matches performed by the Secretary of Health and Human Services or the Inspector General of the Department of Health and Human Services with respect to potential fraud, waste, and abuse,

including matches of a system of records with non-Federal records; or

(x) matches performed pursuant to section 3(d)(4) of the Achieving a Better Life Experience Act of 2014;

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred

retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of Disclosure. – No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be –

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for

evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) Accounting of Certain Disclosures. – Each agency, with respect to each system of records under its control, shall –

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of –

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to Records. – Each agency that maintains a system of records shall –

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and –

> **(A)** not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and
>
> **(B)** promptly, either –
>
> > **(i)** make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or
> >
> > **(ii)** inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency Requirements. – Each agency that maintains a system of records shall –

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual –

> **(A)** the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;
>
> **(B)** the principal purpose or purposes for which the information is intended to be used;
>
> **(C)** the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and
>
> **(D)** the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the

existence and character of the system of records, which notice shall include –

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any

individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the

security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) Agency Rules. – In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall –

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before

the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil Remedies. – Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of –

> **(A)** actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> **(B)** the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district

court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of Legal Guardians. – For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal Penalties. – Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the

material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General Exemptions. – The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is –

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for

the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

49 U.S.C. § 31150. Safety performance history screening

Effective: August 10, 2005

(a) In General. – The Secretary of Transportation shall provide persons conducting preemployment screening services for the motor carrier industry electronic access to the following reports contained in the Motor Carrier Management Information System:

(1) Commercial motor vehicle accident reports.

(2) Inspection reports that contain no driver-related safety violations.

(3) Serious driver-related safety violation inspection reports.

(b) Conditions on Providing Access. – Before providing a person access to the Motor Carrier Management Information System under subsection (a), the Secretary shall –

(1) ensure that any information that is released to such person will be in accordance with the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) and all other applicable Federal law;

(2) ensure that such person will not conduct a screening without the operator-applicant's written consent;

(3) ensure that any information that is released to such person will not be released to any person or entity, other than the motor carrier requesting the screening services or the operator-applicant, unless expressly authorized or required by law; and

(4) provide a procedure for the operator-applicant to correct inaccurate information in the System in a timely manner.

(c) Design. – The process for providing access to the Motor Carrier Management Information System under subsection (a) shall be designed to assist the motor carrier industry in assessing an individual operator's crash and serious safety violation inspection history as a preemployment condition. Use of the process shall not be mandatory and may only be used during the preemployment assessment of an operator-applicant.

(d) Serious Driver-Related Safety Violation Defined. – In this section, the term "serious driver-related violation" means 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.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration Office of the Secretary; Privacy Act of 1974: System of Records

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice to modify a system of records.

SUMMARY: DOT proposes to modify a system of records under the Privacy Act of 1974. The system is FMCSA's Motor Carrier Management Information System (MCMIS), which is updated to include new processes and extractions of sensitive data to implement a change that alters the purpose for which the information is used and an addition of a routine use. This system would not duplicate any other DOT system of records.

DATES: *Effective Date:* This notice will be effective, without further notice, on January 25, 2010, unless modified by a subsequent notice to incorporate comments received by the public. Comments must be received by January 14, 2010 to be assured consideration.

ADDRESSES: Send comments to Habib Azarsina, Departmental Privacy Officer, S-80, United States Department of Transportation, Office of the Secretary of Transportation, 1200 New Jersey Avenue, SE., Washington DC 20590 or habib.azarsina@dot.gov.

FOR FURTHER INFORMATION CONTACT: Habib Azarsina, Departmental Privacy Officer, S-80, United States Department of Transportation, Office of the Secretary of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone 202.366.1965, or habib.azarsina@dot.gov.

SUPPLEMENTARY INFORMATION: The DOT system of records notice subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, as proposed to be modified, is available from the above mentioned address and appears below:

DOT/FMCSA 001

SYSTEM NAME:

Motor Carrier Management Information System (MCMIS).

SECURITY CLASSIFICATION:

Unclassified, Sensitive.

SYSTEM LOCATION:

Volpe National Transportation Systems Center, U.S. Department of Transportation, 55 Broadway, Cambridge, MA 02142.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM OF RECORDS:

1. Individuals who are the sole proprietor/driver (owner/operator) of a motor carrier or hazardous material shipper subject to Federal Motor Carrier Safety Regulations.

2. Drivers of commercial motor vehicles who:

- Were involved in a recordable crash;
- Were the subject of a roadside driver/vehicle inspection; or
- Are the subjects of an investigatory action.

CATEGORIES OF RECORDS IN MCMIS:

MCMIS stores the following types of information:

- *Census Files* – These files contain the USDOT number, carrier identification, carrier address, type and size of operation, commodities carried, and other characteristics of the operation for interstate (and some intrastate) motor carriers, intermodal equipment providers, cargo tank facilities, and shippers. They include motor carrier PII consisting of social security numbers (SSN) and employee identification numbers (EIN).
- *Investigatory Files* – These files contain results of safety audits, compliance review investigations, and enforcement actions conducted by Federal, State, and

local law enforcement agencies. They include driver and co-driver PII consisting of SSN and EIN.

- *Driver/Vehicle Safety Violations and Inspection Data* – This data is collected during roadside inspections of drivers and vehicles and includes driver and co-driver PII consisting of names, dates of birth, vehicle license plate numbers, and State driver's license numbers.

- *Crash Data* – This data is collected from State and local police crash reports and includes driver and co-driver PII consisting of names, dates of birth, vehicle license plate numbers, and State driver's license numbers.

MCMIS SHARES PII WITH THE FOLLOWING FMCSA SYSTEMS OR SYSTEM COMPONENTS:

- *Driver Information Resource (DIR)* – The DIR creates a driver profile using MCMIS crash data from the past five years and inspection data from the past three years. This profile shows PII data for the driver regardless of the employing carrier. The DIR also includes driver/vehicle safety violations and inspection data per the PSP description below. Access is restricted to FMCSA staff, FMCSA contractors and Motor Carrier Safety Assistance Program (MCSAP) State lead agencies.

- *Pre-Employment Screening System* (PSP) – 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.

- *Driver Safety Measurement System (DSMS)* – FMCSA utilizes MCMIS data in the DSMS to support the Comprehensive Safety Analysis 2010 (CSA 2010) initiative and its operational model test. The DSMS uses driver/vehicle safety violations and inspection data and crash data to evaluate the safety performance of Commercial Motor Vehicle (CMV) drivers in seven categories. Access is restricted to FMCSA enforcement personnel, FMCSA Headquarters (HQ) staff and MCSAP State lead agencies.

- *Carrier Safety Measurement System (CSMS)* – FMCSA utilizes MCMIS data in the CSMS to support the CSA 2010 initiative and its operational model test. The CSMS uses driver/vehicle safety violations and inspection data and crash data to evaluate the safety of motor carriers. Access is restricted to FMCSA enforcement, Federal and local law enforcement personnel, FMCSA HQ staff, MCSAP State lead agencies and law enforcement agencies that are FMCSA grantees. The objective of CSMS is to provide an assessment of a carrier's regulatory compliance and safety performance.

- *Safety Fitness Electronic Records (SAFER)* – The SAFER Web site receives MCMIS driver/vehicle safety violations and inspection data and census data on a daily basis for report generation. Although SAFER

receives driver-related PII from MCMIS, SAFER reports for the public users and enforcement officers contain no PII. The driver-related PII from MCMIS is included on the Company Safety Profile reports that are requested by commercial motor carriers for their company.

• *Enforcement Management Information System (EMIS)* – The EMIS is a Web-based application https://emis.fmcsa.dot.gov/ used to monitor, track, and store information related to FMCSA enforcement actions. It manages and tracks all enforcement actions associated with notifying the carrier, monitoring the carrier's response, determining whether further compliance action is required, and generating reports for various FMCSA Headquarters, FMCSA Service Center, and FMCSA Division staff. It is the authoritative source for FMCSA enforcement data. EMIS imports census files, investigatory files, driver/vehicle safety violations and inspection data, and crash data from MCMIS for the purpose of automatically initiating UNFIT/UNSATISFACTORY cases within EMIS resulting from Safety Rating letters generated by MCMIS.

• *Analysis & information (A&I) Online* – The A&I is a Web-based tool designed to provide quick and efficient access to descriptive statistics and analyses regarding commercial vehicle, driver, and carrier safety information. It is used by Federal, State and local law enforcement personnel, the motor carrier industry, insurance companies, and the general public. A&I imports census files, investigatory files, driver/vehicle safety violations and inspection data, and crash

data from MCMIS for the purpose of processing a monthly data snapshot of the MCMIS database.

- *ProVu* – ProVu is a viewer that allows Federal and State enforcement personnel and the motor carrier industry to electronically view standard motor carrier safety profile reports available from the FMCSA. ProVu imports driver/vehicle safety violations and inspection data and crash data in a standard report exported from MCMIS for the purpose of generating Company Safety Profile reports.

- *Compliance Analysis and Performance Review Information (CAPRI)* – CAPRI is used by Federal and State enforcement personnel when conducting compliance reviews and safety audits, specialized cargo tank facility reviews, and hazardous material (HM) shipper reviews. CAPRI includes worksheets for collecting census files, investigatory files, driver/vehicle safety violations and inspection data, and crash data from MCMIS to track (1) hours of service, (2) driver qualifications, and (3) drug and alcohol compliance. It also creates the preliminary carrier safety fitness rating and various reports for motor carriers.

- *McQuery* – The MCMIS database is copied into McQuery, creating an exact image of the MCMIS database. The data in McQuery is used for responding to Freedom of Information Act (FOIA) requests and other requests for public information, generating special data requests for FMCSA, and supporting the operations of FMCSA.

• *GOTHAM* – GOTHAM is an internal FMCSA analysis system that utilizes selected extracts of MCMIS data and is only accessible through the DOT/FMCSA Intranet. GOTHAM imports census files, investigatory files, driver/vehicle safety violations and inspection data, and crash data from MCMIS for the purpose of delivering standard reports via the Intranet.

MCMIS SHARES NON-PII WITH THE FOLLOWING FMCSA SYSTEMS OR SYSTEM COMPONENTS:

• *Query Central (QC)* – QC is a secure Web application that provides Federal and State safety enforcement personnel with a single location where they can enter one query and obtain targeted safety data on commercial motor vehicle (CMV) carriers, vehicles, and drivers from multiple sources in FMCSA and Customs and Border Patrol. QC does not maintain a database of its own, but instead pulls data from the authoritative sources in real-time. QC utilizes MCMIS to verify carrier information. However, QC does not import or use privacy-related information on drivers from MCMIS.

• *Licensing and Insurance System (L&I)* – The L&I system is used to enter and display licensing and insurance information regarding authorized for-hire motor carriers, freight forwarders, and property brokers. It is the authoritative source for FMCSA licensing and insurance data. L&I is part of the registration

process. L&I imports information from MCMIS as follows:

– Data about carriers that received unsatisfactory ratings;

– Data about Out-of-Service carriers; and

– USDOT numbers for synchronization with docket numbers.

• *Hazmat Registration (HMReg)* – HMReg exports data from MCMIS to the Pipeline and Hazardous Materials Safety Administration (PHMSA) database server in response to HAZMAT registration data requests.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

49 U.S.C. 502, 504, 506, 508, Chapter 139, 49 CFR 1.73, and Executive Order 9397.

PURPOSE(S):

To provide a central collection point for records on some intrastate motor carriers, interstate motor carriers, and hazardous material shippers in order to facilitate the analysis of the safety-related data required to administer and manage the agency's programs.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF USE:

- Information may be shared with Federal, State, local, and foreign government agencies for the purposes of enforcing motor carrier and Hazardous Materials shipper safety.

- Information may be accessed by Federal contractors involved in the system support and maintenance of MCMIS.

- Information may be shared with State lead agencies and other law enforcement grantees under the FMCSA Motor Carrier Safety Grant Program and Border Enforcement Grant program, which is a Federal grant program that provides financial assistance to States for the reduction in the frequency and severity of CMV crashes and hazardous materials incidents.

- Information may be shared with Federal, State, and local law enforcement programs to safeguard against and respond to the breach of personally identifiable information.

- In addition to those disclosures permitted under 5 U.S.C. 552a(b) of the Privacy Act, additional disclosures may be made in accordance with the DOT Prefatory Statement of General Routine Uses published at 65 FR 19476 (April 11, 2000).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS:

- *Storage* – MCMIS records are stored in an automated system operated and maintained at the Volpe National Transportation Systems Center (Volpe Center) in Cambridge, MA.

- *Retrievability* – Electronic records are retrieved through automated searches on key words or identifying information (*e.g.*, name, Social Security Number, Employer Identification Number, company name, trade name, and geographical location).

- *Accessibility (Including Safeguards)* – MCMIS access is managed by the Volpe Center. This facility has its own approved System Security Plan that requires the system to be maintained in a secure computer room with access restricted to authorized personnel. Access to the building is limited and requires users to provide a valid account name and password. MCMIS contains a usage tracking system for other authorized users. MCMIS requires users to change access control identifiers at periodic intervals.

- FMCSA operates MCMIS in accordance with the E-Government Act (Pub. L. 107-347), the Federal Information Security Management Act (FISMA) of

2002, and other required policies, procedures, practices, and security controls for implementing the Automated Information System Security Program. Only authorized Federal and State government personnel and contractors conducting system support or maintenance may access MCMIS records. Access to records is password protected, and the scope of access for each password is limited to the official need of each individual who is authorized access. The motor carriers have access to their registration information in MCMIS. Additional protection is afforded by the use of password security, data encryption, and a secure network.

- *Retention and Disposal* – The master files are logged and backed up. The master tape is retained in a secure offsite storage facility and then destroyed in accordance with applicable NARA retention schedule NI-557-05-07 item #5.

SYSTEM MANAGER CONTACT INFORMATION:

Heshmat Ansari, Ph.D.; Division Chief, IT Development Division; Office of Information Technology; Federal Motor Carrier Safety Administration; U.S. Department of Transportation; 1200 New Jersey Avenue SE.; W68-330; Washington, DC 20590.

NOTIFICATION PROCEDURE:

Individuals wishing to know if their records appear in this system may make a request in writing to

the System Manager. The request must include the requester's name, mailing address, telephone number and/or e-mail address, a description and the location of the records requested, and verification of identity (such as, a statement under penalty of perjury that the requester is the individual who he or she claims to be).

RECORD ACCESS PROCEDURES:

Individuals seeking to access their information in this system should apply to the System Manager by following the same procedure as indicated under "Notification Procedure."

CONTESTING RECORD PROCEDURES:

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."

RECORD SOURCE CATEGORIES:

Driver information is obtained from roadside driver/vehicle inspections and crash reports submitted by State and local law enforcement agencies and from investigations performed by State and Federal investigators. State officials and FMCSA field offices forward safety information to MCMIS soon after it has been compiled and processed locally.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Pursuant to subsection (k)(2) of the Privacy Act (5 USC 552a), portions of this system are exempt from the requirements of subsections (c)(3), (d), (e)(4)(G)-(I) and (f) of the Act, for the reasons stated in DOT's Privacy Act regulation (49 CFR Part 10, Appendix, Part II, at A.8.

Dated: December 8, 2009.

Habib Azarsina,
Departmental Privacy Officer.

[FR Doc. E9-29770 Filed 12-14-09; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Privacy Act of 1974; System of Records Notice

AGENCY: Federal Motor Carrier Safety Administration (FMCSA) Department of Transportation (DOT).

ACTION: Notice to establish a new system of records.

SUMMARY: FMCSA proposes to establish a system of records under the Privacy Act of 1974 (5 U.S.C. 552a) for its Pre-Employment Screening Program (PSP), as required by 49 U.S.C. 31150. The system of records will make crash and inspection data about commercial motor vehicle (CMV) drivers rapidly available to CMV

drivers (operator-applicants) and prospective employers of those drivers (motor carriers), via a secure Internet site, as an alternative to requiring them to submit a Freedom of Information Act (FOIA) request or Privacy Act request to FMCSA for the data.

Operator-applicants and motor carriers must pay a fee to access data in PSP, but use of PSP is optional. Motor carriers may continue to request the information from FMCSA under FOIA, and operator-applicants may continue to receive their own safety performance data free of charge by submitting a Privacy Act request to FMCSA.

The PSP system will be administered by a FMCSA contractor, National Information Consortium Technologies, LLC (NIC). The PSP contractor will not be authorized to provide data to any persons other than motor carriers, for pre-employment screening purposes, and operator-applicants, as required in section 31150(b)(3). A data request from any other person (e.g., a law firm) will be treated as a FOIA request by FMCSA. FMCSA will perform audits of the PSP contractor to ensure performance, privacy and security objectives are being met. The PSP system will only allow operator-applicants to access their own data, and will only allow motor carriers to access an individual operator-applicant's data if the motor carrier certifies the data is for pre-employment screening and that it has obtained the operator-applicant's written consent. The system of records is more thoroughly detailed below and in the Privacy Impact Assessment (PIA) that can

be found on the DOT Privacy Web site at http://www.dot.gov/privacy.

DATES: Effective April 7, 2010. Written comments should be submitted on or before the effective date. FMCSA may publish an amended SORN in light of any comments received.

ADDRESSES: Send comments to Pam Gosier-Cox, FMCSA Privacy Officer, FMCSA Office of Information Technology, MC – RI, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590 or pam.gosier.cox@dot.gov.

FOR FURTHER INFORMATION CONTACT: For privacy issues please contact: Pam Gosier-Cox, FMCSA Privacy Officer, FMCSA Office of Information Technology, MC-RI, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590 or pam.gosier.cox@dot.gov.

SUPPLEMENTARY INFORMATION:

I. The PSP Program

Section 31150 of title 49, U.S. Code (USC), titled "Safety performance history screening" as added by section 4117(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA – LU), Public Law 109-59, 119 Stat. 1144, 1728-1729, August 10, 2005, requires FMCSA to provide persons conducting pre-employment screening services for the motor carrier industry electronic with access to the following reports contained in FMCSA's

Motor Carrier Management Information System (MCMIS):

(1) Commercial motor vehicle accident reports.

(2) Inspection reports that contain no driver-related safety violations.

(3) Serious driver-related safety violation inspection reports.

FMCSA designed PSP to satisfy the requirements of 49 U.S.C. 31150 and to meet the following performance, privacy and security objectives:

- Provide driver-related MCMIS crash and inspection data electronically, via a secure Internet site, for a fee, and in a timely and professional manner;

- Allow operator-applicants to access their own data upon written or electronic request, and allow motor carriers to access an operator-applicant's data, for pre-employment screening purposes, with the operator-applicant's written or electronic consent;

- Maintain, handle, store, and distribute the data in PSP in accordance with 49 U.S.C. 31150 and applicable laws, regulations and policies; and

- Provide a redress procedure by which an operator-applicant can seek to correct inaccurate information in PSP, via the DataQs system currently maintained by FMCSA.

II. The Privacy Act

The Privacy Act (5 USC 552a) governs the means by which the United States Government collects, maintains, and uses personally identifiable information (PII) in a system of records. A "system of records" is a group of any records under the control of a Federal agency from which information about individuals is retrieved by name or other personal identifier.

The Privacy Act requires each agency to publish in the **Federal Register** a system of records notice (SORN) identifying and describing each system of records the agency maintains, including the purposes for which the agency uses PII in the system, the routine uses for which the agency discloses such information outside the agency, and how individuals to whom a Privacy Act record pertains can exercise their rights under the Privacy Act (*e.g.*, to determine if the system contains information about them).

IV. Privacy Impact Assessment

FMCSA is publishing a Privacy Impact Assessment (PIA) to coincide with the publication of this SORN. In accordance with 5 USC 552a(r), a report on the establishment of this system of records has been sent to Congress and to the Office of Management and Budget.

System Number:

DOT/FMCSA 007

SYSTEM NAME:

Pre-Employment Screening Program (PSP).

SECURITY CLASSIFICATION:

Unclassified, Sensitive.

SYSTEM LOCATION:

- NIC Primary Data Center

AT&T Data Center, Ashburn, VA 20147.

- NIC Secondary Data Center

AT&T Data Center, Allen, TX 75013.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM OF RECORDS:

PSP will include personally identifiable information (PII) pertaining to CMV, as defined by 49 CFR 390.5, drivers (referred to herein as operator-applicants).

CATEGORIES OF RECORDS IN PSP:

PSP will contain the following categories of records, in separate databases:

1. *CMV crash and inspection records.* Each month, FMCSA will provide the PSP contractor with a current MCMIS data extract containing the most recent five (5) years' crash data and the most recent three (3) years' inspection information. The MCMIS

data extract in PSP will include the following PII data elements, all of which will be encrypted:

- CMV driver name (last, first, middle initial)
- CMV driver date of birth
- CMV driver license number
- CMV driver license state

2. *Financial transaction records.* The PSP system will contain records of payments processed by the contractor, NIC, to collect fees charged to motor carriers and operator-applicants for accessing crash and inspection data in PSP. The financial transaction records will include the following PII data elements, which will be encrypted (and, in some cases, truncated):

- Credit card holder name
- Credit card account number
- Account holder address

Card Verification Value Code (CVV) numbers will be temporarily captured by the system but will not be retained or stored in PSP.

3. *Access transaction records.* The PSP system will contain records of all access transactions processed over the PSP Web site. Access transaction records will include the following PII data elements, which will be encrypted:

- CMV driver name (last, first, middle initial)

- CMV driver date of birth
- CMV driver license number
- CMV driver license State
- CMV driver address.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

49 U.S.C. 31150, as added by section 4117 of Public Law 109-59 [Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA – LU)].

PURPOSE(S):

Authorized DOT/FMSCA staff and contractor personnel will use the following PII in PSP for the following purposes:

- To provide system support and maintenance for PSP.
- To make CMV crash and inspection records available to operator-applicants and motor carriers upon receipt of validated access requests and fee payments.
- To process credit card payments and collect fees for the requested access transactions.
- To create a historical record of PSP usage for accounting and compliance audit purposes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF USE:

The PSP system will share PII outside DOT as follows:

- Authorized motor carriers may access an individual's operator-applicant's crash and inspection data in PSP with the operator-applicant's written consent and payment of a fee.

- Validated operator-applicants may access their own crash and inspection data in PSP upon written request and payment of a fee.

- When an operator-applicant makes a request for his or her own data from PSP, the FMCSA contractor will request that the operator-applicant provide his or her full name, date of birth, driver license number, driver license state and current address to verify the identity of the operator-applicant and this information will be transmitted to the Validation Authority of the FMCSA contractor (e.g. Lexis-Nexis) to verify and validate the individual operator-applicant requesting access to his or her own inspection and crash data.

- Other possible routine uses of the information, applicable to all DOT Privacy Act systems of records, are published in the **Federal Register** at 65 FR 19476 (April 11, 2000), under "Prefatory Statement of General Routine Uses" (available at http://www.dot.gov/privacy/privacyactnoties/).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS:

STORAGE:

Records will be stored in secure database servers, and data will be backed up on a Storage Area Network (SAN) in encrypted/truncated form. Any paper records received or required for purposes of processing data requests will be stored in secure file folders at NIC's Primary Data Center.

RETRIEVABILITY:

CMV crash and inspection records in the PSP database will be retrieved by using the operator-applicant's last name, license number, and license state. Additional operator-applicant information (e.g., date of birth, first name, and middle initial) will be used to confirm the accuracy of the search.

ACCESSIBILITY (INCLUDING SAFEGUARDS):

All records in PSP will be protected from unauthorized access through appropriate administrative, physical and technical safeguards. Electronic files will be stored in a database secured by password security,

encryption, firewalls, and secured operating systems, to which only authorized NIC or DOT/FMCSA personnel will have access, on a need-to-know basis. Paper files will be stored in file cabinets in a locked file room to which only authorized NIC and DOT/FMCSA personnel will have access, on a need-to-know basis. All access to the electronic system and paper files will be logged and monitored. NIC will be subject to routine audits of the PSP program by FMCSA to ensure compliance with the Privacy Act, applicable sections of the Fair Credit Reporting Act and other applicable Federal laws, regulations, or other requirements.

Access by external users (operator-applicants and motor carriers) will be restricted within the system based upon the user's role as an authorized motor carrier or validated operator-applicant. An authorized motor carrier and validated operator-applicant is an entity or person who has been provided a unique user identification and password by NIC and must use the unique identification and password to access data in PSP. External users will be able to query the CMV crash and inspection database only (the financial transaction database and access request database cannot be externally queried). NIC will provide users with an advisory statement that authorized motor carriers could be subject to criminal penalties and other sanctions under 18 U.S.C. 1001 for misuse of the PSP system.

In order for a motor carrier to receive an individual operator-applicant's crash and inspection data, the motor carrier must certify, for each request, under penalty of perjury, that the request is for pre-employment

purposes only and that written consent of the operator-applicant has been obtained. Upon completion of certification, the NIC will send a notification to the motor carrier that the individual operator-applicant data is available on secure Web site. The motor carrier will access this individual's information by entering a unique identification and password. Motor carriers will be required to maintain each operator-applicant's signed, written consent form for five (5) years. Motor carriers are subject to random audits from NIC and/or FMCSA to ensure that written consent of operator-applicants was obtained.

The PSP system also allows validated operator-applicants to access their own crash and inspection data upon written or electronic request. Upon receipt of an operator-applicant's request, NIC will validate the identity of the requestor (operator-applicant) by using his or her full name, date of birth, driver license number, driver license state and current address against a validation authority.

All PII data elements will be encrypted in the PSP system, as more fully described under the heading "Categories of Records in PSP."

RETENTION AND DISPOSAL:

1. *CMV crash and inspection records:* Pursuant to General Records Schedule (GRS) 20 ("Electronic Records," February 2008, see http://www.archives.gov/records-mgmt/ardor/grs20.html), governing extract files,

each monthly MCMIS extract in PSP is deleted approximately three (3) months after being superseded by a current MCMIS extract, unless needed longer for administrative, legal, audit or other operational purposes.

2. *Financial transaction records:* Credit card information is encrypted/truncated and retained for 30 days.

3. *Access transaction records:* PSP transaction records are retained for a period of five years.

SYSTEM MANAGER CONTACT INFORMATION:

PSP System Manager: Arlene D. Thompson; Office of Information Technology; Federal Motor Carrier Safety Administration; U.S. Department of Transportation; 1200 New Jersey Avenue, SE., W65-319; Washington, DC 20590.

MCMIS System Manager: Heshmat Ansari, PhD; Division Chief, IT Development Division; Office of Information Technology; Federal Motor Carrier Safety Administration; U.S. Department of Transportation; 1200 New Jersey Avenue, SE., W68-330; Washington, DC 20590.

Freedom of Information Act (FOIA) Office: Federal Motor Carrier Safety Administration Attn: FOIA Team MC-MMI; DIR Officer, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Notification Procedure: Individual operator-applicants wishing to know if their inspection and crash records appear in this system may directly access the PSP system or make a request in writing to the PSP System Manager identified under "System Manager Contact Information." Individual operator-applicants wishing to know if their transaction records and credit card information appear in this system may make a written request to the following address:

NIC Technologies, Inc., 1477 Chain Bridge Road, Suite 101, McLean, VA 22101.

RECORD ACCESS PROCEDURES:

Individual operator-applicants seeking access to information about them in this system may directly access the PSP system or apply to the PSP System Manager or the FMCSA FOIA Office identified under "System Manager Contact Information."

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest the content of information about them in this system should apply to the System Manager for either PSP or MCMIS by following the same procedures as indicated under "Notification Procedure." Individuals may also submit a data challenge to DataQs by logging into the DataQs Web site (https://dataqs.fmcsa.dot.gov/login.asp).

RECORD SOURCE CATEGORIES:

1. *CMV crash and inspection records:* All commercial driver crash and inspection data in PSP is received from a monthly MCMIS data extract. The MCMIS SORN identifies the source(s) of the information in MCMIS.

2. *Financial transaction records:* Credit card information pertaining to an individual card holder (i.e., operator-applicant) is obtained directly from the card holder, who is responsible for entering it accurately on the PSP Web site.

3. *Access transaction records:* An audit trail of those entities or persons that accessed the PSP (i.e. authorized motor carriers or validated operator-applicants) is automatically created when requests are initiated and when data is released by NIC.

These records are internal documents to be used by NIC and FMCSA for auditing, monitoring and compliance purposes.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: March 2, 2010.

Habib Azarsina,
Departmental Privacy Officer, 202-366-1965.

[FR Doc. 2010-4811 Filed 3-5-10; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2012-0243]

Privacy Act of 1974; Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA) 007 Pre-Employment Screening Program

AGENCY: Federal Motor Carrier Safety Administration (FMCSA) Department of Transportation (DOT).

ACTION: Notice to amend a system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Transportation proposes to update and reissue a Department of Transportation system of records notice titled Department of Transportation/Federal Motor Carrier Safety Administration-007 Pre-Employment Screening Program. The updated system of records consists of information that is created and used by the Department's Pre-Employment Screening program to provide commercial drivers and persons conducting pre-employment screening services for the motor carrier industry electronic access to driver history reports extracted from the Department's Motor Carrier Management Information System (MCMIS).

As a result of biennial review of this system, the Privacy Office has made the five major modifications

to the systems of records. The category of records identified as "Financial Transaction Records" in the previously published System of Records Notice for this system has been removed as the Department does not maintain these records. The "Access Transaction Records" record category also has been revised to clarify the types of information maintained about the two categories of users permitted to request access to records for the purposes of pre-employment screening. The routine uses have been updated to clarify disclosure of Pre-Employment Screening Program (PSP) records to industry service providers directly involved in the hiring of commercial motor vehicle (CMV) drivers on behalf of motor carriers and/or CMV drivers and the routine use concerning the sharing of CMV driver access transaction records with Validation Authorities (e.g. Lexis-Nexis). The system owner information has been modified to omit the contact information for the MCMIS and Freedom of Information Act systems of records and, instead, include only contact information for the PSP system of records. Additionally, this Notice includes non-substantive changes to simplify the formatting and text of the previously published Notice. This updated system will be included in the Department of Transportation's inventory of record systems.

DATES: *Effective* August 21, 2012. Written comments should be submitted on or before the effective date. If no comments are received, the proposal will become effective on the above date. If comments are received, the comments will be considered and, where adopted, the documents will be republished with changes.

ADDRESSES: You may submit comments, identified by Docket No. FMCSA-20120243 by one of the following methods:

■ *Federal e-Rulemaking Portal:* http://www.regulations.gov. Follow the instructions for submitting comments.

■ *Mail:* Department of Transportation Docket Management, Room W12-140, 1200 New Jersey Ave. SE. Washington, DC 20590.

■ *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to www.regulations.gov, including any personal information provided.

■ *Docket:* For access to the docket to read background documents or comments received go to www.regulations.gov. Follow the online instructions for accessing the docket.

■ *Fax:* 202-493-2251. *Instructions:* You must include the agency name and Docket Number FMCSA-2012-0243. All comments received will be posted without change to http://www.regulations.gov, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act notice in the **Federal Register**

published on January 17, 2008 (73 FR 3316-3317), or you may visit www.dot.gov/privacy.

Docket: For access to the docket to read background documents or comments received, go to http://www.regulations.gov or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Arlene Thompson, (202) 366-2094, Arlene.Thompson@dot.gov. For privacy issues please contact: Claire W. Barrett, Departmental Chief Privacy Officer, Privacy Office, Department of Transportation, Washington, DC 20590; privacy@dot.gov; or (202) 527-3284.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, the Department of Transportation (DOT)/Federal Motor Carrier Administration (FMCSA or Administration) proposes to update and reissue a current DOT system of records notice titled, "Department of Transportation/Federal Motor Carrier Safety Administration-007 Pre-Employment Screening Program." The FMCSA's primary mission is to prevent commercial motor vehicle-related fatalities and injuries. The FMCSA contributes to safe motor carrier operations through strong enforcement of safety regulations; targeting high-risk carriers and commercial motor vehicle drivers; improving safety information systems and commercial motor vehicle technologies; strengthening commercial motor vehicle equipment

and operating standards; and increasing safety awareness. To accomplish these activities, the FMCSA works with Federal, State, and local enforcement agencies, the motor carrier industry, labor safety interest groups, and others.

This system of records is used to satisfy requirements mandated by Congress in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 49 U.S.C. 31150, Public Law 109-59, Section 4117. FMCSA believes that making this driver data available to potential employers and operator-applicants will improve the quality of safety data and help employers make more informed decisions when hiring commercial drivers. The PSP is a screening tool that allows motor carriers and individual drivers to purchase driving records from the FMCSA MCMIS system. A record purchased through PSP contains the most recent five years of crash data and the most recent three years of roadside inspection data, including serious safety violations for an individual driver. The record displays a snapshot in time, based on the most recent MCMIS data extract loaded into the PSP system.

This SORN makes four primary changes to the existing system of records. It removes an existing category of records, clarifies the information maintained in the "Access Transaction Records," adds a new routine use, and clarifies an existing routine use. The category of records has been revised to exclude the category of "Financial Transaction Records" as this information is maintained exclusively by DOT's PSP Service Provider

and these records are not considered federal records under the stewardship of the DOT. The "Access Transaction Records" record category was revised to clarify that information is maintained on the two categories of users permitted to request access to records for the purposes of pre-employment screening. In addition to transactions initiated by motor carriers, the record will include information on transactions initiated by industry service providers as authorized by the routine use added as part of this system of records notice. The category of records more clearly states the information maintained on requests initiated by operator-applicant requesting his or her own PSP record. This information establishes a record of account access to ensure that operator-applicants only access their own information. These changes have been made to more clearly reflect existing FMCSA processes and do not introduce changes in actual operations.

The routine uses have been updated to permit disclosure of PSP records to industry service providers directly involved in the hiring of commercial motor vehicle (CMV) drivers on behalf of motor carriers and/or CMV drivers. This change reflects motor carrier business models which may include the use of industry service providers to directly hire commercial motor vehicle drivers on behalf of motor carriers. Additionally, the routine use concerning the sharing of CMV driver Access Transaction Records with Validation Authorities (e.g. Lexis-Nexis) was clarified by removing information incorrectly included in the routine use that

should be discussed in the Notice's categories of information.

The system owner information has been modified to include only contact information for the PSP system of records and no longer included information for the MCMIS and Freedom of Information Act (FOIA) systems, which are separate and distinct system of records. The complete system of records notices for these systems may be found at www.dot.gov/privacy.

FMCSA plans to introduce PSP Mobile iOS Application as an alternative means of providing information available through the PSP Web site to the authorized users. FMCSA does not require individuals to register or provide any PII as a condition of downloading PSP iOS application. Individuals downloading the PSP iOS application must fulfill Apple's registration requirements prior to downloading the application. Apple does not provide FMCSA any PII of individuals who download the PSP iOS application from its site. Requesters seeking information on CMV drivers through the PSP iOS mobile application can only access PSP records using the same authorization process and data elements described in this System of Records Notice.

This updated system will be included in DOT's inventory of record systems.

SYSTEM NUMBER:

DOT/FMCSA 007.

SYSTEM NAME:

Department of Transportation Federal Motor Carrier Safety Administration Pre-Employment Screening Program.

SECURITY CLASSIFICATION:

Unclassified, Sensitive.

SYSTEM LOCATION:

Records are maintained at the DOT Service Provider sites managed by AT&T in Ashburn, VA and Allen, TX.

CATETORIES OF INDIVIDUALS COVERED BY THE SYSTEM OF RECORDS:

PSP records will include personally identifiable information (PII) pertaining to Commercial Motor Vehicle (CMV) drivers, as defined by 49 CFR 390.5,

(referred to in this system of records notice as operator-applicants). PSP will also include access transaction records. For CMV drivers, this will include personal information submitted by the CMV driver to access his or her personal PSP record. For motor carriers or authorized industry service provider, Access Transaction Records will include the unique username and password submitted by the user to access the PSP system

and the CMV driver information submitted by the motor carrier or authorized industry service provider to retrieve a PSP record.

CATEGORIES OF RECORDS:

Categories of records in this system include:

CMV crash and inspection records. Data extract from the FMCSA Motor Carrier Management Information System (MCMIS) containing the most recent five years' crash data and the most recent three years' inspection information for operator-applicants including:

- CMV driver name (last, first)
- CMV driver date of birth
- CMV driver license number
- CMV driver license State

Access transaction records. In the case of a motor carrier or industry service provider accessing a CMV driver's PSP record, transaction records include information about the subject of the electronic record request including:

- CMV driver name (last, first, middle initial)
- CMV driver date of birth
- CMV driver license number
- CMV driver license State

Access Transaction Records also include information about the motor carrier or industry service provider accessing the record including:

- User unique system username
- User unique system password

In the case of an operator-applicant requesting his or her own PSP record, the Access Transaction Record will include:

- CMV driver name (last, first, middle initial)
- CMV driver date of birth
- CMV driver license number
- CMV driver license State
- CMV driver address.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

49 U.S.C. 31150, as added by section 4117 of Public Law 109-59 [Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA – LU)].

PURPOSE(S):

The purpose of this system is to make CMV crash and inspection records available to authorized operator-applicants, authorized industry service providers, and authorized motor carriers. Records maintained in

the system will also support operational management of the PSP program.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PRUPOSES OF USE:

In addition to those disclosures generally permitted under Section (b) of the Privacy Act, 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system may be disclosed outside of DOT as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To authorized industry service providers and motor carriers as part of the operator-applicant's PSP record; authorized industry service providers and motor carriers may use PSP records only for purposes of pre-employment safety screening of operator-applicants and must have the operator-applicant's consent to access the PSP record;

2. To the DOT Validation Authority (e.g., LexisNexis) to verify and validate the presented identity of the individual operator-applicant requesting access to his or her own inspection and crash data.

3. Other possible routine uses of the information, applicable to all DOT Privacy Act systems of records, are published in the **Federal Register** at 75 FR 82132, December 29, 2010, under "Prefatory Statement of General Routine Uses" (available at http://www.dot.gov/privacy/privacyactnotices).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities. Electronic records may be stored on magnetic disc, tape, digital media, and CD – ROM. Any paper records received or required for purposes of processing data requests will be stored in secure file folders at the DOT Service Provider's secure storage facility.

RETRIEVABILITY:

Records will be retrieved by using the operator-applicant's last name, date of birth, license number, and license State.

SAFEGUARDS:

All records in the system will be protected from unauthorized access through appropriate administrative, physical, and technical safeguards. Electronic files will be stored in a database secured by password security, encryption, firewalls, and secured operating systems, to which only authorized Service Provider or

DOT/FMCSA personnel will have access, on a need-to-know basis. Paper files will be stored in file cabinets in a locked file room to which only the authorized Service Provider and DOT/FMCSA personnel will have access, on a need-to-know basis. All access to the electronic system and paper files will be logged and monitored. All PII data elements will be encrypted in the PSP system.

The Service Provider will be subject to routine audits of the PSP program by FMCSA to ensure compliance with the Privacy Act, applicable sections of the Fair Credit Reporting Act and other applicable Federal laws, regulations, or other requirements.

Access by external users (operator-applicants, authorized industry service providers and motor carriers) will be restricted within the system based upon the user's role as an authorized industry service provider, motor carrier, or validated operator-applicant. An authorized industry service provider or motor carrier is an entity or person who has been provided a unique user identification and password and must use the unique identification and password to access data in PSP. External users will be able to query the CMV crash and inspection database only. The Service Provider will provide users with an advisory statement that authorized industry service providers and motor carriers could be subject to criminal penalties and other sanctions under 18 U.S.C. 1001 for misuse of the PSP system.

In order for an authorized industry service provider or motor carrier to receive an individual operator-applicant's crash and inspection data, the authorized industry service provider or motor carrier must certify, for each request, under penalty of perjury, that the request is for pre-employment purposes only and that written or electronic consent of the operator-applicant has been obtained. Upon completion of certification, the Service Provider will provide the individual operator-applicant data to the industry service provider or motor carrier via the secure PSP Web site. The authorized industry service provider or motor carrier will access this individual's information by entering a unique identification username and password. Authorized industry service providers or motor carriers will be required to maintain each operator-applicant's signed, written consent form or electronic signature for five years. Authorized industry service providers or motor carriers are subject to random audits by DOT to ensure that written or electronic consent of operator-applicants was obtained.

The PSP system also allows validated operator-applicants to access their own crash and inspection data upon written or electronic request. Upon receipt of an operator-applicant's request, the Service Provider will validate the identity of the requestor (operator-applicant) by using his or her full name, date of birth, driver license number, driver license State and current address against a validation authority.

The contractor and FMCSA have established an ongoing, random-selection audit process to monitor

compliance with the written consent obligation. The audit requirements and penalties process is incorporated by reference as part of the contract between FMCSA and the contractor. The purpose of the audit requirements and penalties process is to ensure that the account holder obtains a driver-signed consent form prior to completing a PSP driver record inquiry in accordance with the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, and 49 U.S.C. 31150. The contractor will penalize an account holder, who fails to comply with the audit requirements. Based on the nature and frequency of these violations, the contractor may send a written warning, suspend, or terminate the account holder from the PSP.

Individuals who access the PSP system via the iOS application are subject to the privacy policy integrated in the application.

RETENTION AND DISPOSAL:

1. CMV crash and inspection records: Pursuant to General Records Schedule (GRS) 20 ("Electronic Records," February 2008, see http://www.archives.gov/records-mgmt/ardor/grs20.html), governing extract files, each monthly MCMIS extract in PSP is deleted approximately three months after being superseded by a current MCMIS extract, unless needed longer for administrative, legal, audit or other operational purposes.

2. Access Transaction Records: Pursuant to GRS 24, "Information Technology Operations and Management Records," Item 6, April 2010, see http://www.archives.gov/records-mgmt/grs/grs24.html) Access Transaction Records are retained for a period of five years.

SYSTEM MANAGER CONTACT INFORMATION:

PSP System Manager: Office of Information Technology; Federal Motor Carrier Safety Administration; U.S. Department of Transportation; 1200 New Jersey Avenue SE., W65-319; Washington, DC 20590.

NOTIFICATION PROCEDURE:

Operator-applicants wishing to know if their inspection and crash records appear in this system may directly access the PSP system or make a request in writing to the PSP System Manager identified under "System Manager Contact Information."

Individual operator-applicants wishing to know if their Access Transaction Records appear in this system may make a written request to the following address: NIC Technologies, 4601 N. Fairfax Drive, Suite 1160, Arlington, VA 22203.

Any other requests for records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 49 CFR part 10. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a

law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Freedom of Information Act Officer, http://www.dot.gov/foia or 202.366.4542. In addition you should provide the following:

An explanation of why you believe the Department would have information on you;

- Identify which component(s) of the Department you believe may have the information about you;

- Specify when you believe the records would have been created;

- Provide any other information that will help the FOIA staff determine which DOT component agency may have responsive records; and

- If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See "Notification Procedure" above.

CONTESTING RECORDS PROCEDURE:

Operator-applicants seeking to contest the content of information about them in this system should apply to the System Manager by following the same procedures as indicated under "Notification Procedure." Operator-applicants may also submit a data challenge to FMCSA's online system to record and monitor challenges to FMCSA data, DataQs. The system can be accessed via the DataQs Web site *(*https://dataqs.fmcsa.dot.gov/login.asp*)*. The DataQs system, provides an electronic means for operator-applicants to file concerns about Federal and State data contained in the PSP report. Specifically, DataQs allows an individual to challenge data maintained by FMCSA on, among other things, crashes, inspections, registration, operating authority, safety audits and enforcement actions. Through this system, data concerns are automatically forwarded to the appropriate Federal or State office for processing and resolution. Any challenges to data provided by State agencies must be resolved by the appropriate State agency. Additionally, FMCSA is not authorized to direct a State to change or alter MCMIS data for violations or inspections originating within a particular State(s). Once a State office makes a determination on the validity of a challenge, FMCSA considers that decision as the final resolution of the challenge. FMCSA cannot change State records without State consent. The system also allows filers to monitor the status of each filing.

RECORD SOURCE CATEGORIES:

1. CMV crash and inspection records: All commercial driver crash and inspection data in PSP is received from a monthly MCMIS data extract. The MCMIS SORN identifies the source(s) 01 the information in MCMIS. (FMCSA modified the MCMIS SORN to describe the system's sharing of PII with the Driver Information Resource and PSP systems. See 74 FR 66391, December 15 2009). All DOT SORNs may be found at www.dot.gov/privacy.

2. Access transaction records: An audit trail of those entities or persons that accessed the PSP (i.e. authorized motor carriers, authorized industry service providers, or validated operator-applicants) is automatically created when requests are initiated and when data is released by the Service Provider. These records are internal documents to be used by the Service Provider and FMCSA for auditing, monitoring and compliance purposes.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Issued in Washington, DC on July 13, 2012

Claire W. Barrett,
Departmental Privacy Officer.

[FR Doc. 2012-17597 Filed 7-18-12; 8:45 am]

BILLING CODE 4910-EX-P

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETS

Thomas O. Flock Twin Valley Transport LLC 42991 Spring Greek Road Nebo, IL 62355 Dennis K. Thompson 62 Brannon Montgomery Road Mauk, GA 31058 Thomas H. Gooden 10720 Kim Lane Hudson, FL 34669-2530 C. Douglas Heisler 287 Riverview Road Peach Bottom, PA 17563-9717 Walter A. Johnson 153 Garden Street Lawrence, MA 01840-1608 Gayla S. Kyle P.O. Box 914 Ogden, KS 66517-0914 Plaintiffs, vs. United States Department of Transportation 1200 New Jersey Ave., S.E. Washington, D.C. 20590	Civil Action No. **CLASS ACTION COMPLAINT FOR DAMAGES**

Federal Motor Carrier Safety Administration
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

The United States of America
c/o The Attorney General of the United States
950 Pennsylvania Avenue N.W.
Washington, DC 20503

Defendants.

NATURE OF THE CASE

1. The Federal Motor Carrier Safety Administration ("FMCSA") operates and maintains a database that contains information relating to the safety records of commercial truck drivers and motor carriers. This database is known as the Motor Carrier Management Information System or "MCMIS." MCMIS is a comprehensive record of safety performance and contains crash, census, inspection, compliance review and enforcement information.

2. By statute FMCSA is authorized to disseminate a subset of the driver inspection records maintained in the MCMIS database to potential employers of commercial truck drivers. The program is known as the Pre-Employment Screening Program or "PSP." As relevant here, that subset is limited to accident reports and reports of serious driver-related safety violations. 49 U.S.C. § 31150(a). The Secretary of Transportation is required to determine which violations of applicable

safety standards are serious driver-related violations. 49 U.S.C. § 31150(d).

3. FMCSA has intentionally or willfully disseminated inspection reports covering Plaintiff Drivers and others similarly situated that contain references to alleged safety violations not determined by the Secretary to be serious driver-related safety violations.

4. Under the PSP program, the safety records of Plaintiff Drivers and others similarly situated have been improperly disparaged. The economic value of services provided by Plaintiff Drivers, and other similarly situated, as commercial motor vehicle operators has been diminished by the actions of FMCSA in unlawfully disseminating driver inspection records not authorized for dissemination under the PSP. Plaintiff Drivers and other similarly situated have been adversely affected and have sustained actual damages within the meaning of the Privacy Act. They are entitled to actual damages, statutory damages, attorney fees and costs of suit pursuant to 5 U.S.C. §§ 552a(g)(1)(D) and 552a(g)(4).

JURISDICTION AND VENUE

5. This court has jurisdiction pursuant to 5 U.S.C. § 552a(g)(1)(D) (the Privacy Act), and 28 U.S.C. § 1331 (Federal Question Jurisdiction).

6. Venue is proper in this Court pursuant to 5 U.S.C. § 552a(g)(5) because the agency records at issue here are situated at the Volpe National Transportation

Systems Center, U.S. Department of Transportation, 55 Broadway, Cambridge, MA 02142, a location within this judicial district.

PARTIES

7. Plaintiffs Thomas O. Flock, Dennis K. Thompson, Thomas H. Gooden, C. Douglas Heisler, Walter A. Johnson, and Gayla S. Kyle, are professional commercial vehicle operators whose driving activities have been the subject of reports unlawfully released for dissemination by Defendant FMCSA under its Pre-Employment Screening Program ("PSP"), 49 U.S.C. § 31150(a)-(d) within a two-year period immediately prior to the filing of this complaint. Plaintiffs will be referred to herein collectively as "Plaintiff Drivers."

8. Defendant, United States Department of Transportation ("DOT") is a department within the executive branch of the federal government, having responsibility for enforcing various federal transportation laws and regulations. Defendant, Federal Motor Carrier Safety Administration ("FMCSA") is a federal agency within the United States Department of Transportation. DOT and FMCSA are agencies within the meaning of 5 U.S.C. §§ 552a(a)(1) and 552(f)(1).

9. Defendant, United States of America, is a sovereign power that has, by Act of Congress, assumed liability to individuals for damages, costs and reasonable attorney fees in any suit brought under 5 U.S.C. § 552(a)(g)(1)(C) or (D) where a court determines that

an agency of the United States has acted in a manner that was intentional or willful. 5 U.S.C. § 552a(g)(4).

STATUTORY BACKGROUND

10. 49 U.S.C. § 31150(a)(1)-(3) authorizes the Secretary of Transportation ("the Secretary") to provide access to a limited subset of inspection records maintained in the MCMIS database to persons conducting pre-employment screening services for motor carriers under FMCSA's Pre-Employment Screening Program. This authorization limits access under the PSP program to: (1) commercial vehicle accident reports; (2) inspection reports that contain no driver-related safety violations; and (3) serious driver-related safety violation reports.

11. 49 U.S.C. § 31150(b)(1) requires Defendant to ensure that the release of information under the PSP program be in accordance with various federal statutes related to privacy including the Privacy Act, 5 U.S.C. § 552a.

12. 49 U.S.C. § 31150(c) provides that the process for granting access to MCMIS driver records under Section 31150(a) "shall be designed to assist the motor carrier industry in assessing an individual operator's crash and *serious safety violation inspection* history as a pre-employment condition." (Emphasis added)

13. The statute defines "serious driver-related violation" to mean " . . . 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." 49 U.S.C. § 31150(d).

14. The only driver-related violations for which the Secretary, or his delegate, has authorized enforcement officials to prohibit the continued operation of a commercial motor vehicle until the violation is corrected are for the use of alcohol under 49 C.F.R. §392.5(c) and for specific violations of the Hours of Service rules under 49 C.F.R. §395.13. Prohibiting continued operation of a commercial motor vehicle is known as an out-of-service order.

15. Under The Privacy Act, an agency that maintains a system of records may disseminate from its records "only such information about an individual as is relevant and necessary to accomplish a purpose of that agency required to be accomplished by Statute or Executive order of the President." 5 U.S.C. § 552a(e)(1).

16. Except as may be disclosed in commercial vehicle accident reports, Congress has provided no authority under 49 U.S.C. § 31150(a) for FMCSA to disseminate under the PSP program inspection reports dealing with violations that the Secretary has not determined to be "serious driver-related inspection reports" within the meaning of 49 U.S.C. § 31150(d). Dissemination of such records is neither relevant nor necessary to accomplish the specifically defined purpose of the PSP program (set forth in 49 U.S.C. § 31150(c)) within the meaning of 5 U.S.C. § 552a(e)(1) and (6).

17. Numerous PSP reports generated by Defendants, including, but not limited to, PSP reports covering Plaintiff Drivers, identify violations that do not constitute a serious driver-related safety violation within the meaning of 49 U.S.C. §§ 31150(a), (c) and (d).

18. The dissemination of PSP reports containing alleged violations of law not determined by the Secretary to be "serious-driver related violations" under circumstances where motor carriers are entitled only to receive "serious driver-related safety violation inspection reports" diminishes the economic value of services offered by Plaintiff Drivers and others similarly situated as well as the employment opportunities available to such drivers. Plaintiff Drivers and others similarly situated have been adversely affected by Defendants' unlawful implementation of the PSP program.

DEFENDANT HAS NOT PROMULGATED AN ADMINISTRATIVE REMEDY APPLICABLE TO PLAINTIFF DRIVERS' CLAIMS

19. Defendant FMCSA has by regulation established an administrative remedy available to address claims by individuals that he or she has either been improperly denied access to his or her records pursuant to 5 U.S.C. § 552a(d)(1) or improperly denied a request to amend records pursuant to 5 U.S.C. § 552a(d)(2)-(4). The administrative remedy established by the Defendant FMCSA is found at 49 C.F.R. § 10.51.

20. Plaintiff Drivers raise no claims in this proceeding with respect to their rights under 5 U.S.C.

§ 552a(d)(1) or (d)(2)-(4). The administrative remedy established under 49 C.F.R. § 10.51 has no applicability here.

21. Plaintiffs' claims in this proceeding arise under 5 U.S.C. §§ 552a(g)(1)(D) and 5 U.S.C. § 552a(e)(1) and (6).

22. Defendant FMCSA has created no administrative remedy applicable to the claims asserted by Plaintiff Drivers in this proceeding. There are no administrative remedies to exhaust prior to an adjudication of Plaintiffs Drivers' claims by this Court.

ALLEGATIONS WITH RESPECT TO INDIVIDUAL PLAINTIFF DRIVERS

23. Plaintiff Thomas O. Flock is a resident of the State of Illinois and has been issued Commercial Drivers License Number W113040001.

A. Defendant FMCSA has prepared and made available for dissemination to potential employers of Plaintiff Flock one or more PSP reports that include references to the following alleged driver-related violations:

PSP Report Date	Driver Name	Driver Violation	Description of Violation
3/19/2014	Flock, Thomas	392.2W	Excessive Weight violation
		392.2-SLLS2	State/Local Laws – Speeding 6-10 miles

			per hour over the speed limit
		392.2RG	State vehicle registration or License Plate violation
		392.2-SLLS2	State/Local Laws – Speeding 6-10 miles per hour over the speed limit
		392.16	Failing to use seat belt while operating CMV
		392.2-SLLEWA1	State/Local Laws – Excessive weight – 1-2500 lbs over on an axle/axle groups
		392.2-SLLEWG1	State/Local Laws – Excessive weight – 1-2500 lbs over on allowable gross weight

B. The Secretary of Transportation has not made a determination that the violations identified above in Mr. Flock's PSP report are "serious driver-related violations" under 49 U.S.C. § 31150(d).

C. The Secretary of Transportation has not authorized or required enforcement officials to prohibit drivers from continuing to operate a commercial motor vehicle until the violations identified above in Mr. Flock's PSP report have been corrected.

D. FMCSA has disparaged Plaintiff Flock's qualifications for employment as a commercial motor vehicle driver in a manner not authorized by law. FMCSA's action was designed to compromise or impair and has compromised or impaired Flock's ability to secure gainful employment with good wages and benefits within the trucking industry.

E. Disparagement of Plaintiff Flock's qualifications as a commercial motor vehicle operator has had a negative economic or pecuniary impact on his ability to earn a living as a commercial motor vehicle.

F. The only avenue available to Plaintiff Flock to acquire current and accurate information with respect to FMCSA's unlawful conduct is to purchase a copy of his PSP report from Defendant. Plaintiff Flock is required to pay a fee of $10.00 to FMCSA's statutory employee each time he seeks to gain access to a current copy of his PSP report from Defendant. 5 U.S.C. § 552a(m).

G. Plaintiff Flock has been adversely effected by Defendants' conduct and has suffered actual damages within the meaning of 5 U.S.C. § 552a(g)(1)(D) as a result of FMCSA's wrongful conduct.

24. Plaintiff Dennis K. Thompson is a resident of the State of Georgia and has been issued Commercial Drivers License Number 051019538.

A. Defendant FMCSA has prepared and made available for dissemination to potential employers of Plaintiff Thompson one or more PSP reports that include references to the following alleged driver-related violations:

PSP Report Date	Driver Name	Driver Violation	Description of Violation
6/20/2014	Thompson, Dennis	395.8(f)(1)	Drivers record of duty status not correct
		395.8(f)(1)	Drivers record of duty status not correct
		395.3(a)(2)	14 hour rule violation (Property)
		395.3(a)(1)	11 hour rule violation (Property)
		395.8(f)(1)	Drivers record of duty status not correct
		392.16	Failing to use seat belt while operating CMV
		395.8(f)(1)	Drivers record of duty status not correct
		392.71(a)	Using or equipping a CMV with radar detector
		392.71(a)	Using or equipping a CMV with radar detector

		392.2-SLLS2	State/Local Laws – Speeding 6-10 miles per hour over the speed limit
		392.2-SLLSWZ	State/Local Laws – Speeding work/construction zone

B. The Secretary of Transportation has not made a determination that the violations identified above in Mr. Thompson's PSP report are "serious driver-related violations" under 49 U.S.C. § 31150(d).

C. The Secretary of Transportation has not authorized or required enforcement officials to prohibit drivers from continuing to operate a commercial motor vehicle until the violations identified above in Mr. Thompson's PSP report have been corrected.

D. FMCSA has disparaged Plaintiff Thompson's qualifications for employment as a commercial motor vehicle driver in a manner not authorized by law. FMCSA's action was designed to compromise or impair and has compromised or impaired Thompson's ability to secure gainful employment with good wages and benefits within the trucking industry.

E. Disparagement of Plaintiff Thompson's qualifications as a commercial motor vehicle operator has had a negative economic or pecuniary

impact on his ability to earn a living as a commercial motor vehicle.

F. The only avenue available to Plaintiff Thompson to acquire current and accurate information with respect to FMCSA's unlawful conduct is to purchase a copy of his PSP report from Defendant. Plaintiff Thompson is required to pay a fee of $10.00 to FMCSA's statutory employee each time he seeks to gain access to a current copy of his PSP report from Defendant. 5 U.S.C. § 552a(m).

G. Plaintiff Thompson has been adversely effected by Defendants' conduct and has suffered actual damages within the meaning of 5 U.S.C. § 552a(g)(1)(D) as a result of FMCSA's wrongful conduct.

25. Plaintiff Thomas H. Gooden is a resident of the State of Florida and has been issued Commercial Drivers License Number G350828583060.

A. Defendant FMCSA has prepared and made available for dissemination to potential employers of Plaintiff Gooden one or more PSP reports that include references to the following alleged driver-related violations:

PSP Report Date	**Driver Name**	**Driver Violation**	**Description of Violation**
6/25/2014	Gooden, Thomas	395.8	Log violation (general/form and manner)

		392.2	Violation of Local Laws
		392.2W	Excessive Weight violation
		395.8(f)(1)	Drivers record of duty status not correct
		392.16	Failing to use seat belt while operating CMV

B. The Secretary of Transportation has not made a determination that the violations identified above in Mr. Gooden's PSP report are "serious driver-related violations" under 49 U.S.C. § 31150(d).

C. The Secretary of Transportation has not authorized or required enforcement officials to prohibit drivers from continuing to operate a commercial motor vehicle until the violations identified above in Mr. Gooden's PSP report have been corrected.

D. FMCSA has disparaged Plaintiff Gooden's qualifications for employment as a commercial motor vehicle driver in a manner not authorized by law. FMCSA's action was designed to compromise or impair and has compromised or impaired Gooden's ability to secure gainful employment with good wages and benefits within the trucking industry.

E. Disparagement of Plaintiff Gooden's qualifications as a commercial motor vehicle operator has had a negative economic or pecuniary

impact on his ability to earn a living as a commercial motor vehicle.

F. The only avenue available to Plaintiff Gooden to acquire current and accurate information with respect to FMCSA's unlawful conduct is to purchase a copy of his PSP report from Defendant. Plaintiff Gooden is required to pay a fee of $10.00 to FMCSA's statutory employee each time he seeks to gain access to a current copy of his PSP report from Defendant. 5 U.S.C. § 552a(m).

G. Plaintiff Gooden has been adversely effected by Defendants' conduct and has suffered actual damages within the meaning of 5 U.S.C. § 552a(g)(1)(D) as a result of FMCSA's wrongful conduct.

26. Plaintiff C. Douglas Heisler is a resident of the State of Pennsylvania and has been issued Commercial Drivers License Number 22316724.

A. Defendant FMCSA has prepared and made available for dissemination to potential employers of Plaintiff Heisler one or more PSP reports that include references to the following alleged driver-related violations:

PSP Report Date	**Driver Name**	**Driver Violation**	**Description of Violation**
4/25/2014	Heisler, C.	395.8	Log violation (general/ form and manner)
		395.8	Log violation (general/ form and manner)

		395.8	Log violation (general/ form and manner)
		392.2	Violation of Local Laws
		395.8(f)(1)	Drivers record of duty status not correct
		395.8	Log violation (general/ form and manner)

B. The Secretary of Transportation has not made a determination that the violations identified above in Mr. Heisler's PSP report are "serious driver-related violations" under 49 U.S.C. § 31150(d).

C. The Secretary of Transportation has not authorized or required enforcement officials to prohibit drivers from continuing to operate a commercial motor vehicle until the violations identified above in Mr. Heisler's PSP report have been corrected.

D. FMCSA has disparaged Plaintiff Heisler's qualifications for employment as a commercial motor vehicle driver in a manner not authorized by law. FMCSA's action was designed to compromise or impair and has compromised or impaired Heisler's ability to secure gainful employment with good wages and benefits within the trucking industry.

E. Disparagement of Plaintiff Heisler's qualifications as a commercial motor vehicle operator has had a negative economic or pecuniary impact on his ability to earn a living as a commercial motor vehicle.

F. The only avenue available to Plaintiff Heisler to acquire current and accurate information with respect to FMCSA's unlawful conduct is to purchase a copy of his PSP report from Defendant. Plaintiff Heisler is required to pay a fee of $10.00 to FMCSA's statutory employee each time he seeks to gain access to a current copy of his PSP report from Defendant. 5 U.S.C. § 552a(m).

G. Plaintiff Heisler has been adversely effected by Defendants' conduct and has suffered actual damages within the meaning of 5 U.S.C. § 552a(g)(1)(D) as a result of FMCSA's wrongful conduct.

27. Plaintiff Walter Johnson is a resident of the State of Massachusetts and has been issued Commercial Drivers License Number S62148172.

A. Defendant FMCSA has prepared and made available for dissemination to potential employers of Plaintiff Johnson one or more PSP reports that include references to the following alleged driver-related violations:

PSP Report Date	**Driver Name**	**Driver Violation**	**Description of Violation**
4/16/2014	Johnson, Walter	392.2	Violation of Local Laws
		392.22(a)	Failing to use hazard warning flashes

		395.8(f)(1)	Drivers record of duty status not correct
		395.8(f)(1)	Drivers record of duty status not correct

B. The Secretary of Transportation has not made a determination that the violations identified above in Mr. Johnson's PSP report are "serious driver-related violations" under 49 U.S.C. § 31150(d).

C. The Secretary of Transportation has not authorized or required enforcement officials to prohibit drivers from continuing to operate a commercial motor vehicle until the violations identified above in Mr. Johnson's PSP report have been corrected.

D. FMCSA has disparaged Plaintiff Johnson's qualifications for employment as a commercial motor vehicle driver in a manner not authorized by law. FMCSA's action was designed to compromise or impair and has compromised or impaired Johnson's ability to secure gainful employment with good wages and benefits within the trucking industry.

E. Disparagement of Plaintiff Johnson's qualifications as a commercial motor vehicle operator has had a negative economic or pecuniary impact on his ability to earn a living as a commercial motor vehicle.

F. The only avenue available to Plaintiff Johnson to acquire current and accurate information with respect to FMCSA's unlawful conduct is to purchase a copy of his PSP report from Defendant. Plaintiff Johnson is required to pay a fee of $10.00 to FMCSA's statutory employee each time he seeks to gain access to a current copy of his PSP report from Defendant. 5 U.S.C. § 552a(m).

G. Plaintiff Johnson has been adversely effected by Defendants' conduct and has suffered actual damages within the meaning of 5 U.S.C. § 552a(g)(1)(D) as a result of FMCSA's wrongful conduct.

28. Plaintiff Gayla S. Kyle is a resident of the State of Kansas and has been issued Commercial Drivers License Number K03364972.

A. Defendant FMCSA has prepared and made available for dissemination to potential employers of Plaintiff Kyle one or more PSP reports that include references to the following alleged driver-related violations:

PSP Report Date	**Driver Name**	**Driver Violation**	**Description of Violation**
5/22/2014	Kyle, Gayla	392.22(a)	Failing to use hazard warning flashes
		392.2PK	Unlawfully parking and/or leaving vehicle in the road
		392.22(a)	Failing to use hazard warning flashes

B. The Secretary of Transportation has not made a determination that the violations identified above in Mr. Kyle's PSP report are "serious driver-related violations" under 49 U.S.C. § 31150(d).

C. The Secretary of Transportation has not authorized or required enforcement officials to prohibit drivers from continuing to operate a commercial motor vehicle until the violations identified above in Mr. Kyle's PSP report have been corrected.

D. FMCSA has disparaged Plaintiff Kyle's qualifications for employment as a commercial motor vehicle driver in a manner not authorized by law. FMCSA's action was designed to compromise or impair and has compromised or impaired Kyle's ability to secure gainful employment with good wages and benefits within the trucking industry.

E. Disparagement of Plaintiff Kyle's qualifications as a commercial motor vehicle operator has had a negative economic or pecuniary impact on her ability to earn a living as a commercial motor vehicle.

F. The only avenue available to Plaintiff Kyle to acquire current and accurate information with respect to FMCSA's unlawful conduct is to purchase a copy of her PSP report from Defendant. Plaintiff Kyle is required to pay a fee of $10.00 to FMCSA's statutory employee each time she seeks to gain access to a current copy of her PSP report from Defendant. 5 U.S.C. § 552a(m).

G. Plaintiff Kyle has been adversely effected by Defendants' conduct and has suffered actual damages within the meaning of 5 U.S.C. § 552a(g)(1)(D) as a result of FMCSA's wrongful conduct.

DEFENDANT'S ACTIONS ARE INTENTIONAL OR WILLFUL

29. Defendant FMCSA's conduct in disseminating reports under its PSP program other than accident reports or reports of serious driver-related violations is intentional or willful.

30. 49 U.S.C. § 31150(a) is clear and unambiguous. FMCSA is authorized to release only accident reports and "[s]erious driver-related safety violation inspection reports." Section 31150(d) requires the Secretary to identify serious driver-related inspection report[s]" that he "determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected."

31. FMCSA' unlawful dissemination of reports under the PSP program covering Plaintiff Drivers and others similarly situated has included (1) reports of violations not determined by the Secretary of Transportation to include serious driver-related violations; and (2) reports of violations that could not qualify as serious driver-related violations as defined in 49 U.S.C. § 31150(d) even if the Secretary were deemed to have made a contrary determination. This second category

of violations includes those violations that do not result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected.

32. FMCSA knows and at all times material to this complaint knew, that 49 U.S.C. § 31150(d) does not authorize it to disclose reports of violations that do not result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected.

33. Defendants' conduct is in flagrant disregard of the statutory rights of Plaintiff Drivers and other similarly situated. The statutory limitations on Defendants' authority to disseminate reports of driver-related violations are so clear and unambiguous that no person engaged in the conduct alleged in this complaint would have grounds to believe that such disclosure is within the authority conferred upon Defendants by statute.

34. 49 U.S.C. § 31150(c) specifically mandates that PSP reports be "designed to assist the motor carrier industry in assessing an individual operator's crash and *serious safety violation* inspection history. . . ." (Emphasis added).

35. The Privacy Act authorizes dissemination "only of such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or Executive order of the President." 5 U.S.C. § 552a (e)(1). *See also* § 552a(e)(6).

36. Dissemination of inspection reports of violations or alleged violations not identified by the Secretary as a "serious driver-related violation" and not "designed to assist the motor carrier industry in assessing an individual's crash and *serious safety violation inspection history*" violates the Privacy Act, 5 U.S.C. § 552a (e)(1) and (6), because such dissemination is neither relevant nor necessary to accomplish a statutory purpose under 49 U.S.C. §31150(a) - (d).

37. On January 14, 2010, Defendant was informed of the limitations imposed on the disclosure of inspection records under 49 U.S.C. § 31150 (a) - (d). On that date, the Owner-Operator Independent Driver Association, Inc. ("OOIDA"), a trade association representing the interests of commercial motor vehicle drivers, filed comments with FMCSA pursuant to a request for comments under System of Records Notice (SORN) published at 74 Fed. Reg. 66391 (December 15, 2009). OOIDA's comments specifically identified the statutory limitations imposed upon the dissemination of driver-related safety records under the PSP program and now raised by Plaintiff Drivers in this complaint.

38. On April 14, 2010, after receiving the comments filed by OOIDA on behalf of drivers in the SORN, FMCSA published a Privacy Impact Assessment (PIA) covering its Pre-Employment Screening Program. That PIA shows that FMCSA understood its responsibilities under 49 U.S.C. § 311150(a):

Personally Identifiable Information (PII) and PSP

PSP processes, transmits, and stores the following distinct types of PII:

1. ***Commercial driver (CMV) crash and inspection information.*** Each month, FMCSA provides the PSP contractor with an updated MCMIS data extract containing driver crash data from the previous five (5) years and inspection data from the previous three (3) years. This MCMIS extract is used to create a driver profile known as the Driver Information Resource (DIR). * * * *

In accordance with 49 U.S.C. _ 31150(a), the CMV *driver safety information* extracted from MCMIS and made available for pre-employment screening *comes from the following reports*: commercial motor vehicle accident reports; inspection reports that contain no driver-related safety violations; and *serious driver-related safety violation inspection reports.* (Emphasis added).

39. The provision of 49 U.S.C. § 31150 (a) - (d) establishing the PSP program and those of 5 U.S.C. § 552a (e)(1) constraining an agency's authority to disseminate information are so clear and unambiguous that no person engaged in the conduct alleged in this complaint would have grounds to believe it to be within the authority conferred upon Defendant by statute.

40. FMCSA's 2010 PIA demonstrates Defendant's actual knowledge that 49 C.F.R. § 31150(a) requires that PSP reports should be drawn from accident reports

and "serious driver-related safety violation inspection reports."

41. Defendant's conduct is a flagrant disregard of the statutory rights of Plaintiff Drivers and others similarly situated and is intentional or willful.

PLAINTIFF DRIVERS HAVE SUSTAINED ACTUAL DAMAGES

42. Plaintiff Drivers and others similarly situated have sustained economic or pecuniary loss as a result of FMCSA's implementation of its PSP program.

43. Each driver for whom a PSP report has been prepared must pay a fee of $10.00 in order to acquire a copy of that PSP report from NIC, FMCSA's contractor and, by statute, an employee of FMCSA. 5 U.S.C. § 552a(m). This fee is not authorized under 49 U.S.C. § 31150(a)-(d) and imposes an economic and pecuniary burden upon drivers as a condition of securing and evaluating the PSP reports prepared for dissemination to potential employers of commercial motor vehicle drivers.

44. FMCSA updates on a monthly basis the extracts from its MCMIS database that are prepared for incorporation into PSP reports. On information and belief, new reports of alleged violations are added each month and reports of violations older than three years and crash reports older than five years are reportedly deleted. In order to remain current with the content of

his or her PSP report, drivers must purchase PSP reports on an ongoing basis at a cost of $10.00 per report.

45. Access to driver safety data directly from the MCMIS database under the Freedom of Information Act (FOIA) does not provide drivers with current and accurate information. Each FOIA report furnished to drivers by Defendant under the FOIA contains the following disclaimer:

> WARNING
>
> FMCSA does not guarantee that all events displayed for a driver are relevant to that driver, nor can it be guaranteed that all relevant events for drivers are displayed. Therefore, FMCSA recommends that FMCSA and State enforcement personnel recognize that the result of DIR do not provide definitive driver histories.

Disclosures under FOIA do not show, among other things, which violations, if any, have been determined to be "serious driver-related violations," and which violations, if any, have been extracted from the MCMIS database for inclusion in the driver's PSP report at any particular point in time.

46. Plaintiff Drivers and others similarly situated are also harmed economically by the actions of FMCSA under its PSP program when the agency unlawfully disseminates reports of alleged violations not determined by the Secretary to be serious driver-related safety violations.

47. The goal of the PSP program is to influence the decisions of motor carriers in the hiring of commercial motor vehicle drivers by providing access to driver accident reports and reports of serious driver-related violations. Motor carriers with access to such records are more likely to hire individuals with the most satisfactory reports and less likely to hire individuals with less satisfactory reports.

48. Dissemination of reports of driver-related safety violations from FMCSA's MCMIS database diminishes the economic value of the services of individual driver candidates for employment resulting in economic or pecuniary harm to such drivers. FMCSA's authority to disseminate disparaging information about drivers to potential employers is strictly limited under 49 U.S.C. § 31150(a)-(d) and 5 U.S.C. § 552a(e)(1) and (6). Defendant has exceeded its statutory authority in disseminating such reports.

49. The intentional and willful disparagement of driver qualifications violates the rights of commercial motor vehicle drivers under the Privacy Act. Such disparagement has a negative economic or pecuniary impact on Plaintiff Drivers and others similarly situated.

50. According to informal surveys of motor carriers conducted by FMCSA, reports of driver-related safety violations have a negative impact on the ability of individual driver candidates to command better compensation and benefits when they are hired.

51. The status of a driver's PSP report also has an influence on the willingness and ability of individual commercial motor vehicle drivers to seek out better employment opportunities with motor carriers. Individuals with reports of driver-related safety violations on their PSPs are discouraged from seeking out better employment opportunities.

52. The employment prospects of Plaintiff Drivers and others similarly situated have been diminished and they have been economically harmed by the actions of FMCSA in unlawfully disseminating driver safety records not authorized by statute for dissemination under the PSP program.

53. Plaintiff Drivers and others similarly situated have been adversely effected by Defendants' conduct and have sustained actual damages as a result of FMCSA's violation of their rights under Privacy Act. Plaintiff Drivers and members of the class for which certification will be sought are entitled to recover statutory damages of $1,000 per violation under 5 U.S.C. § 552a (g)(4).

CLASS ACTION ALLEGATIONS

54. Plaintiffs seek to represent a class (hereinafter "Class") consisting of all individuals in the United States for whom FMCSA has collected, maintained and transmitted for dissemination under the Pre-employment Screening Program inspection reports that contain references to alleged safety violations not determined by

the Secretary of Transportation to be serious driver-related safety violations.

55. On information and belief, there are over ten thousand (10,000) individuals members of this Class. These individuals are residents of virtually every state. As commercial vehicle drivers, they are on the road continuously, and are, therefore, widely dispersed geographically. Joinder of all potential Class members would be impracticable.

56. There is a well-defined commonality of interest in the questions of law and fact arising in this case. Questions of law and fact common to the members of the Class include, but are not limited to:

a. Whether PSP reports by Defendant for dissemination to potential employers of drivers that identify enforcement activity that does not constitute serious driver-related safety violations within the meaning of 49 U.S.C. §§ 31150(a), (c) and (d) constitute a violation of the Privacy Act;

b. Whether Defendant's conduct in disseminating reports under its PSP program, other than accident reports or reports of serious driver-related violations, was intentional or willful; and

c. Whether Plaintiff Drivers and others similarly situated have been adversely effected and have sustained actual damages as a result of Defendant's conduct.

57. The claims of the Plaintiffs are typical of the claims of the Class because Plaintiffs and the other Class members have been adversely effected and have sustained actual damages arising out of the same wrongful conduct described herein.

58. Plaintiffs are capable of fairly and adequately protecting the interests of the Class. Plaintiffs have retained counsel that are experienced in litigating complex class actions. Neither Plaintiffs nor their counsel have any interests that are adverse to those of the Class.

59. Defendant has acted or failed to act on grounds generally applicable to the potential class as a whole, as alleged in this Complaint.

60. The questions of law enumerated in this complaint are common to all potential class members and predominate over any questions affecting only individual members which are essentially limited to the amounts due each member. Therefore, a class action is superior to other available methods for the fair and efficient adjudication of the claims alleged in this Complaint. Thus, class certification is appropriate under Fed. R. Civ. P. 23(b)(3).

61. Other factors favoring the certification of this suit as a class action include:

a) the amounts in controversy for individual owner-operators are relatively small, so that individual members of the Class would not find it cost-effective to bring individual claims;

b) requiring individuals to prosecute separate actions would substantially impair or impede the individual members' ability to protect their interests;

c) on information and belief, there is no litigation already commenced by Class members concerning the causes of action for damages arising under the Privacy Act raised in the Complaint;

d) each member of the class is identified individually in the MCMIS database maintained by FMCSA; and

e) no substantial difficulties are likely to be encountered in managing this class action.

CLAIM FOR RELIEF

Defendant's Unauthorized Dissemination of Inspection Reports Under its PSP Program Is Actionable Under 5 U.S.C. § 522a(g)(1)(D)

62. Plaintiffs incorporate and re-allege ¶¶ 1-61, above.

63. Defendant regularly identifies for release to motor carriers and to persons conducting pre-employment screening services violations or allegations of violations of Federal Motor Carrier Safety Regulations that have never been determined by the Secretary to be serious driver-related violations and/or that do not satisfy the criteria for a serious driver-related violation set forth in 49 U.S.C. § 31150(d).

64. The Privacy Act permits an individual to bring a civil action against an agency when it "fails to comply

with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. . . ." 5 U.S.C. § 552a(g)(1)(D).

65. Defendant's conduct in providing access to driver inspection reports under 49 U.S.C. § 31150(a) that include reports of violations or alleged violations not identified by the Secretary to be reports of serious driver-related violations and/or that do not satisfy the criteria for a serious driver-related violation within the meaning of 49 U.S.C. § 31150(d) violates 5 U.S.C. § 552a(e)(1) and (6), and is actionable under 5 U.S.C. § 552a(g)(1)(D) because:

a. Defendant's conduct is intentional or willful;

b. Defendant's conduct has had an adverse effect on each of the Plaintiff Drivers and others similarly situated; and

c. Each of the Plaintiff Drivers and others similarly situated have sustained actual damages in the form of economic or pecuniary loss as a result of Defendant's conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Drivers request that this Court enter a judgment in their favor, to wit:

1. Certify a class comprised of all drivers for whom Defendant FMCSA has prepared a PSP report for dissemination to potential employers in the two year period immediately prior to the date when this Complaint was filed that

includes one or more reports of driver-related safety violations not previously determined by the Secretary of Transportation to be a report of a serious drive-related violation within the meaning of 49 U.S.C. § 31150(d);

2. Appoint Plaintiff Drivers as Class Representatives;

3. Appoint counsel for Plaintiff Drivers as Class Counsel;

4. Award statutory damages of $1,000 per violation to each of the Plaintiff Drivers and to each member of the class certified by the Court;

5. Award Plaintiff Drivers their costs of litigation, including reasonable attorneys' fees;

6. Establish a common fund comprised of damages awarded to members of the Plaintiff Class;

7. Award Class Counsel reasonable attorneys fees and expenses payable out of the common fund; and

8. Order such other relief as the Court may deem just and proper.

DATE: July 18, 2014

Respectfully submitted,

/s/ John A. Kiernan

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