

BULLETIN

(June 20, 2012)

I have enclosed a link to the Federal Motor Carrier Safety Administration's *Pre-Employment Screening Program*, known as "PSP". This is a screening tool available to motor carriers and drivers that allows them to purchase a report showing a candidate driver's roadside inspection data, including the driver's most recent 5 years of crash data and most recent 3 years of roadside inspection results as recorded in the Motor Carrier Management Information System (MCMIS). This is different from the MVR which reflects only a driver's past 3 or more years (depending on the state) of license violations.

PSP is worthwhile since you can obtain an accurate history of a candidate driver violations which, if they were repeated when in your employ, would contribute to increasing your CSA score, and therefore the possibility of an audit. There is a charge for the service. There is an initial subscription fee - \$25.00 to \$100.00 depending on number of power units, and then \$10.00 for each PSP report. As with any government program there are plenty of requirements and conditions but they are not prohibitive. For instance, you must have written permission from the driver to obtain the PSP, or, if after reviewing the driver's record on the PSP you are influenced not to hire, that must be conveyed to the driver.

The link above contains frequently asked questions and answers, enrollment information, and requirements.

Feel free to contact me if you should have any questions regarding the above or enclosed.

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FCRA Notifications, PSP, AND THE DRIVER HIRING PROCESS

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During the driver application and qualification process, motor carriers traditionally have relied upon motor vehicle record ("MVR") reports to verify professional commercial vehicle drivers' licensure and driving records. In addition to gathering the MVR as part of the pre-employment driver qualification process, many carriers as a matter of routine also have done criminal background checks, employment history verifications (as required by the FMCSA), and a variety of other free and paid employment screening services.

Pursuant to the Fair Credit Reporting Act ("FCRA"),¹ any employer that obtains a "consumer report" for purposes of determining eligibility for employment must disclose the fact that the employer is going to obtain a consumer report on the employee and also obtain written consent from the employee to do so. Therefore, since the 1990s, nearly all trucking companies have included FCRA disclosures and authorization forms along with their driver applications. The recent introduction of the federal pre-employment screening program ("PSP") into the driver pre-employment qualification and evaluation process has perhaps brought motor carriers even more squarely into the confines of the FCRA.

Motor carriers and their counsel should be aware of the benefits—and burdens—of using PSP to verify the driving records of their driver recruits, and should be careful to follow the procedures set forth in the FCRA

in screening, rejecting, and hiring drivers. The following is an outline of legal issues that motor carriers and counsel should consider when implementing PSP into driver hiring practices.

I. What is PSP?

PSP is a recordkeeping system maintained by the Federal Motor Carrier Safety Administration ("FMCSA"), and was created to work in conjunction with the provisions of the both lauded and maligned motor carrier safety auditing program, "Compliance, Safety, Accountability" ("CSA"). The term "CSA" previously served as an acronym for "Comprehensive Safety Analysis 2010," and was set to come online in early 2010, but was repeatedly delayed due to the fact that it was—and continues to be—bereft with safety scoring and administrative problems.

"The Pre-Employment Screening Program ("PSP") is a screening tool that allows motor carriers and individual drivers to purchase driving records from the Federal Motor Carrier Safety Administration's Motor Carrier Management Information System."² As opposed to a MVR, which typically only reflects a commercial motor vehicle driver's past 3 to 10 years of licensure and citations (depending on state), the PSP report for a driver reflects his most recent 5 years of crash data and his most recent 3 years of roadside inspection data as recorded in the FMCSA's Motor Carrier Management Information System ("MCMIS").

This information, which previously was unavailable to prospective employers in any form, is intended to give motor carriers insight into the past safety performance of a driver. The advent of CSA has effectively forced motor carriers to be more selective in hiring professional truck drivers. PSP is a tool that is critical in assisting the motor carrier in making an informed judgment about a driver's likely effect on the motor carrier's CSA score.

II. How Does A Motor Carrier Become Eligible To Use PSP?

Motor carriers are not required to use the PSP system as part of their hiring practices; however, given the benefits of the insightful safety information provided by the PSP report, carriers would be remiss if they did not incorporate the procurement and review of PSP reports into their driver hiring and qualification protocol.

The PSP system is accessed at <http://www.psp.fmcsa.dot.gov/Pages/default.aspx>. In order to access the system, a carrier must sign a detailed and comprehensive contract with the FMCSA called the PSP Monthly Account Holder Agreement (the "Agreement"). Among other things, the Agreement covers or requires the following:

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(i) The carrier must pay a yearly subscription fee of either \$25.00 (motor carriers with fewer than 99 power units) or \$100.00 (motor carriers with 100 or more power units).

(ii) The carrier must provide the FMCSA with bank account information so the FMCSA can initiate ACH debits to cover the \$10.00 fee charged for each PSP report. A credit card or other such secure payment is not acceptable.

(iii) The carrier must agree to use the PSP system only for the pre-employment screening of commercial motor vehicle driver applicants. Importantly, and also interestingly, the PSP report may not be obtained on drivers already employed by the carrier.³

(iv) The carrier must agree to provide certain notices to drivers regarding their PSP as required by the FCRA, including a "clear, separate, and conspicuous written disclosure" that the employer is going to obtain a PSP report on the driver. This notice must be on a separate form or section of the application and must be stand-alone. Carriers cannot lump their PSP disclosure and authorization together with other disclosures and authorizations, such as FCRA notices, EEOC notices, or other background check disclosures.⁴

(v) The carrier must maintain records of each driver's written PSP authorization and disclosure, as well as the PSP report itself, for 3 years after the date of the hiring decision with respect to the particular driver, and must

thereafter destroy the foregoing data in such a manner as to make it "unreadable, unusable, and unrecoverable."⁵

Once the motor carrier has signed the Agreement, provided the bank account information required, and paid the annual subscription fee, the carrier can use the PSP on as many or as few driver applicants as it chooses.

III. How does the FCRA apply to PSP reports?

As with MVRs, PSP reports fit within the definition of a "consumer report" as defined in the FCRA:

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, creditstanding, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for ... employment purposes[.]⁶

In order to rely upon a consumer report as a factor in determining a driver's eligibility for employment, a motor carrier must disclose the fact that the employer is going to obtain a consumer report on the employee and also obtain written authorization from the employee to do so.⁷

With FCRA disclosures and authorizations, the disclosure and authorization need not be in writing, as long as the only communication with the driver has been via "mail, telephone, computer, or other similar means."⁸ However, as indicated above, the PSP Monthly Account Holder Agreement provides that all PSP disclosures and authorizations must be written.

IV. What does a motor carrier have to do in order to comply with the FCRA in the context of the PSP report?

Motor carriers are required to provide multiple notices to drivers in the PSP context, and there are complex, branching subsections of the code pertaining to notification of drivers and also wholesale exemptions from those notification requirements. A motor carrier must provide the following notices and/or information to drivers in the context of the PSP:

(i) Prior to obtaining a PSP disclosure and authorization consistent with FCRA § 1681b(b)(2)(A). Again, it is important to note that the PSP disclosure and authorization must be in writing, as opposed to an FCRA notice and authorization, which need not be in writing if the driver applies via "mail, telephone, computer, or other similar means."

(ii) If the applicant presents his application in person, a notification prior to the carrier taking an "adverse action" against an employee based in whole or in part upon the PSP. An "adverse action" is defined in 15 U.S.C. § 1681a(k) as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." This notice must be written and must contain a copy of the PSP along with the notice required by 15 U.S.C. § 1681g(c) of the driver's rights to investigate and dispute the information contained in the PSP, including the contact information for the FMCSA and an explanation of the fact the driver is entitled to dispute the accuracy of any information contained in

the PSP through the DataQs system.

(iii) If the applicant presents his application in person, the carrier must provide notification after taking an adverse action against the applicant based in whole or in part upon a PSP. Pursuant to 15 U.S.C. § 1681m(a), after making a decision not to hire a driver based in whole or in part upon a PSP, the carrier must:

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right—

(A) to obtain, under section 1681j of this title, a free copy of a consumer

report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

Id.

(iv) If the "only interaction between the [driver] and the [carrier] has been by mail, telephone, computer, or other similar means," the carrier must provide notification only after taking an adverse action against the applicant based in whole or in part upon a PSP. As set forth in 15 U.S.C. § 1681b(b)(3)(B)—(C), a carrier that does not interact with the driver in person may skip the "pre-adverse action" written notice requirement and provide, within 3 days of the hiring decision:

"oral, written or electronic notification—

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains

files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

15 U.S.C. § 1681b(b)(3)(B)(i)

(v) For applicants applying other than in person, upon request made pursuant to 15 U.S.C. § 1681b(b)(3)(B)(i) (IV), the carrier must provide a copy of the PSP and the notice required by 15 U.S.C. § 1681g(c) of the driver's rights to investigate and dispute the information contained in the PSP.

V. How to advise your clients?

The following are some practical considerations in advising carrier clients regarding the introduction of the PSP report into their driver hiring and qualification practices.

(i) Advise your clients to use PSP as part of the driver hiring and qualification process. Under CSA, the focus is on crash data and roadside inspections. PSP is a completely new source of information, and crash data and roadside inspection detail is not available from any other source. Remember, PSP reports are not a replacement

for the MVR, but rather an add-on to your client's driver hiring and qualification process. PSP reports do not contain information regarding citations, so your clients need to continue to run MVRs. The only thing between your client and a DOT intervention could be one bad hiring decision, so requesting, reviewing, and considering the PSP report on each driver is critical. While the applicant's past safety performance is not by itself predictive of future safety performance, recent ATRI research shows significant links between past conviction and crash data and future behavior. It is key that carriers utilize all the resources available to them to protect their CSA scores.

(ii) Ensure that the carrier has a written, stand-alone PSP disclosure and authorization as part of its application. This is required by the PSP Monthly Account Holder Agreement, notwithstanding the fact that the FCRA does not require it unless the applicant applies in person. Further, make sure that your client does not lump the "check the box" authorization (for electronic applications) or signature block (for written applications) for the PSP together with the FCRA disclosure and authorization, the EEOC policy, or any other disclaimer or notice provisions in the application. This will ensure compliance with both the FCRA and the PSP Monthly Account Holder Agreement.

(iii) Consider suggesting that your client only accept driver applications via facsimile or through its website.

Nowadays, most sophisticated carriers have complex and robust online driver application systems, and possibly even an application management system. Even smaller carriers typically have an application form available online, even if they do not have a full-blown application management system. Accepting applications only in electronic or facsimile format sidesteps the complex regulations and notices dealing with in-person applicants. Further, aside from the compliance issues it avoids, most carriers will find this to be welcome advice as this cuts down on a significant amount of administrative hassle—and paper!

(iv) Consider advising the carrier to set up a separate, unlinked bank account for the sole purpose of allowing the FMCSA to ACH debit the PSP report fees. FMCSA requires carriers to provide bank account information so it can ACH debit PSP report fees. Credit card or other payment is not acceptable. Federal databases of bank account information and secure personal data are a prime target for hackers. Therefore, suggest that the client deposit in the separate PSP account no more than is necessary to fund a few months of PSP report fees, and that its accounting personnel keep a regular reconciliation log of that account to ensure the account has not been compromised. Also suggest the PSP account not be linked to any of the company's other bank accounts (such as a sweep account or ZBA) to avoid the potential for operating, payables or payroll accounts being compromised.

They will appreciate this practical advice.

(v) Ask to audit or assist in developing the carrier's PSP document retention and destruction policies. The PSP Monthly Account Holder Agreement requires retention of PSP-related documents for 3 years, and also requires the immediate, secure destruction of those documents. Most sophisticated carriers already have document retention and destruction policies in place pertaining to hours of service logs, IFTA records, and other critical business information, so they should be able to implement these policies rather easily. For smaller carriers that retain paper records, suggest that the safety director or operations manager keep a file drawer with PSP reports organized by month, and then destroy the PSP documents on the 3 year anniversary of the PSP report.

(vi) Consider advising the carrier to comply with the PSP/FCRA notification provisions, even if the decision not to hire an applicant is not in fact made "based in whole or in part" upon the PSP. In many cases, the carrier's decision not to hire a driver will be based on reasons totally unrelated to the PSP report. However, the statute is unclear what constitutes an employment decision "based in whole or in part" on a PSP. Therefore, the best practice would appear to be to require that every driver for whom the carrier requests and obtains a PSP report and then determines not to hire should receive the appropriate PSP/FCRA notifications. Further, ask to audit

the carrier's notifications to ensure compliance with the applicable FCRA provisions. Different notifications require

different language, some provisions are time sensitive and yet others require enclosure of the PSP report itself, so you

should ensure that the carrier understands what notices to send and when to send them.

Endnotes

1. 15 U.S.C. § 1681 et seq.
2. See <http://www.psp.fmcsa.dot.gov/Pages/FAQ.aspx>.
3. See PSP Monthly Account Holder FCRA Employer Certification ¶ 1.
4. *Id.* ¶ 2-3.
5. PSP Monthly Account Holder Agreement § 3, ¶ 4(e).
6. 15 U.S.C. § 1681a(d).
7. *Id.* § 1681b(b)(2)(A).
8. See *id.* § 1681b(b)(2)(B) – (C).