



**ALLIANCE FOR DRIVER SAFETY & SECURITY, LLC**

Cargo Transporters • Dupré Logistics • JB Hunt Transport • KLLM Transport Services • Knight-Swift Transportation • Maverick USA •  
May Trucking Company • Schneider • US Xpress

September 21, 2022

Robin Hutcheson  
Deputy Administrator  
Federal Motor Carrier Safety Administration  
United States Department of Transportation  
1200 New Jersey SE  
Washington, D.C. 20003

**Re: [Docket No. FMCSA–2022–0127-0003] Controlled Substances and Alcohol Use and  
Testing: Application for Exemption; The Trucking Alliance**

Dear Deputy Administrator Hutcheson:

The Alliance for Driver Safety & Security (“The Trucking Alliance”) is a coalition of like-minded, safety-conscious transportation companies in support of a mission to advance safety reforms and technologies to reduce and ultimately eliminate all large truck crash fatalities. The Trucking Alliance files these comments on behalf of its’ corporate membership and in support of the petition (“Petition”) for an exemption from 49 CFR 382.107. The Trucking Alliance

When the Federal Motor Carrier Safety Administration (“FMCSA” or “Agency”) grants the Petition, FMCSA will recognize positive hair drug test results as an employer’s “actual knowledge” of a driver’s illegal drug use. The significance of this exemption is that employers will be allowed to submit truck drivers’ positive hair drug test results to the FMCSA Drug and Alcohol Clearinghouse (“Clearinghouse”) and these results will be available to other inquiring carriers as required to comply with 49 CFR 391.23.

This exemption will reduce the likelihood of truck drivers who use illegal drugs from operating commercial vehicles, until they complete rehabilitation. The industry and public’s benefit will be a reduced risk of large truck accidents. FMCSA has the authority to grant this exemption, and the current definition of actual knowledge requires reporting under these circumstances.

Pursuant to 49 CFR 382.107, FMCSA defines “Actual Knowledge” as: *actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer's direct observation of the employee, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances or an employee's admission of alcohol or controlled substance use, except as provided in § 382.121* Direct observation as used in this definition means observation of alcohol or controlled substances use and does not include observation of employee behavior or physical characteristics sufficient to warrant reasonable suspicion testing under § 382.307. As used in this section, “traffic citation” means a ticket, complaint, or other document charging driving a CMV while under the influence of alcohol or controlled substances.”

**1. FMCSA has established precedent for granting this Petition.** On January 28, 2022, FMCSA published guidance regarding an employer’s “actual knowledge” of a truck driver’s illegal drug use. FMCSA explained that if a truck driver receives a citation to appear in court for driving under the influence (“DUI”), the driver’s employer must immediately report the DUI citation to the Clearinghouse, “regardless of conviction.”

The 5th, 6th, and 14th Amendments of the United States Constitution create the legal basis for “innocent until proven guilty.” Notwithstanding those constitutional requirements, FMCSA rightfully determined that in order to protect the public’s safety, employers must report a driver to the Clearinghouse after receiving a DUI citation, rather than at conviction.

This DUI reporting requirement is correctly intended to prevent drivers from operating a commercial vehicle for another company, while the DUI charges are pending. This is precisely what members of The Trucking Alliance aim to achieve with this Petition – to prevent drivers who fail a hair drug test from operating a commercial vehicle for another company until he/she completes rehabilitation.

A DUI citation is afforded more Constitutional protections in a criminal proceeding in a court of law, than is a hair drug test. Yet FMCSA correctly determined that a DUI citation is immediately worthy of reporting to the Clearinghouse. For this reason, FMCSA has clearly established precedent on the issue of “actual knowledge” so that granting the Petition is easily within FMCSA’s authority.

**2. FMCSA accepts non-regulated, subjective information as “actual knowledge” into the Clearinghouse.** A motor carrier employer can report a driver to the Clearinghouse if someone at the company overhears the driver talking about his/her drug use. Additionally, the employer would be required to report a driver to the Clearinghouse if an independent witness reported the driver’s illegal drug use, or if drug paraphernalia was found in the driver’s possession. None of these are examples of a regulated test for drug use. But FMCSA regards these instances as “actual knowledge” that must be submitted to the Clearinghouse.

**3. A hair drug test is widely regulated and accurate.** Hair testing is a scientific and nationally recognized method for confirming a person’s illegal drug use. Trucking Alliance carriers utilize laboratories that are accredited, certified and which adhere to strict national testing standards. Hair testing is recognized in statute and regulated for legal purposes in at least

thirteen (13) states. Congress has twice listed hair testing in federal statute, as an appropriate method for identifying drug use. Hair testing is relied on for business purposes and in legal proceedings.

Hair testing is also acknowledged as the most accurate method for identifying a person's regular use of illegal drugs. As an example, Trucking Alliance companies have disqualified thousands of truck drivers who submitted to a hair test and tested positive for using illegal drugs. Confirming its accuracy, none of these thousands of disqualified drivers filed legal action, claiming that the hair test produced a "false positive" drug test result.

**4. The Petition is consistent with the purposes of the Clearinghouse.** Before the creation of the Clearinghouse, the federal regulatory system lost track of positive pre-employment drug test results because there was no record or database of the drivers who tested positive for illegal drug use. The carrier disqualified the driver. But the positive pre-employment test went undiscovered by other motor carrier employers. That's exactly what is happening here – positive hair drug test results are escaping the review of the motor carrier industry.

**5. FMCSA misconstrues the Petition.** In its publication of this Petition, FMCSA states: *"Although FMCSA lacks the statutory authority to grant the Trucking Alliance's request for exemption until the Department of Health and Human Services has taken certain action, FMCSA requests public comment on the exemption application, as required by statute."*

The Petition does not seek to circumvent forthcoming HHS drug testing guidelines. If the Petition is granted, Trucking Alliance carriers will continue to utilize both hair testing and a urinalysis until HHS issues a final rule. The Petition simply seeks to give equal standing to an accredited hair drug test as FMCSA does to a DUI citation and other non-DOT examples of drug use.

**6. FMCSA could decide to move forward on hair testing now.** While not proposed in the Petition, the Trucking Alliance believes that FMCSA has the authority to fully implement hair testing now, should it choose to do so.

The Agency has stated that hair testing cannot be fully implemented because of an obscure reference in a non-statutory conference report that was attached to the Fast Act of 2015. The sentence, originally requested by FMCSA, is that the Agency should not implement a hair drug testing rule until the Dept. of Health and Human Services (HHS) has issued lab testing guidelines. But Congress did not include this sentence in the actual legislation.

Nothing in the federal statute prohibits FMCSA from implementing what Congress specifically directed the Secretary of Transportation to do – recognize hair testing as an acceptable alternative to urine testing. Certainly, Congress did not think we would be without a hair testing final rule seven (7) years and three US Presidents after Congress directed it to happen. But again, the Petition does not propose this action.

**7. The Trucking Alliance is concerned about the public's safety and of all commercial truck drivers.** Our concerns are not limited to drivers of our member company fleets. This

exemption will allow Trucking Alliance companies to report positive hair test results to the Clearinghouse, so that other motor carrier employers can inquire about driver applicants. Those employers can achieve the same objective as Trucking Alliance companies – to hire a drug free workforce.

Granting the Petition will give a hair drug test equal footing with, at the least, things like a DUI citation without a conviction, previous employer scuttlebutt, Monday morning admissions, and drug paraphernalia in the possession of a truck driver.

In summary, hair drug testing is recognized nationally, non-subjective, widely regulated, and accurate. But if FMCSA denies the Petition, positive hair test results will keep escaping the review of the motor carrier industry. This lack of reporting to the Clearinghouse will continue to create a public safety risk, to the detriment of all who travel our nation's roadways.

Finally, to reference an obscure sentence tucked away in a non-statutory legislative report as reason to deny the Petition, the Agency would ignore Congress, its own precedent and contradict its primary safety mission – **to reduce crashes, injuries and fatalities involving large trucks and buses.**

For these reasons, the Trucking Alliance is confident that under your new leadership, FMCSA will send the right message for public safety and grant the Petition.

Respectfully submitted.



Lane Kidd  
Managing Director