HAZARDOUS MATERIALS ENDORSEMENT BACKGROUND CHECKS

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BEFORE THE

SUBCOMMITTEE ON
HIGHWAYS, TRANSIT AND PIPELINES

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

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HAZARDOUS MATERIALS ENDORSEMENT BACKGROUND CHECKS

Wednesday, May 11, 2005

HOUSE OF REPRESENTATIVES, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, SUBCOMMITTEE ON HIGHWAYS, TRANSIT AND PIPELINES, WASHINGTON, D.C.

The subcommittee met, pursuant to call, at 3:15 p.m., in Room 2167, Rayburn House Office Building, Hon. Thomas E. Petri [chairman of the subcommittee] presiding.

Mr. PETRI. The meeting of the Subcommittee on Highways, Transit, and Pipelines will come to order.

We will do our best to accommodate our witnesses' schedules. To that end, the members of the Committee, if they appear, will make closing statements rather than opening statements. I will make one, and Mr. DeFazio, and possibly Mr. Oberstar at the very beginning, but abbreviated.

We welcome you and we very much appreciate your coming to discuss this very important subject. This oversight hearing of the Subcommittee on Highways, Transit, and Pipelines will specifically focus on background checks for drivers with a HAZMAT endorsement on their Commercial Drivers License.

This requirement, which was included in the Patriot Act that passed shortly after 9-11, seeks to identify persons carrying hazardous materials that may pose a security threat, and address, in part, the vulnerability posed by thousands of hazardous materials shipments traveling each day on our Nation's highways. The process will include a fingerprint-based criminal history, immigration, and intelligence-related checks based on driver information. During 2004, the Transportation Security Agency screened 2.7 million drivers with a HAZMAT endorsement by completing a name-based screening of drivers with various Government databases.

In the years leading up to the implementation of the background checks, many questions were raised as to how the program would be structured, how States would have to adjust Commercial Drivers License programs to meet the new requirements, and the impact on trucking companies and drivers as the background checks were phased in. States were uncertain how to structure their program, as guidance from the Transportation Safety Administration was delayed even as compliance deadlines looms. States also had to determine whether to utilize TSA agents for the collection of information and fingerprinting or whether to gather the information on its own.

Other questions, which I hope will be covered by the witnesses in the course of this hearing, include: the cost of the program,

which may be $72 million for the Transportation Safety Administration over the first five years; the ability of the Administration to provide timely security threat assessments on up to 45,000 applicants per month and handle any appeals that may result; additional fees the drivers face to meet the increased cost of securing a HAZMAT endorsement; rights of drivers who have been denied a license based on the background checks; what information will be shared with companies on the drivers affected; and the impact on interstate commerce if drivers are unable to drive due to delays in the processing of license renewals.

At a time when we are already facing a drivers shortage, some have expressed concern that the new requirements will have a chilling effect on recruitment and retention of HAZMAT drivers, with some suggesting up to 20 percent of drivers not choosing to renew their HAZMAT endorsement.

Today we will hear from a distinguished panel representing a cross-section of interests that are affected by this, including a representative from the Transportation Safety Administration, from the Federal Motor Carrier Safety Administration, the Office of the Inspector General of the Department of Transportation, the Virginia Department of Motor Vehicles, and also from transportation industry representatives about their concerns.

I now recognize the Ranking Democrat on the Subcommittee, Mr. DeFazio, for his opening statement.

Mr. DEFAZIO. Thank you, Mr. Chairman. Mr. Chairman, thank you for holding this oversight hearing. I am pleased that we are finally beginning to fully implement the intent of the law in terms of verifiable background checks for HAZMAT drivers with Commercial Drivers Licenses.

My concern is that because we are having a full requirement on newly licensed drivers, that with the renewal period it will be actually 2010 before we have completed all of these background checks. I would like to investigate ways that we could see that we are fully compliant with the law more promptly.

There are also I think legitimate concerns being raised by those who will be subjected to this requirement in terms of access to licensing points or places where they can be fingerprinted and the cost of that. Certainly, we would like to look at ways to not make this an onerous burden, knowing that many of these drivers in the deregulated environment are not making a tremendous amount of money.

Mr. Chairman, I think that this is a timely hearing and there are a number of issues before the Committee that are very important for public safety and the regulation of commerce in a way that makes sense to maximize safety but also not to be overly burdensome on the industry. So I look forward to the testimony.

Mr. Chairman, if I could, I do regret that, not that I am disinterested in this, but I have an absolutely essential hearing over in Resources that is very, very pointed toward my district and I will have to leave for that in the not too distant future.

Mr. PETRI. Thank you.

It is nice to put a name behind a product or a company, or in this case a truck. I have seen many England trucks over the years, and a growing number I might add, as a member of the traveling

public. We would like to ask Mr. Daniel England, Chief Executive Officer of C.R. England Trucking Company, if he would lead off.

TESTIMONY OF ANNETTE M. SANDBERG, ADMINISTRATOR, FEDERAL MOTOR CARRIERS SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION; TODD J. ZINSER, DEPUTY INSPECTOR GENERAL, DEPARTMENT OF TRANSPORTATION; TOM BLANK, CHIEF SUPPORT SYSTEMS OFFICER FOR THE TRANSPORTATION SECURITY ADMINISTRATION, DEPARTMENT OF HOMELAND SECURITY; D.B. SMIT, COMMISSIONER DEPARTMENT OF MOTOR VEHICLES, COMMONWEALTH OF VIRGINIA; DANIEL E. ENGLAND, CHIEF EXECUTIVE OFFICER, C.R. ENGLAND, INC.; SCOTT MADAR, ASSISTANT DIRECTOR OF THE SAFETY AND HEALTH DEPARTMENT, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. ENGLAND. Mr. Chairman, Ranking Member DeFazio, and also Mr. Matheson, who I shared a podium with last week and pleased to see here, and other members of the Committee, thank you for inviting me to testify today on behalf of American Trucking Associations on the subject of TSA's implementation of the background check for drivers with hazardous materials endorsements.

As was mentioned, my name is Dan England. I am the CEO of C.R. England, Inc., a family-owned trucking business headquartered in Salt Lake City, with operations throughout the U.S. and in Mexico and Canada. We operate approximately 2,600 trucks and have roughly 45 employees and owner-operators. I have submitted my written testimony for inclusion in the record.

The background check of drivers required in the Patriot Act is intended to prevent terrorists from gaining authorized access to hazardous materials for the purpose of doing harm. Let me be clear, the trucking industry supports this goal. The industry supported the name-based checks TSA conducted last year. However, the increased burdens and unjustified costs resulting from TSA's implementation of fingerprint-based checks have had a profound impact on my business and they are about to have a similar impact on all customers who ship HAZMAT.

The problems we experience today are only bound to get much worse on May 31st when the fingerprint-based checks apply to endorsement holders seeking renewals. A name-based background check should be sufficient to achieve our shared security objective. Congress did not mandate fingerprint-based checks in the Patriot Act. When I fly and TSA checks to make sure I am not a terrorist on a terrorist watch list or on a no-fly list, nobody takes my fingerprints. They check using my name. TSA stated that they were satisfied that name-based checks of drivers addressed the immediate security threats on several occasions last year.

Therefore, we ask you to direct TSA to continue conducting name-based checks until a truly coordinated nationwide transportation-wide security credentialing program is in place for access to secure areas or HAZMAT that preempts State and local requirements. Name-based checks can be done with little or no delay, very little additional expense to the driver, and no costs or hassles associated with time wasted going to and from remote fingerprint locations.

About a year and a half ago, I and several other trucking company owners had the opportunity to meet with TSA officials to discuss implementation of the fingerprint program. The trucking industry conveyed three key points: (1) the process should be uniform nationwide; (2) the process should be convenient and not unduly expensive for drivers; and (3) carriers should be notified of the ultimate disposition regarding their drivers. Unfortunately, I appear here today dealing with a process that is (1) not uniform; (2) inconvenient and costly for drivers; and (3) one in which I am not notified of my drivers' status.

The ramifications are significant. Until February 28, we required all of our approximately 3,500 drivers to obtain hazardous materials endorsements. Because of the costs, delays, and administrative burdens associated with fingerprinting, we have discontinued this requirement. Driver turnover in my sector, the truckload sector, is and always has been high. We hire over 100 drivers per week. Because of the cost to the driver, for which they see no return, few of our new drivers apply for the endorsement. In just over three months, coinciding with the January 31st fingerprint requirement for new entrants, our endorsed driver count has gone from about 3,500 to 2,600.

Our ability to haul HAZMAT is rapidly diminishing. Soon shippers of everyday commodities such as soda drink syrup and chewing gum extract which require endorsements to haul will find it difficult to move their goods. If they can find a carrier, it will likely be at increased cost. Let me give you a real life example. Less than 5 percent of my company's shipments are HAZMAT.

However, 60 percent of that amount comes from our second largest customer. Because it is virtually impossible to dedicate certain endorsed drivers to this customer's account, or any HAZMAT account for that matter, we required endorsements for all of our drivers.

In light of the new requirements, we examined the financial feasibility of continuing to haul HAZMAT freight. Our additional cost per HAZMAT load came out to be $500. Therefore, we no longer require all drivers to have endorsements. As our capacity to haul HAZMAT diminishes, I am not sure how long we will be able to retain this customer if we cannot haul their HAZMAT freight.

I have included in my written testimony a number of problems faced throughout the trucking industry. Here are a few others I have noticed:

The lack of uniformity forces my company to deal with different processes in a number of States. For example, Texas, a non-TSA State, will not recognize a background check from Utah, a TSA State. Thus requiring the individual to get fingerprinted again and pay an additional fee. Most States do not have enough fingerprint locations, and where there are locations their availability is limited. Utah has one in Salt Lake City and recently opened a second one off of I-15 that is only open on Thursday from 2:00 to 6:00 p.m.

We have had drivers who, due to long lines, have had to come back another day. Delays in getting the results vary from two weeks to as long as 180 days. Finally, we never receive notification of whether the driver has been cleared or rejected. This makes no sense to me from a security standpoint.

At a time when carriers are struggling to attract qualified drivers, and I want to emphasize that, it is one of the most serious problems we have, and freight volumes are up, TSA has imposed upon the industry an unwieldy fingerprint process that discourages drivers from obtaining hazardous materials endorsements. The truth is, if somebody intends to do harm with a load of HAZMAT, that person is more likely to highjack a load than take the time to learn the skills to safely transport HAZMAT and obtain an endorsement.

TSA also needs to give some serious thought to the scope of commodities they are targeting. A vast majority of commodities requiring placarding, like soda drink syrup, paint, or nail polish, are simply not going to be used by terrorists. In the meantime we should continue with the one solution that enhances security in an efficient and cost-effective manner, and that is name-based checks.

Mr. Chairman, thank you again for giving me the opportunity to voice my industry's concerns about this background check program.

Mr. PETRI. Thank you. Thank you for your testimony. I apologize for not recognizing the Representative from Utah, a member of our Committee, Mr. Matheson for any comments. Did you want to say anything?

Mr. MATHESON. Nothing at this time, Mr. Chairman.

Mr. PETRI. The next witness is Ms. Annette Sandberg, the Administrator of the Federal Motor Carriers Safety Administration.

Ms. SANDBERG. Thank you, sir. Chairman Petri, Ranking Member DeFazio, and members of the Subcommittee, thank you for inviting me to discuss the hazardous materials endorsement background checks. I am pleased to appear before you to describe the Federal Motor Carrier Safety Administration's role in enforcing these background checks and how we work with our partners at the Transportation Security Administration to ensure the safe and secure transportation of hazardous materials across our Nation's highways.

The Commercial Vehicle Safety Act of 1986 established the Commercial Drivers License program and the CDL Information System, known as CDLIS. The goal of the CDL program is to ensure that persons who operate commercial motor vehicles have only one driver's license at a time.

CDLIS enables States to exchange commercial driver licensing information. It includes the databases of 51 licensing jurisdictions in the CDLIS Central Site. FNCSA's role in the CDL program is to verify the CDL program is uniformly and properly administered by all 51 jurisdictions, including enforcing State compliance with TSA's hazardous materials security threat assessments.

To obtain a CDL, applicants must complete an application form verifying that they are medically qualified and not subject to a disqualification in another State. Additionally, the applicant must pass a general knowledge and applicable endorsement knowledge test and a skills test in a representative commercial motor vehicle. Upon surrender of a current non-CDL license, the applicant is issued a CDL with applicable class and endorsements.

Drivers wishing to transport hazardous materials must obtain a hazardous materials endorsement to the CDL. As part of the licensing process, applicants are required to satisfactorily pass a knowl-

edge test related to hazardous materials transportation. The second part of the HM endorsement process requires the drivers to undergo a criminal background check, otherwise known as a security threat assessment.

TSA is responsible for conducting all security threat assessments. To obtain an HM endorsement, the driver submits to fingerprinting by a State or TSA agent and provides proof of citizenship or immigration status. Fingerprints are sent to the FBI for a criminal background, while TSA checks information from national and international databases. TSA provides the results to the State DMV which issues or denies the endorsement.

If an applicant is deemed to be a security risk and therefore denied an HM endorsement, the applicant may appeal the risk determination to TSA. If overturned on appeal, the applicant may then be issued a CDL with an HM endorsement.

Our agency has a significant role to play in promoting and verifying State compliance with TSA's hazardous materials security threat assessment requirements. FMCSA verifies State compliance in two ways. First, we conduct a regular CDL State compliance review every three years. Second, we conduct a special CDL compliance review any time the agency receives a complaint that a State is not following proper procedures.

Our agency conducts compliance reviews on the CDL program not only to verify the State's compliance with the TSA hazardous materials security threat assessment, but to promote nationwide compliance and uniformity with Part 384 of the Federal Motor Carriers Safety Regulations. The CR program is a comprehensive on-site examination of the State's CDL program.

During the review, our agency works with the States to improve highway safety and reduce CDL fraud by assessing the effectiveness of the State's CDL program and compliance with the 29 requirements listed in Part 384. FMCSA identifies legal, technical, operational, and administrative deficiencies in State CDL programs, establishes a mechanism for monitoring States' progress in correcting serious program deficiencies or areas of non-compliance, and assesses a State's vulnerability to CDL fraud.

FMCSA averages about 15 CDL compliance reviews a year. In 2004 and 2005, our agency made improvements to its CDL program, including developing on-site review training for States, incorporating Motor Carrier Safety Improvement Act implementation and CDL fraud vulnerabilities assessments into the process, and establish a CDL sanctioning process for States found to be in substantial non-compliance.

States found to be out of compliance with any of the CDL requirements will have 5 percent of certain Federal-aid highway funds withheld the first year and 10 percent the second year and subsequent years of non-compliance. Our agency may decertify a State's CDL program, prohibiting the State from issuing Commercial Drivers Licenses if the deficiency that caused the substantial non-compliance affects a substantial number of CDL applicants or drivers.

FMCSA has modified the CR process to ensure thorough and proper oversight, that the State one, has the statutory authority to enforce the TSA threat assessment requirements; and two, is fol-

lowing proper procedures in issuing a Commercial Driver License with hazardous materials endorsement. Since TSA implemented the security threat assessment on January 31 for drivers obtaining an HM endorsement for the first time, three compliance reviews with hazardous materials components have been conducted. These were conducted in the District of Columbia, Tennessee, and Idaho. No substantial non-compliance findings regarding the hazardous materials endorsement process were found in these reviews.

Mr. Chairman, TSA has the lead in developing and implementing the process that States must follow to conduct HM security threat assessments. Our agency reviews State compliance with the TSA requirements and verifies all States have a solid and compliant CDL program. By verifying regulatory compliance, our agency's activities are a significant contribution to increased safety and security for hazardous materials transport.

I look for to working and continuing this partnership as we move forward to implement this very important program. Our agency will continue to work with TSA to iron out any differences and inefficiencies to ensure that the program works seamlessly across the agency and departmental lines, keeps unsafe and unsecured drivers off our Nation's highways, and provide for the adequate State compliance enforcement of the CDL program. Accomplishing these goals will allow us to maintain the safety and security of America's communities. Thank you, and I would be happy to answer questions after the panel is finished.

Mr. PETRI. Thank you. The next witness is Mr. Todd Zinser, the Deputy Inspector General of the Department of Transportation. And as is the case with the other witnesses, your full statement will be made a part of the record and we invite you to summarize it in approximately five minutes.

Mr. ZINSER. Thank you, Mr. Chairman. Mr. Chairman, Mr. DeFazio, members of the Subcommittee, on behalf of Inspector General Mead, we appreciate the opportunity to testify today on HAZMAT endorsement background checks.

A critical post-September 11th issue is the interdependency among the Department of Transportation and other Federal agencies to carry out programs that have both safety and security elements. For the DOT, this intersection of safety and security is most pronounced in the area of hazardous materials oversight and enforcement. We commend the Subcommittee for holding this hearing and keeping this issue at the forefront.

As we have been reporting since September 11th, the imperative for the Department is to effectively integrate new security measures into our existing safety regimens in ways that promote stronger security without degrading transportation safety and efficiency. In our opinion, the new background records check will, if properly implemented, provide an additional factor of both safety and security because it will help ensure that we know that the drivers are (1) who they say they are, (2) are legally present in the United States, and (3) can be trusted with the public's safety and security when transporting HAZMAT.

Processing background records checks is not new to TSA. When TSA was still with the Department of Transportation, it established a similar program for airport workers. And since 2002, over

1.6 million employees working at the Nation's 400-plus commercial airports have had a criminal history records check completed. While initially a concern, the issue of timeliness turned out to be a non-factor. In that case, the American Association of Airport Executives served as a clearinghouse to facilitate the process of fingerprints for the airports and airlines.

Since TSA is no longer part of the Department, we do not have first-hand knowledge of how TSA is implementing the program or whether the experience at the airports provides any lessons to the HAZMAT endorsement rule. But based on our observations at airports and airlines, strong cooperation among all stakeholders is absolutely critical to make the process efficient and effective.

TSA is responsible for the background checks, but FMCSA shares responsibility with TSA at the back end of the process by ensuring the States comply with TSA's rule. And as Administrator Sandberg mentioned, if the States do not comply, FMCSA can withhold Federal funds or take away a State's authority to issue CDLs. So DOT remains a critical link in the safety and security chain, along with the States and the trucking industry.

We have done a substantial amount of audit work in the past, initiated at the request of this Subcommittee, to assess and improve the Commercial Drivers License program. This program, established by Congress less than 20 years ago, now has 11 million CDL holders on record and is the centerpiece of the Department's Motor Carrier Safety Program. One concern we have reported on and continue to stress to the Department is the program's vulnerability to fraud, and FMCSA is taking steps with the States to strengthen the program against fraud.

After September 11th, several CDL fraud cases gained the attention of other law enforcement agencies because foreign national were involved. Currently, for example, two of our 28 CDL fraud investigations involve the Joint Terrorism Task Force, but to date none of our investigations have found terrorist activities.

In closing, Mr. Chairman, we would suggest a few areas for FMCSA to watch. Each of these suggestions is geared toward making sure we effectively integrate the background data into the CDL process.

First, computer system tests will be needed to ensure that information is properly collected and shared among TSA, FMCSA, and the States. For example, is the HAZMAT endorsement data being integrated into the existing Commercial Drivers License Information System? We have concerns that they are not taking advantage of this existing system.

Second, routine monitoring of data should also be used, as we have suggested in other parts of the CDL program, to spot problems that may develop. For example, are there noticeable gaps in any of the data?

Third, new compliance review steps and additional expertise may be needed to assist States with compliance with the new TSA rule. Has FMCSA retooled its compliance review steps to cover this requirement?

Finally, Mr. Chairman, FMCSA's previous experience with conducting reviews of State CDL programs and the fact that they regularly visit States to conduct these reviews puts FMCSA in the

best position to identify any inconsistencies among the States concerning HAZMAT endorsement checks and how to fix them.

This concludes our testimony. We would be glad to answer any questions.

Mr. PETRI. Thank you. Mr. Tom Blank, Chief Support Systems Officer of the Transportation Security Administration of the Department of Homeland Security. Welcome.

Mr. BLANK. Good afternoon, Mr. Chairman, Representative DeFazio, and other members of the Subcommittee. It is my pleasure to be here with you today to speak about the Department's implementation of the HAZMAT threat assessment program. We see this as an important step in countering the very real threat that terrorists could pose in securing licenses to operate trucks carrying hazardous materials.

There is much to be proud of with the implementation of the program. The Department has thus far conducted name-based security threat assessments on all 2.7 million HAZMAT drivers that hold Commercial Drivers Licenses. In the three months since the Department began fingerprint-based checks, we have had over 30,000 enrollments. We have cleared more than 25,000 of those, and 33 States and the District of Columbia participate with us as agents through which TSA collects and transmits fingerprint and driver applications. We are processing currently 84 percent of what we receive within five days relative to the background check.

Right now, we have 123 enrollment sites, including local law enforcement offices, mobile units, truck stops, and other sites that meet certain minimum standards required by TSA, with plans to put at least 24 additional sites in place and open and operating by May 31 of 2005.

TSA actively engages daily with the State Departments of Motor Vehicles, industry associations, Members of Congress, and other stakeholders to develop enhanced enrollment capabilities. The agency does propose to submit to the Subcommittee the roster of all of the sites that are open and operating as of May 31. And I would add that for the 33 States and the District of Columbia that are participating in the TSA agent program, that the States have approved the locations where we have put these sites.

TSA is employing a phased approach to implement the program, which began, as has been discussed, with name-based security threat assessments of all HAZMAT drivers, which we completed in the summer of 2004. This critical effort required a terrorist-focused name check of 2.7 million hazardous material drivers and resulted in the referral of 100 individuals to law enforcement agencies.

The second phase began January 31, 2005, which includes a fingerprint-based Federal Bureau of Investigation criminal history records check, an intelligence related check, and an immigration status verification. The third phase, which we are on track to begin at the end of this month, will extend the fingerprint-based checks to HAZMAT drivers seeking to renew or transfer the hazardous material endorsement.

Now, all HAZMAT drivers seeking to obtain a new HME or to renew or transfer must satisfy the requirements of the TSA rule by first obtaining a No Security Threat Determination from TSA. Here is how this works. The driver submits biographical informa-

tion and fingerprints to TSA through a TSA contractor in agent States or through the DMV or the DMV's contractors in non-agent States. We conduct a threat assessment, relay the determination to the applicant and the State DMV.

If an applicant meets TSA's security threat assessment standards, the State may issue the HME. If not, the State must deny the hazardous materials endorsement. Under certain circumstances, an applicant may appeal the initial TSA determination. In most cases, drivers who are unsuccessful in appealing the initial determination or do not contest it may apply for a waiver.

The threat assessment comprises two distinct processes—an initial adjudication process in which TSA assesses the applicant's criminal history, citizenship status, and mental history, and vets the applicant against relevant intelligence databases, and a post-adjudication appeals and waiver process that is consistent with the framework available to transportation security cardholders under the Maritime Transportation Security Act.

TSA has established a comprehensive program and it is working. We make the security threat determinations quickly and efficiently. Of all the applications submitted so far, more than 25,000 have been cleared to hold an HME, and TSA's goal is to complete the adjudication process within 30 days. We have already exceeded that by processing 85 percent of these applications within 5 days after receiving all information necessary to consider the threat assessment. Most of the appeals we are able to resolve thus far in 1 to 5 days. And we do have procedures in place to ensure that drivers are covered by their HMEs during the adjudication process.

We are not without challenges. We are working with our colleagues at AAMVA whose CDLIS system would enable us to collect and electronically submit the applications from non-agent States. The Department is also carefully assessing interoperability to the HAZMAT program with other vetting credentialing programs, including TWIC, to ensure that such programs are complementary as we work towards convergence of all credentialing programs.

We are also leveraging processes in our sister agencies like Customs and Border Protection and so forth. We are also working to improve the situation with Mexican and Canadian drivers seeking to transport hazardous materials into the U.S.

Thank you. I would be happy to answer questions at the appropriate time.

Mr. PETRI. Thank you. Mr. D.B. Smit, Commissioner, Department of Motor Vehicles, Commonwealth of Virginia. Thank you very much for coming over here to the District today to be with us.

Mr. SMIT. Thank you, Mr. Chairman, and thank you to the distinguished members of the Subcommittee. I am D.B. Smit. I am the Commissioner of the Department of Motor Vehicles in Virginia, and I also chair the American Association of Motor Vehicle Administrators Government Affairs Committee. I want to thank you again for the opportunity to testify on behalf of AAMVA.

AAMVA is a State-based, non-profit educational association representing motor vehicle agency administrators and senior law enforcement officials in the U.S. and Canada. Our members are recognized experts who administer the laws governing motor vehicle operation, driver credentialing, and highway safety enforcement.

AAMVA plays a significant role in the development and supervision of both the Commercial Driver's License and motor carrier safety programs. Today I will share AAMVA's historical working relationship with TSA, I will extol some of the AAMVA and TSA's collaborative accomplishments, and walk through our operational and implementation concerns, and recommend some solutions for programmatic success.

The USA Patriot Act required background checks on CDL holders with HAZMAT endorsements. AAMVA and the States have been working diligently to comply with these provisions. In October of 2002, AAMVA began working with FMCSA, this is the agency originally tasked with implementing HAZMAT endorsement background checks. Just as that relationship was formalized and rules and procedures were established the program was transferred to TSA, first as an agency under the US DOT and then later under the Department of Homeland Security.

To facilitate communication among the States, AAMVA commissioned a working group in July of 2003, which also included representatives from TSA and the FBI. Since then, AAMVA and the States have committed countless hours and untold dollars in pursuit of implementing HAZMAT provisions. In addition, the AAMVA leadership has met or attempted to meet with all the TSA chiefs to build relationships and address State implementation concerns and deadlines.

These meetings have had only short-term effect due to the high rate of employee turnover and competing demand for resources within TSA. In the two years since the agency has overseen this program, AAMVA has worked with five different TSA project managers. Communications break down regularly. For example, TSA made a decision to change individual driver's license numbers that resulted in States inability to match background checks with HAZMAT endorsement applications. This example also illustrates another issue detrimental to the program. Respectfully, TSA does not fully understand DMV business processes or who we are or what we do.

In addition, some States are worried about the turnaround time for receiving threat assessments from TSA. One instance, Florida has submitted 2,179 applications since January of 2005 and has only received 735 responses. If this continues, we believe it will bring commerce to a grinding halt. In States such as Alaska and Minnesota, which elected to use a TSA agent for fingerprinting, there are an insufficient number of offices to handle the assessment requests. Many offices are inaccessible and often are in remote locations.

States use the Commercial Driver's License Information System, or CDLIS, to manage the Commercial Driver's License program. Instead of using this already operational secure and time-tested system, TSA plans to use a stand alone web-based approach to receive application data and send threat assessments to the States. This approach will not integrate with State systems and it puts a heavy burden on the States and will not stand the test of time.

As deadlines approach and you move forward in your analysis of the situation, I urge you to help commerce continue unimpeded by calling on TSA to do the following:

Through the highway reauthorization bill, commit to using CDLIS versus the newly created and expensive stand alone approach.

Second, develop a realistic project time line.

Third, delay the requirement for fingerprint-based background checks for renewal applicants until the CDLIS-based solution is ready, since the FBI has already conducted background checks on the current 2.7 million HAZMAT endorsement holders.

Fourth, work more closely and cooperatively with AAMVA working groups and the State experts.

Fifth, engage in a faster and more straightforward decision-making process.

And finally, share threat assessment fees with DMVs to offset State costs.

Mr. Chairman, AAMVA and our members are committed to ensuring the security of our homeland. I want to thank you once again for the opportunity to testify, and I welcome your comments and your questions. Thank you.

Mr. PETRI. Thank you. We appreciate your association and you and the work you put in to making a thoughtful and constructive series of recommendations.

The final witness, Mr. Scott Madar is the Assistant Director of the Safety and Health Department of the International Brotherhood of Teamsters. Sir, welcome.

Mr. MADAR. Thank you. Good afternoon, Mr. Chairman and members of the Subcommittee. My name is Scott Madar, and I am the Assistant Director of the Safety and Health Department of the International Brotherhood of Teamsters. Thank you for the opportunity to testify today on behalf of our 1.4 million members regarding such an important issue. The Teamsters Union represents hundreds of thousands of drivers who make their living driving on our Nation's road, oftentimes carrying hazardous materials.

We recognize that conducting security threat assessments across the transportation network is part of the Federal Government's responsibility, and are therefore making every effort to ensure that the system balances the need for a safe and secure industry with the rights of the drivers to hold good jobs.

While the Teamsters appreciate the attempts of the TSA to balance security with the rights of drivers, the Union continues to believe that the process could be improved to root out true risks, to provide a level of fairness and due process for affected workers, to ensure privacy rights, to provide for timely processing of applications and threat assessments, and to ensure that workers are not unfairly kept from their chosen profession. I will briefly highlight some of our recommendations.

By way of background, it is important to point out that although a commercial driver is not technically required to possess a HAZMAT endorsement, from a practical standpoint it is usually necessary for a professional truck driver to have such an endorsement since the vast majority of drivers do not exclusively transport hazardous materials or non-hazardous materials. Thus, the loss of an endorsement will in most, if not all, cases have the same effect as a total loss of the CDL for a driver. For this reason it is imperative that the process be made as fair as possible.

With regard to disqualifying offenses, the list of disqualifying offenses must be improved. We believe the list is overly broad and should be revised to better reflect those crimes that are more closely related to terrorism risks or threats to national security. While none of the listed crimes can be condoned, many are not indicative of an individual's propensity to commit a terrorist act, and the TSA has offered no evidence to the contrary.

Briefly on the appeal and waiver process. The Teamsters Union is pleased that the TSA adopted a waiver process and we consider it an essential element in ensuring that individuals who made mistakes in the past are not unfairly denied employment opportunities in the present. However, we continue to believe that appeal and waiver decisions should be made by an Administrative Law Judge or some other third party not officially included in the TSA hierarchy. This would bring fairness and consistency to a system that is central to both employee rights and national security.

With regard to time limits and application delays, the Teamsters Union is concerned that the time limits stipulated in the rule are too short and urge an increase in the notification timeline to at least 90 days. The current timeline of 60 days provides insufficient time for the HME holder to complete all aspects of the security threat assessment should there be a need for an appeal or waiver.

While we cannot speak directly to the difficulties faced by every driver during this initial phase-in of the background checks, we do know that many drivers seeking new HMEs are being told that there are long processing delays, lasting in some cases well over seven weeks.

Additionally, some drivers who are seeking renewals and are not currently subject to background check requirements are incorrectly being forced by States to submit fingerprints such that a background check can be performed. At this time, it is impossible to characterize the full extent of the problems and delays faced by applicants seeking renewals; however, it is only a matter of weeks before these problems will likely manifest themselves, as the May 31st deadline fast approaches.

Briefly on the cost to drivers. As we have stated many times, the Teamsters Union does not believe that the drivers should have to bear the cost of these requirements. The fees imposed should be divided among all affected parties, including the employers and the Federal Government. In other sectors of transportation, the Federal Government has provided security assistance and this sector of transportation should receive the same benefit.

In addition, there are costs that will be associated with States that choose to get involved in this process by performing the information collection and transmission functions themselves. Currently, drivers in different States are being charged different amounts to obtain their HME, up to $250 in the State of Texas.

In conclusion, the Teamsters Union appreciates the efforts made to balance the interests of increased security with the protection of drivers' rights. It is our hope that these balancing efforts will continue. The recommendations that I have highlighted here, as well as others, are discussed in much greater detail in my written comments and have been submitted for the record. I would encourage their review and consideration.

With that, I thank you again for the opportunity to testify today. I would be happy to answer any questions you may have.

Mr. PETRI. Thank you. We thank all the witnesses for their testimony. We will start the questioning with a member of our panel on this side of the hearing who has some experience because he has a Commercial Drivers License and has for many years, Mr. Davis from Tennessee.

Mr. DAVIS OF TENNESSEE. Mr. Chairman, thank you very much, and Ranking Member Oberstar, it is good to see you here today. I do not really have any questions. But a comment I do want to make is that it is good to see today the regulators and those who are advocates for the trucking industry be here today to comment on the new regulations that perhaps could bring to bear some difficult times for those who drive trucks and who deliver products that we use in our homes and our business and help keep America's economy going.

In 1965, while in college at Tennessee Tech I applied for and was able to obtain what at that time was called a Special Chauffeurs License, which entitled you to drive a bus, which I drove for a while, you could drive a taxi, which I never drove, but you could also drive an 18-wheeler or a 10-wheeler or 6-wheeler, whatever at that particular time. And then I went into the construction business in the late 1970s, and obviously the Special Chauffeurs License still gave me the right to drive whatever vehicle I chose.

Well, thankfully, in the late 1980s legislation was passed that basically said if you are going to drive an 18-wheeler, if you are going to be on the road with a large truck of that size, you need to at least have experience and also there are certain testing procedures that you should have to go through.

So in the early 1990s when my chauffeurs license ended, I was grandfathered in to drive the big truck, which I had been doing for several years anyway in business. And then I did take the test which was the combination as well as the weight up to 80,000 pounds at that time in Tennessee.

I think there were three different tests I took. Fortunately, I passed those and now have a CDL which I use in my construction company. I do not do much work anymore, but I still have that and occasionally I will move a piece of equipment from one place to another on the farm.

But I realize, I think as most on this Committee, that America moves today by truck. Certainly, we talk about rail and we talk about freight at some of our ports that we have and some of the inland rivers, the Cumberland River, for instance, in my district, the Tennessee River in my district, that provide some ports for goods and services travel.

But most of everything that comes to the district I represent comes by truck. So as we look at regulations, I sure hope that we have in mind that it is important that this industry continues to be there which has such a positive impact on our economy in America.

When we built the Interstate System we were able to start a new process called "just in time manufacturing." Our trucks deliver those parts to the assembly plants in Smyrna, Tennessee, or in Spring Hill to Saturn in my district. So as we look at regulations

with hazardous materials and these new regulations, I hope that we do not bring to bear undue regulations that will shut down an industry that has moved America.

I think today as we all left the Capitol and our offices in the House Office Buildings and perhaps the Senate as well, we are well aware of how terrorist activity can have a devastating impact on this country, as we observed September 11th, and then today we renewed in our minds the potential of what we felt, most of us who were here, could happen again. That can also happen with a big truck with hazardous materials explosives in it.

So I hope that the advocates, the drivers, the trucking industry, as well as the regulators realize that this is something that collectively working together we will be able to have a safe America and also an America that continues to have a great economy. I thank you for being here.

Mr. PETRI. Thank you. Mr. Oberstar.

Mr. OBERSTAR. Chairman, thank you for the courtesy of giving me an opportunity to respond. I would ask unanimous consent at this time to include my statement in the record.

Mr. PETRI. Yes, sir. Without objection, so ordered.

Mr. OBERSTAR. And I would prefer that you recognize other members who have been here earlier. I was detained on committee business and Minnesota district business, constituents coming in to visit. So I defer to those who were here on time.

Mr. PETRI. Thank you. I maybe would ask a couple of questions really of all the panel, but particularly Mr. Smit and Mr. England. It is my understanding that we have had a licensing and regulatory regime for hazardous materials in the United States for many years and we have had special procedures in place involving the FBI and other agencies for things like explosives and particularly dangerous materials. Now we have got this whole new comprehensive approach. This is costing State governments and it is costing the private industry and ultimately consumers a very great deal and it has considerable potential for disruption of the economy.

Does it really make sense? Are we adopting the right approach of looking at every driver and sort of assuming that they are a terrorist until we can establish that they are not? Or does it make more sense to start at the other end and look at terrorists and see if they are likely to use a truck somewhere? I am just curious about how we will know when we succeed in this whole effort.

I think Mr. Zinser said that they have not found any evidence of any terrorist activity whatsoever so far. Now I do not know if that means there has not been any, or if they have been deterred by this regulatory regime, or if, in fact, there is nothing to find because people, if they do want to do a terrorist thing, are not going to go in and apply for a license and go through a background check, but they are going to steal a truck or do some underground illegal activity and all of this legal stuff is going to be beside the point.

I do not know if you would care to comment on this, either one of you. We want it to be as safe as possible but we do not really want to use terrorism as an excuse to hire a lot more bureaucrats if it is not going to be effective. How will we know when we have succeeded, is my bottom line, and at what cost in this whole thing?

Mr. ENGLAND. Well I have a comment on that. Certainly in this post-9-11 era, I think we would certainly be irresponsible if we were not examining our modes of transportation to make sure that they could not be used in any sort of terrorist activity. Unfortunately, in my view, in our zeal to do that, we have made some serious mistakes in the way in which we have proceeded, mistakes to the degree that our economy is being harmed unnecessarily.

If we had continued, for instance, with simply the name-based background check, which involved much less expense, much less administrative work, and delay, and so forth, we could accomplish the same thing without this tremendous escalation in cost, which, by the way, is having the tendency right now to push drivers away from hauling HAZMAT freight.

Unlike Mr. Madar, we are a truckload carrier and we can have some drivers go through their whole career and may not haul a HAZMAT load. Only 5 percent of the freight that we haul is HAZMAT. But because of the cost and the hassle factor involved in getting this license, we are finding now that drivers have a tendency to want to avoid carriers that haul HAZMAT freight.

And so I and the circles that I associate with of other carriers and so forth, we are finding that many carriers situated similar to us where only a small percentage of our businesses involve HAZMAT, many of these carriers are discontinuing the hauling of HAZMAT freight. And in our case, it involves giving up some very profitable freight.

But I think the long term consequence of this is that those in the economy, those shippers, those companies that manufacture and ship hazardous materials are going to end up paying a lot more to get their goods shipped because fewer people are going to ship it. And, of course, that cost is ultimately going to be passed along to the consumer.

Additionally, I would say that under the umbrella of HAZMAT there are a lot of goods. I have mentioned some of them. I do not want to mention the names of these customers but you can probably guess who they are. The major soft drink manufacturers in this Nation are some of our largest customers. Much of their product we have to ship with a placard. I doubt if those are the sorts of goods that a terrorist wants to get his hands on to use in connection with some sort of terrorist activity.

So my plea would simply be let us identify those goods that would pose a legitimate terrorist threat, then let us go and figure out ways to control or regulate the manufacture, the storage, and the transportation of those goods. Let us not paint the broad stroke and cover so many different kinds of goods that it costs a tremendous amount and ultimately drives many of us away from hauling HAZMAT.

Mr. PETRI. So you are saying we have taken this category HAZMAT, which has to do with materials that could be environmentally hazardous or a hundred and one different dangers, but they might not be a terrorist type threat.

Mr. ENGLAND. Exactly.

Mr. PETRI. And yet we are applying this whole regulatory scheme to everything without rethinking what we are actually looking at.

Mr. ENGLAND. Yes. And as an addendum to that, I think the rule is that if you ship under 1,000 pounds of many of these HAZMAT materials on a shipment you do not have to placard. What we find on many of our customers, they will tender a shipment that is, say, 1,000 or 2,000 pounds of a certain volume of commodity, maybe a corrosive or a flammable or something like that.

Again, I doubt if volumes of that kind of anything are really going to pose a threat. So in addition to looking at the type of the commodity, look at the volume that is shipped, and then let us come up with some reasonable standards.

Mr. PETRI. It sounds like a good idea. Define your job so it is doable, focused, and cost-effective, and then get on with it. We have not done the first stages. We are engaging in a broad brush regulatory regime as the first stage rather than deciding what the nature of the problem is as our first stage.

Mr. ENGLAND. Exactly.

Mr. PETRI. Other comments? Yes, sir, Mr. Blank?

Mr. BLANK. If I might, Mr. Chairman. I want to paint a little context for a moment if I can. First of all, let me just read into the record the mission statement of the Transportation Security Administration. It says, "TSA protects the Nation's transportation systems to ensure freedom of movement for people and commerce." We think we are doing that with this program.

I think the first thing we have to acknowledge is TSA is the implementing agency but we are by no means a lone actor. We are partners with DOT, and we are partners with the industry, we are partners with the unions, and we are partners with AAMVA. Let us remember that we are implementing this program according to provisions of the USA PATRIOT Act, which requires us to run HAZMAT background checks using relevant criminal history databases.

We cannot do that without a fingerprint-based check. We cannot comply with the law. And if the law were changed, perhaps we could give more consideration to the plea for name-based checks only. But it is our view that we would not be in compliance with the provisions of the law were we to skip doing the fingerprint-based checks.

Now I am a little concerned that there is some impression being left here that we have not been sensitive to unions, industry, and public sector State-level concerns. I think that we have a track record that would demonstrate otherwise. First of all, we have amended and eased up on the disqualifying crimes. Of particular concern to the industry was a disqualifying crime of possession of drugs. We eliminated that. That eased and kept a lot of people who otherwise had reformed themselves working and productive.

We have partnered with the American Trucking Association to get information out. We have been visible on the schedule. We have found provisions to be able to extend, where a concern comes up, to extend a CDL HME in place for 90 additional days. We have worked with States to prevent requiring an additional check on transfers in many instances. The industry wanted us to use law enforcement sites to take prints and transmit. We have taken that in tow and do that. We allow drivers with a state-issued CDL learner's permit to apply for the background checks so there is not a

delay for somebody that is a student. We put a requirement in place that States must notify drivers 60 days in advance of when a renewal is in place to give enough time.

We have provided for interoperability in the 33 States and the District of Columbia, which is to say someone who has to do the fingerprinting and make a submission, they can do it at any site that is a TSA agent-operated site in any of those 33 States and the District of Columbia. That is a pretty high degree of flexibility in my view for somebody that has to come into compliance with this.

We will continue to value AAMVA as a partner and look at how we can potentially use the CDLIS system. But there are different and better technologies available to us than what CDLIS operates. And I believe that there were opportunities even before 9-11 to improve the information technology in CDLIS. We are using web-based digital methods of transmission for these fingerprints that is creating a high degree of efficiency, allowing us a 2 percent error rate, and a very fast turnaround time. We just cannot do that with the CDLIS technology as it currently exists.

Mr. PETRI. I want to give any others who want to respond a chance. But could you comment a bit on the point that there is a lot of material that is labelled as hazardous which really is not a threat in any way if it falls into the hands of terrorist. It is a threat if it falls into the hands of irresponsible users to the environment or something else, but it is not like TNT or some explosive or some dangerous gas.

Are your hands tied similarly by the laws that all hazardous materials apply to this, or could you build on the special rules that do exist for things like TNT and some other highly dangerous things that have all kinds of checks throughout the distribution and manufacturing system? There are hundreds of ways to catch someone who wants to get hold of that to do mischief.

Mr. BLANK. I think that is a good point. I think that is something we would continue to look at with FMCSA and other parts of DOT who are the lead in the hazardous materials regulations. So I think that is something we can look at and it may make good sense to do so.

Mr. PETRI. It certainly would keep the commerce flowing and perhaps 95 percent of things that are labelled as hazardous but were done in other context at another time and for other reasons. That would certainly save us a lot of grief if we could make sure that we are defining the problem and not wasting resources because we have too broadly defined it.

Any other comments? Yes, sir?

Mr. SMIT. Mr. Chairman, I would defer to TSA on whether or not we need to go to these lengths for security. We certainly support security in Virginia and we would want to do that. And I would defer to the trucking industry and the TSA about what commodities we should be concerned with. But I would like to get to the area of cost if I can, because that was part of your question earlier.

Our main concern with AAMVA, with the membership across the country is the amount of cost that would be resident with the States, even those States where TSA agents are essentially taking care of the program, because we still have costs related to interface, adjudication, and normal customer service costs as well. So I

did not want that to escape mention because we are concerned about the pressure on State budgets and that type of thing.

Not to quarrel with Mr. Blank, but to talk about the CDLIS technology, I think the important thing here, we would like to use CDLIS. States are used to it. It would be easier for us to conform with that. But let us not miss the real question we have, and that is the timeliness of decision-making. We are scheduled to go online July 31st. Right now, we do not know what system we are going to be using to transmit data to TSA. That is really more a major concern than whether we use CDLIS or not. So, again, it is the whole area of cost, it is communication, it is working together, making decisions and moving on. Those are our main concerns.

Mr. ZINSER. Mr. Chairman, could I just say a few words. I think one of the problems you have is you really do not know what the problem is and where the breakdown is. You had Mr. Smit testifying that there is a big gap between the applications that are submitted and the turnaround time; I do not remember the exact numbers. And Tom is saying that they are turning things around in no more than 30 days. So you have a disconnect there and you do not know where the breakdown is. I guess if we still have jurisdiction to provide oversight to TSA, that is an area that we would look at is where exactly is the problem.

When I mentioned the checks that were done at the airports, initially there was some problems at the airports. I think in some cases it was taking like 40 days to get a fingerprint check done. Well, they fixed that and the fingerprint check, for the most part, does not appear to be a big problem in the airport environment. And I do not know enough about TSA's implementation here to know exactly what the problem is.

So in terms of whether we are doing too much and whether it costs too much, I think you need to do some analysis first to find out exactly where the bottlenecks are.

Mr. PETRI. Yes, sir?

Mr. BLANK. I can address at least certain aspects of that. In the early going after January 31st, we did not have a digitalized automated system in place to receive applications from the non-TSA agent states so we were dealing with paper applications that were being sent to us, and then fingerprints that were being taken. And we had a situation develop where we might have a hundred or a couple of hundred applications and we were unable to match with fingerprint results from the FBI due to errors and inconsistencies int he information submitted by the non-TSA agent states, and we are getting frustrated customers, whether they be drivers or whether they be State agencies, because we have not been able to match up fingerprints, or there was an error in fingerprints because of the method of enrolling and transmitting them and the use of paper products.

What we have done is say that is on us to provide better customer service. We have moved ahead and now we have liaison officers for each State in place who are going to look at that—I have these applications but I do not have fingerprints, or I have an error. That is not acceptable. We have got to begin to go back to the States and deal with that backlog, and we have worked that backlog down. We think that why we are optimistic going forward

is because we are looking at a more digitalized, less paper intensive method of collection and transmission to the affected parties.

I should say, to answer the gentleman from AAMVA, where the States are conducting this, it was by their own choice. They had the option of taking the TSA agent to do this or using their own existing infrastructure, which they may want to leverage for whatever reason, have control over the setting of fees in their particular States. So they had a choice at the State level and could deal with the issues related to cost and so forth on their own without urging one way or the other from the Federal Government.

Mr. ENGLAND. If I may make one more comment. I have no doubt about the diligence of Mr. Blank and his agency in going after the mandates that they have been given. Perhaps some of those mandates were too broad, I do not know. However, he is no responsible to move the freight around this country every day, we are.

And there are significant obstacles that are being thrown up because of what I consider to be poor planning on TSA's part. Another one in particular, having a nationwide uniform system that we could deal with, where we knew what we were going to have to deal with in every State and that we had uniformity in every State, then that would make it much easier to deal with.

Right now, we get a driver who gets a HAZMAT endorsement in the State of Utah, he moves to some other State, a non-TSA State, in most cases so far those other States do not recognize that endorsement. The fees in the States are different.

We met with TSA early on and recommended and admonished just how critical it was that we have some sort of uniformity. Our company operates in all 48 contiguous States. And as we have to deal with this challenge of trying to get our drivers endorsed in all States, it has become a nightmare. For that reason, we are exiting the HAZMAT business, as are many of our fellow carriers. Mark my words, those people who are going to be shipping HAZMAT are going to be paying a lot more to get their goods hauled, which means consumers are going to be paying more for those goods.

Mr. PETRI. So the price of Coke is going to go up.

Mr. ENGLAND. I did not say Coke, you did.

Mr. PETRI. Whatever. Because that is a hazardous material when it is shipped in concentrate.

Mr. ENGLAND. That is right. That is exactly right.

Mr. PETRI. Mr. DeFazio?

Mr. DEFAZIO. Thank you, Mr. Chairman. I would agree with Mr. England's observation that it seems absurd that this somehow devolved to the States and Territories and that they can do it in one of many different ways—they can do it with inked fingerprints and just put it in the mail, or they can whatever. I guess I would just point to the model that we have established in aviation in working with the industry, where it is an average of four hours to clear a person.

I do not know the cost of the remote sensing devices which transmit the data, but I do not think they are all that tremendously expensive, and would suggest that the Federal Government, since there is a Federal interest, might pay for the capitalization costs and then contract with someone to operate the system. In the case of aviation, it is the AAAE, which would be equivalent to the ATA.

I am just curious why we decided—this is a Federal certification, Federal background check for national security purposes—why we devolved that to the States in this sort of diffuse haphazard manner. Could we not go to a system like is being used in aviation which works very well. I have got to disagree with Mr. England, I do not think a name-check is meaningful. You can be anybody and have a good name, you could have assumed a name. That does not tell us anything. It just tells us that name is not in the criminal database. It does not tell you that they are that person. So I want to see fingerprints. But the way in which it is being done seems absurd.

Mr. BLANK. We went in the direction that we went because we did not think it appropriate to preempt the States rights with regard of issuance of drivers licenses.

Mr. DEFAZIO. No, no. Wait. We are not preempting. All we are doing is certifying that the person whose name has that license, who has a HAZMAT certification issued by the State, is that person and does not have a criminal background or is not an illegal alien or terrorist. That is all we want to know. And if so, then the appropriate Federal law enforcement people would be involved and that person would lose their license. But we are not preempting the States. If you use that example, then we preempted the States in aviation, we preempted them in port security, we preempted them in a whole bunch of areas, have we not?

Mr. BLANK. We felt it would be—I will address that in a second—but we felt it would be very confusing if we have the Federal Government authorizing States as to whether or not it is legal and appropriate directly to issue licenses or not. Rather, we thought it would be more appropriate for us to be their partners in conducting this.

If you switch over to the aviation side, what we do there, as you pointed out, for those background checks is we regulate airports and require them to conduct certain of the enrollment and transmission function and we regulate the airlines. I am not sure how much the trucking industry would like us to be regulating them directly.

Mr. DEFAZIO. We regulate the trucking industry in safety and time/duty hours, things like that. There is a tremendous amount of regulation of the interstate trucking industry. Look, it is not working, and hopefully you will admit that. It is cumbersome. It is imprecise. It is hit or miss. We really need to look at a successful model that is a lot cheaper, that is a lot more secure, that would not raise all the host of problems that Mr. England is pointing to in terms of the implementation. I think if we could get it down to $29 and four hours, I do not think he would be saying that we cannot do this.

Mr. BLANK. Congressman, I think it is premature to say it is not working. It has barely even started yet. We have been in business since January 31 on new

Mr. DEFAZIO. Come on. If I might just reclaim my time. I do not know how many DMVs you visit around the country. I have visited a few in different States. You have got some pretty primitive DMVs out there and we are going to try and deal with that in another

law in terms of how they issue individual licenses to citizens or non-citizens.

We have just preempted their authority to issue licenses to 270 million Americans and you are concerned about whether or not we are going to preempt them. I mean, how many HAZMAT truck drivers are there? There are not 270 million. We have preempted 270 million drivers licenses by Federal law because we do not think the DMVs are rigorous, they are cohesive. You can go in some of these DMVs and it is like you are back in the 1950s or in some Third World bureaucracy.

I just do not have the level of confidence you have. I think we could do this a much better way. You both have a point to make here. One is, I want to have the fingerprint checks and know who these people are, but I want to do it in a way that is not totally disruptive and excessively costly.

If I could just ask one other question. Mr. England did make a point, and I would hope it is not true, that what we are trying to do here is capitalize a system that is going to be used beyond trucking. If we are capitalizing a system for Federal national security purposes, we should capitalize it out of the Federal budget and not on the backs of truck drivers.

Mr. ENGLAND. Excuse me. I apologize, because of the delay, I have to go to catch a plane. But I appreciate the opportunity of being here.

Mr. DEFAZIO. Sure. Okay. I understand that. I do it all the time.

Mr. PETRI. Mr. Blank, if you could just respond to that.

Mr. BLANK. Sure. Let me discuss the cost issue. In nearly every instance, the cost to do the background is between $92 and $94, and that is whether or not it is at an agent or a non-agent State. The FBI fingerprint check is $22 of that, that is a pass-through cost; that is what it is. And the information collection element when TSA does it is $38, when the States do it it can vary, yes, but they are the ones that have elected to do that.

For TSA's purposes, we have put a threat assessment fee on there of $34, which means we are charging in the agent States $94. For the most part, we are building the capital infrastructure with appropriated dollars, some $12 million over the past couple of years have built the infrastructure, appropriated dollars, but there is a small portion of that $34 assessment fee that is contributing to building our capability and our infrastructure to do this program.

And if I could, sir, I do want to address the issue of whether things are working or not. We have 2.7 million background checks to complete over the next five years on truckers that have the HME endorsement on their CDL. We have really only been in business since January 31 doing that. We have 30,000 of that 2.7 million in. We have completed the background check on 2,500 of that. We are prepared to ramp that up as of May 31. But I think it is awfully early in the game to say that the system we have put in place will not work or is not working.

Mr. DEFAZIO. Again, you are depending upon 50 States not using uniform technology, some using Federal contractors to do this. I just think it is destined to fail. I just do not believe that the State of Mississippi using inked fingerprints and putting them in the mail, or whatever State might be that retrograde versus the sys-

tem. I am just back to the point of the AAAE system it works, it has more integrity, and it is more efficient, and they are apparently somehow either breaking even or making money on it at $29, and they are accessing the same database which costs $22, so apparently their processing cost is $7.

Mr. BLANK. Well we think the cost to do this at the $92 to $94 level is in line with an original passport that is going to cost you $97.

Mr. DEFAZIO. A what?

Mr. BLANK. An original passport. If you are over 16 and you go for a passport application, you are going to pay $97 to get a U.S. passport.

Mr. DEFAZIO. The ones with the chips that anybody in the world can intercept and read, those great things? Yes, those will be nice.

Mr. BLANK. I cannot address that. But I do think that we are not out of line. We have looked at other Government fees relative to getting official documents and credentials.

Mr. DEFAZIO. Okay. Thank you, Mr. Chairman.

Mr. PETRI. Thank you. Mr. Oberstar wanted to have some questions. We have a few minutes till a vote.

Mr. DEFAZIO. Mr. Chairman, I ask unanimous consent that members be able to submit written questions, which will never be answered, for the record. In my observation, most of mine go unanswered unless I am very persistent.

Mr. PETRI. Sometimes it depends on the question, too. Mr. Oberstar?

Mr. OBERSTAR. Thank you, Mr. Chairman. And I would caution witnesses to answer questions and staff can follow up on those. What I am concerned about here is we created the Department of Homeland Security who is supposed to coordinate and bring all elements together. Mr. Chairman, we heard that time and again in the creation of this Department of Homeland Security, that we can have all these elements together under one roof and all things are going to be hunky-dory. And they are not. There seems to be less communication, less coordination, less cooperation now than before creation of this Department.

Why are these agencies not coordinating, communicating, and formulating this program and removing these obstacles. Why can you not work out a Memorandum of Understanding within the Department on how to get this thing done instead of scrapping the law, putting it on hold, waiting till God knows when.

We passed this legislation. We expect it to be enforced, we expect it to be implemented, we do not expect it to be put off and delayed until hell freezes over and it is never done. Now tell me why you cannot work out a Memorandum of Understanding, overcome the obstacles, get this cost down, figure out a central place that is accessible for drivers so we can get this, and the universe of drivers who handle hazardous material is relatively small compared to the total number of 3 million-plus CDL drivers. I want an answer.

Mr. BLANK. Well we think that we are addressing many of the concerns that you laid out. In terms of availability of sites, taking into consideration what an individual driver is faced with, we have even offered to go into particular trucking companies with terminals, with a mobile unit to make it easy for their drivers.

Some people say we are two years late, and that is a fair criticism, sir. We published our interim final rule in May of 2003 and we wanted to implement by November 2003. Our partners, the States, indicated that compliance with that aggressive time frame, given the significant IT infrastructure changes in order to accommodate this, was not realistic.

And so we first pushed that back to 2004 as a result of the feedback we got from partners, industry and others. At that point, we realized that in order to be able to conduct this program we needed to have fee authority, which we did not have, and the Congress did give us that in our appropriations measure of 2004.

Then we had to go through a rulemaking in order to implement the authority that the Congress gave us, and that began to push us towards the end of 2004 until we could get all the Government apparatus, if you will, in place.

But I think that a spin-off positive effect of that was it gave the States, it gave the industry, and it gave the drivers representatives, the Unions, a significant period of time to figure out how all of this was going to impact. This is not something that is brand new. The people at this table have known that this has been coming for a significant period of time. And there has been communication. Are we all in agreement on everything? No, we are not. Did we have some fits and starts and deserve some criticism? Yes, sir, I will take that onboard.

Mr. OBERSTAR. Mr. Zinser, do you find it unusual that there has not been an agreement worked out here?

Mr. ZINSER. Yes, sir, because TSA went through the same thing with the airports. So we are wondering where the communication breakdowns have occurred. It is obvious that there are disconnects between the industry and TSA, but it is reminiscent of what the Agency went through with the airports.

Mr. OBERSTAR. I find it unacceptable, I will just be kind, that there is a $94 charge per test for drivers. TSA security personnel do not pay that. TSA covers that cost. Security personnel who are employed by airports do not pay that security charge. It is paid by the Airport authority. Why are drivers being saddled with this cost? Why? Because, on one hand, we have not appropriated funds to cover the cost of doing it, and that should be done. But regulation in this context should not be paid for by the regulated.

I know, Mr. Chairman, we are running out of time. We have got a vote on the floor and you probably want to conclude the hearing.

Mr. PETRI. Yes, we have run out of time. But I am hoping this is the last hearing on this subject and everything moves forward well from this point. But I am fearful that unless there are a number of big changes, we are going to be continuing to have problems as we attempt to implement greater safety regimes in trucking. So we will be monitoring it and working with the different stakeholders and probably revisiting this from time to time as this process unfolds.

Mr. OBERSTAR. One final comment, if I may. It is not sufficient in my lengthy experience in security in aviation and in surface transportation for a name check. You have got to have more than that. Government should pick up that cost and we ought to be ap-

propriating the funds for it. But we should not put these regulations off.

Mr. PETRI. The hearing is adjourned.

[Whereupon, at 4:40 p.m., the committee was adjourned.]

TESTIMONY OF TOM BLANK
CHIEF SUPPORT SYSTEMS OFFICER
TRANSPORTATION SECURITY ADMINISTRATION
DEPARTMENT OF HOMELAND SECURITY
BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS, TRANSIT & PIPELINES
U.S. HOUSE OF REPRESENTATIVE
MAY 11, 2005

Good afternoon Mr. Chairman, Representative DeFazio, and Members of the Subcommittee. It is my pleasure to be here today to speak with you about the Department of Homeland Security's (DHS) implementation of the Hazardous Materials (Hazmat) Threat Assessment Program. The Hazmat Threat Assessment Program is an important step in countering the very real threat that terrorists could pose by securing licenses to operate trucks carrying hazardous materials.

There is much to be proud of with the implementation of the program. Since publication in the Federal Register on May 5, 2003, the Department has conducted name-based security threat assessments on all 2.7 million hazmat drivers that hold Commercial Drivers Licenses (CDL). In the three months since the Department began fingerprint-based checks, we have over 30,000 enrollments, and today 33 States and the District of Columbia participate as Agent States through which the Transportation Security Administration (TSA) collects and transmits fingerprint and driver application information. There are 123 enrollment sites, and TSA has plans for at least 24 additional sites by May 31, 2005. TSA engages daily with State Departments of Motor Vehicles (DMVs), industry associations, Members of Congress, and other stakeholders to find enhanced enrollment capability solutions to expand the number of sites that collect fingerprint and driver information.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act,[1] requires the completion of a background records check for drivers who transport hazardous materials in commerce. To comply with the USA PATRIOT Act and the Safe Explosives Act (SEA),[2] TSA issued an interim final rule on May 5, 2003,[3] in coordination with the Federal Motor Carrier Safety Administration (FMCSA) and the Pipeline and Hazardous Materials Safety

[1] Pub. L. 107-56, 115 Stat. 272 (October 25, 2001).
[2] The May 5, 2003 interim final rule (May 5 IFR) was also issued to be compliant with the Safe Explosives Act, Pub. L. 107-296, 116 Stat. 2280, (November 25, 2002) codified at 18 U.S.C. 842, which amended the federal criminal code to add several categories to the list of persons who may not lawfully ship, transport, receive or possess explosives affecting interstate or foreign commerce. The SEA includes an exception from criminal prosecution for circumstances in which the transportation of explosives is regulated by Department of Transportation. This SEA exception was triggered by the May 5 IFR.
[3] 68 FR 23852 (May 5, 2003).

Administration (PHMSA), formerly the Research and Special Programs Administration; another interim final rule on November 24, 2004[4]; and a fee rule on January 13, 2005.[5]

TSA employed a phased approach to implement the Hazmat Threat Assessment Program. The first phase was to conduct a name-based security threat assessment of all hazmat drivers, which was completed in the summer of 2004. This effort was critical in that it required a terrorist-focused name check of 2.7 million drivers with a hazardous materials endorsement (HME) for their CDL. This check resulted in the referral of 100 individuals to law enforcement agencies. Some referrals were linked to on-going FBI investigations and some to terrorism. The second phase includes a fingerprint-based Federal Bureau of Investigation (FBI) criminal history records check (CHRC), an intelligence-related check, and an immigration status verification for applicants seeking to obtain a new HME on their State-issued CDL. This phase began on January 31, 2005. The third phase, scheduled to begin at the end of this month, will extend the fingerprint-based checks to all hazmat drivers, including those seeking to renew or transfer an HME on their State-issued CDL.

Under the TSA regulation, certain individuals are not allowed to hold an HME. This includes those who have been convicted of certain felonies or are fugitives; individuals who are not U.S. citizens, lawful permanent residents, or lawful non-immigrants, refugees, or asylees with valid evidence of unrestricted employment authorization; individuals who have been adjudicated as mentally incompetent or involuntarily committed to a mental institution; and individuals who are determined to pose a threat of terrorism or a threat to national transportation security. However, individuals convicted of some crimes or disqualified for other conditions are eligible for a waiver provided they submit evidence of rehabilitation.

Through a driver's employer or through the State DMV, a driver should know of the security threat assessment requirement before seeking a new HME, or renewing, or transferring an existing HME on a State-issued CDL. A driver submits biographical information and fingerprints to TSA through a TSA contractor in Agent States and through the State DMV (or its contractors) in Non-Agent States. TSA then conducts a threat assessment and relays its determinations back to the applicant and State DMV. If TSA determines that the applicant meets the security threat assessment standards, the State may issue the HME. Please note that some States conduct additional checks of State records prior to issuing the HME. However, if the applicant does not meet the standards, the State must deny the HME. Under certain circumstances, an applicant may appeal the initial TSA determination. In most cases, drivers who are unsuccessful in appealing the initial determination, or who do not contest it, may apply for a waiver.

Threat assessments are separated into two distinct processes, adjudication and post-adjudication. The two-part process allows TSA to (1) effectively process a large volume of threat assessments, (2) ensure that applicants who are initially denied an HME can

[4] 69 FR 68720 (November 24, 2004).
[5] 70 FR 2542 (January 13, 2005).

request an impartial appeal and/or waiver, and (3) complete all threat assessments in a timely matter.

Since January 31, 2005, there have been 31,858 applications of which more than 30,000 have been cleared to hold an HME; approximately 1,500 are in the initial adjudication process; and approximately 358 all in the post-adjudication process. Ten applicants have been deemed disqualified to hold an HME. TSA's goal is to complete the application and adjudication process within 30 days. To ensure that drivers are covered during the adjudication process, the TSA regulation requires States to notify drivers of the threat assessment requirement at least 60 days in advance of the expiration of the driver's HME, and when necessary, States may extend the expiration date of an existing HME for up to 90 days.

The initial adjudication process includes an assessment of each HME applicant's criminal history, citizenship status, and mental history, and each applicant is also vetted against relevant intelligence databases. This intelligence check is the same check that was initially conducted on all 2.7 million hazmat commercial drivers. Each applicant with potential disqualifying information is assessed through a process of review by multiple trained adjudicators ("initial determination adjudicators") who determine whether the applicant meets the requirements to hold an HME. The process is designed to reduce the risk of error of improperly adjudicating each applicant while minimizing the time of adjudication. Formal legal assistance is available to the adjudicators to help resolve issues before reaching a decision concerning an applicant's threat to transportation security within the confines of the regulation (49 CFR Part 1572). The end result of the initial adjudication is either a Final Determination of No Security Threat if the applicant is cleared to hold the HME or an Initial Determination of Threat Assessment (IDTA or "initial determination") if the initial information indicates that the applicant fails to meet the standard and is deemed to be a security threat. The initial determination is provided to the applicant to provide adequate time to appeal the initial determination. The applicant must initiate the appeal process within 30 days of receipt of the initial determination. If the applicant does not appeal the initial determination within 30 days, TSA issues a Final Determination of Threat Assessment (FDTA or "final determination") to the applicant and the State DMV.

The post-adjudication process is managed by completely separate adjudicators ("appeals and waiver adjudicators") and includes all activities related to the final disposition of an applicant's threat assessment after the initial determination is decided. During an appeal of an initial determination, the applicant has the opportunity to request the records on which the initial determination was based and provide further information regarding the condition that resulted in the applicant's IDTA, such as incorrect records. The applicant may provide additional information on his or her criminal history, citizenship status, or other relevant information. In the case of inaccurate records, it is the applicant's responsibility to contact the jurisdiction or entity where the incorrect or incomplete information is held and to correct the record. The applicant must provide TSA with an official revised record, or a certified true copy, to correct the record(s). If the appeal is successful, both the applicant and the State DMV are provided a Determination of No

Security Threat. In the event of an unsuccessful appeal, a final determination is provided to the applicant and the State DMV, and the applicant is ineligible to hold an HME. When feasible, TSA will make a reasonable attempt to assist the applicant by identifying or acquiring information that enables TSA to grant a favorable final determination.

Applicants may request a waiver when it is undisputed that the disqualifying information that resulted in an initial determination has been mitigated. The applicant must provide TSA with the appropriate information, such as information indicating that the applicant has been rehabilitated, for TSA to review to make a final determination. The waiver adjudicator creates a summary of each case addressing the severity of the offense, recidivism, and rehabilitation. Each applicant's waiver is then vetted by a waiver committee comprised of members of various TSA components. The level of participation from committee members is based on the circumstances surrounding the case. At a minimum, the appeals and waiver adjudicators, counsel, and the hazmat program office will participate in making a determination of the applicant's threat to transportation security. TSA does not grant waivers for individuals who have convictions for treason, sedition, espionage, or crimes of terrorism. Since implementation, TSA has received 8 waivers requests, all of which are currently under consideration.

It should be noted that the hazmat threat assessment appeal and waiver processes are based on the Maritime Transportation Security Act framework to achieve consistency and to ensure that drivers have maximum rights.

TSA has established a comprehensive program that is working. The program is not without its challenges, however. Complete roll-out of the fingerprinting infrastructure in all States served by the TSA contractor to obtain full operating capability is still somewhat challenging in rural areas that do not have a high volume of drivers holding or seeking HMEs. In such instances, TSA is seeking enhanced enrollment capabilities by working with local Law Enforcement offices and deploying mobile enrollment centers. For example, in Minnesota, we have two full-time enrollment centers and are adding three additional mobile centers, which will be operational by May 15th. Additional sites in other States are also under review.

Another issue concerns the methods for obtaining biographical information from the 17 Non-Agent States. Currently, biographical information from Non-Agent States is received in a non-automated manner, including fax and mail. In addition to the delays added by the time to transfer the information from the State to TSA, the process has many opportunities for error. Correcting these errors increases the time from when the applicant submits the application to the State and when the applicant's information is successfully submitted to TSA. Originally, TSA anticipated that it could utilize the Commercial Drivers License Information System (CDLIS) managed by the States and the American Association of Motor Vehicle Administrators (AAMVA) to collect and electronically submit the applications from the 17 Non-Agent States. However, as the AAMVA system will not be ready to accommodate us in the near future, TSA is considering alternatives to make the process more efficient and speedy for Non-Agent State applicants. For example, we are considering implementation of a secure website or

another electronic means to facilitate the registration process. This system should significantly reduce application errors and decrease overall processing time for drivers in Non-Agent States. I want to recognize, at this point, the excellent cooperation and assistance TSA has received from AAMVA and its State DMV partners throughout the process of developing and implementing the Hazmat Threat Assessment Program.

I would also like to address some concerns that TSA received about the higher processing fees that are being charged by certain States that are not served by TSA agents. As stated in TSA's Hazmat Fee Rule (49 CFR 1572), TSA has statutory authority to recover infrastructure and other start-up costs necessary to perform background checks and provide credentialing-related services. The fees must be reasonably related to the costs of providing services in connection with the activity or items for which the fee is charged. TSA studied several options for the fingerprint and application collection process, including a TSA-managed program, a program conducted by the States, a hybrid in which the States could opt into certain portions of the process and opt out of others, and the process we ultimately selected, in which the States may choose to conduct the fingerprint and information collection process or use TSA's agent for that purpose. We considered the viability of each of the alternatives discussed above, estimating the costs to the industry and government agencies under each alternative. TSA did not find significant differences in the likely fee a driver would pay among the alternatives considered.

For Agent States, the fee is comprised of three components and a portion of the fee is allocated to those operations as follows: FBI records checks ($22), fingerprint application ($38), and adjudication processing ($34). For Non-Agent States, applicants pay $22 for the FBI records check, $34 for the adjudication processing, plus the fee charged by the State for fingerprint and information collection. There is no additional charge to the applicant for the appeals and waiver process.

Another challenge is to ensure that we leverage the technical and policy innovations for data collection to provide greater efficiencies and reduce duplication of effort between this initiative and other DHS credentialing programs, such as the Transportation Worker Identification Credentialing (TWIC) program. The Department will carefully assess the interoperability of the Hazmat program with other vetting and credentialing programs, including TWIC, to ensure that such programs are complementary while working towards convergence of all credentialing programs. To this end, the Department is establishing an Office of Screening Coordination and Operations (SCO), intended to streamline and integrate all terrorist-related screening through comprehensive coordination of procedures.

Similarly, we are evaluating standards for reciprocity with federal agencies, such as the National Nuclear Security Administration, a component of the Department of Energy and Department of Defense (DoD) agencies, so that drivers who transport hazardous materials on behalf of the federal agencies and who have security clearances based on comparable disqualifying and vetting criteria will not have to undergo a TSA security threat assessment for an HME. However, there are still substantial procedural issues to

resolve before implementation of such a security clearance exception to the program. We are committed to developing an adequate solution in this regard that is consistent with the spirit of the USA PATRIOT Act requirements.

Another challenge is addressing the implementation of similar security measures for foreign drivers (Canada/Mexico) who are currently not prohibited from transporting hazardous materials to the United States without a TSA security threat assessment. While the Department has not issued specific regulations affecting all Canadian and Mexican drivers who transport hazardous materials within the United States borders, TSA regulations at 49 CFR 1572.201 require Canadian drivers who transport explosives from Canada to the U.S. to submit certain information to Transport Canada, which conducts a background check and determines whether the drivers are properly licensed. Drivers who are not listed by Transport Canada as completing these steps are not authorized to enter the U.S. with explosives shipments. Also, TSA checks these names against watch lists to determine whether they may pose a threat to transportation security. Transport Canada forwards a list of vetted drivers to TSA, which forwards the list to the U.S. Customs and Border Protection (CBP). CBP checks drivers who are transporting explosives at the border against the list to determine whether the drivers are cleared to transport explosives into the United States. For drivers whose names are not on the approved list, CBP denies entry of the explosives.

With regard to Mexican drivers, TSA is working to have similar solutions at both United States borders. It should be noted, however, that Mexican drivers are also regulated by international law, such as the North American Free Trade Agreement.

Additionally, under the Free and Secure Trade (FAST) Commercial Driver Program administered by the CBP some commercial drivers transporting hazmat within the United States currently undergo background records checks. FAST participants undergo a risk assessment vetting process which includes a fingerprint-based background records check and personal interviews. Based on TSA's assessment of the FAST program, we have determined that it is comparable to the Hazardous Material Threat Assessment Program. The only significant difference is that participation in the FAST commercial driver program is currently voluntary. TSA and CBP, under the direction of the Border and Transportation Security directorate (BTS), are working closely to consider leveraging the FAST program for all foreign drivers seeking to transport hazardous materials into the United States.

I appreciate this opportunity to appear on this panel with our important partners in motor carrier security. The experience and expertise of FMCSA has been an invaluable asset throughout the development of the Hazardous Material Threat Program. In its early days, TSA received excellent guidance and recommendations from the DOT Inspector General's Office. The Teamsters have helped us understand the issues and concerns of drivers throughout the country, and we have considered their comments very carefully. Through its Highway Watch program, the American Trucking Associations has been instrumental in keeping our highways secure, acting as our eyes and ears across the country. Lastly, I would be remiss if I did not also thank the FBI for its cooperation with

the implementation of this program and with excellent response time on our requests for criminal history records information. We appreciate this opportunity to come before the Subcommittee to explain this important program.

I would be happy to answer any questions you may have.

Before the

SUBCOMMITTEE ON HIGHWAYS, TRANSIT AND PIPELINES
OF THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

Statement of

DANIEL E. ENGLAND, CEO
C.R. ENGLAND, INC.
SALT LAKE CITY, UTAH

Representing

THE AMERICAN TRUCKING ASSOCIATIONS, INC.

On

The Background Check Process for Truckers' Hazmat Endorsements

May 11, 2005

2200 Mill Road
Alexandria, VA 22314
703-838-1996

Mr. Chairman and members of the committee, thank you for inviting me to testify today on behalf of American Trucking Associations, Inc. ("ATA") on the subject of the Transportation Security Administration's ("TSA") implementation of the background check for drivers seeking hazardous materials endorsements to their commercial drivers licenses ("CDL"). My name is Dan England. I am CEO of C.R. England, Inc., headquartered in Salt Lake City, Utah, a truckload carrier and broker with approximately 2,600 power units and 4,200 employees and independent contractors operating nationwide. I am here on behalf of ATA, a federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA's membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation. The trucking industry hauls nearly 70% of all the domestic freight transportation tonnage in the U.S. on an annual basis, equating to 9.8 billion tons.

Overview:

The trucking industry has long been actively engaged in promoting security. It is in our interest from both a customer relations perspective and a financial bottom line perspective. Since the tragic events of September 11, 2001, we now also realize it is in our interest from a homeland security perspective.

Prior to September 11, all carriers utilized various methods to screen their drivers. A large number of carriers utilized third party vendors to conduct criminal history record checks on their drivers. However, these checks were often limited in geographic scope due to cost constraints resulting from a lack of access to the Federal Bureau of Investigation's ("FBI") nationwide databases. When Congress enacted the security threat assessment requirement for hazardous materials endorsed drivers in October 2001 as part of the USA PATRIOT Act, the trucking industry was encouraged that a sensible approach to security screening of drivers would be implemented. Unfortunately, as this testimony demonstrates, TSA has not done so.

ATA believes that the primary objective of the background check we are discussing today is to prevent a terrorist from legitimately gaining access to a load of hazardous materials for the purpose of doing harm. *The trucking industry unequivocally supports that objective.* However, where ATA differs from those at TSA responsible for implementing the background check program is that ATA believes the objective can be accomplished through means that do not unnecessarily discourage drivers from hauling hazardous materials by virtue of inconvenient processes and inflated costs. We must all keep in mind that a hazardous materials endorsement is required to haul such innocuous (from a weapons standpoint) and routinely used products as paint and nail polish.[1]

Since January 31, the trucking industry has borne the monetary and non-monetary costs of the missteps associated with the implementation of the fingerprint-based background check

[1] For scheduling and logistics purposes, a number of carriers require all their drivers to have hazardous materials endorsements. ATA estimates that there are 3.2 million active CDL holders, and TSA estimates that this background check requirement will affect 2.7 million of these holders, equaling roughly 84% of the active driver population.

requirement for new applicants – a relatively small population. On May 31, the requirement will go into effect for drivers seeking renewals and transfers. Thus, it will affect drivers who have been hauling hazardous materials loads for, in some cases, over 30 years. This is a significantly larger population (TSA estimated roughly 2.7 million drivers). TSA's inability to smoothly handle background checks for the small population of new applicants is hardly reassuring that it will be able to handle an estimated 45,000 renewals monthly. This program needs immediate attention.

Consistent with the security objective, ATA proposes Congress direct TSA to perform name-based checks of drivers until such time as a nationwide, coordinated transportation-wide security credentialing program is put in place. As discussed further below, this approach will continue to ensure that terrorists do not obtain hazardous materials endorsements. It will also allow the trucking industry to tie into a coordinated program that, if implemented properly, could minimize costs, reduce driver inconvenience, and eliminate duplicative and redundant background checks of drivers and/or other transportation workers. Ultimately, this solution will greatly improve the trucking industry's ability to haul the products that are vital to this Nation's economy in a secure and safe manner.

TSA made a number of bad decisions in implementing Congress's mandate.

With enactment of the PATRIOT Act, ATA began thinking about ways to implement a system to achieve the security objective in an efficient and convenient manner that would provide the least disruption to the trucking industry and its workforce as possible. Over the extended course of time it has taken TSA to implement the background check program, ATA shared with TSA its thoughts and ideas on how the security threat assessment should work. Throughout, ATA conveyed the following key points: 1) the process should be uniform nationwide; 2) the process should be convenient for drivers; and 3) carriers should be notified of the ultimate disposition regarding their drivers. Unfortunately, I appear here today before this Committee dealing with a process that is 1) not uniform; 2) inconvenient for drivers; and 3) one in which carriers are not required to be notified of their drivers' security status. If all these negatives were in return for heightened security, it may have been more palatable to the trucking industry. Regrettably, the added costs and driver inconvenience associated with TSA's deployment of the fingerprint-based check do not seem to be justified by a commensurate increase in security.

The PATRIOT Act requires a check of the following: a) the relevant criminal history data bases; b) in the case of an alien, a check of the relevant data bases to determine that alien's immigration status; and c) as appropriate, a check of relevant international data bases. In implementing the statute through regulations, TSA chose to initially commence name-based checks on May 5, 2003 and commence with fingerprint-based checks on November 1, 2003. After several delays, it is our understanding that the name-based checks were not commenced until mid-2004. The fingerprint-based checks commenced on January 31, 2005 for new applicants and will commence on May 31, 2005 for current holders of hazardous materials endorsements seeking to renew or transfer their endorsements. Nothing in the PATRIOT Act requires a fingerprint-based check.

Early in the process, it became evident that TSA was more interested in the views of the states than the real regulated community – carriers and drivers. We can only presume it is because the states issue hazardous materials endorsements. The trucking industry has always viewed the CDL and the hazardous materials endorsement as *safety* documents – they certify that a driver has the knowledge and skills to *safely* transport hazardous materials. The background check requirement is a security program created by a federal statute and implemented by federal regulation. It can, and should, be done separate and apart from the CDL program. Regardless, the states implement the CDL program pursuant to federal rules. Therefore, TSA's failure to assert more control over the program to make it uniform is inexcusable.

TSA ultimately decided to use a contractor to assist with implementation of this background check program. While it insisted on the January 31, 2005 start date, TSA did not finally award the contract until October 2004. TSA then chose to give each state until December 24, 2004 to decide whether the state wanted to utilize the TSA contractor for fingerprint and information collection or not. Therefore, it was not until Christmas Day (roughly a month before implementation began) that the contractor knew in which states it had to set up fingerprint collection capabilities. As could be expected, there were, and continue to be, more than a few hiccups.

TSA's implementation has created, and will continue to create, numerous problems for the trucking industry.

I would like to highlight just a few of the problems the industry faced early on and then some of the problems we in the trucking industry continue to face. The end result of these problems is that it reduces our industry's ability to transport the freight that is crucial to our economy's continued strength and growth.

- From a State of Illinois official dealing with CDLs who surveyed fellow CDL officials: As of March 4 (a month after the requirement had gone into effect for new entrants): Illinois had submitted 644 fingerprint requests and received 0 responses from TSA in return; New York had submitted 350 fingerprint requests and received back 0 responses in return; Vermont had submitted 10 fingerprint requests and received back 0 responses in return; Iowa had submitted 138 fingerprint requests and received back 0 responses in return; Mississippi had submitted 100 fingerprint requests and received back 0 responses in return; Kansas had submitted 150 fingerprint requests and received back 40 responses in return; and Florida had submitted 700 fingerprint requests and received back 14 responses in return.

- From a DMV official in Virginia as of March 10: Virginia was not receiving confirmation from TSA that prints had been received and no approvals. In fact, as of March 10, TSA was still giving instructions to Virginia on how to fix the communications process.

- Several states were implementing the federal regulation unevenly, highlighting the problem with lack of uniformity. Although the fingerprint requirement for renewals and

> transfers does not take effect until May 31, several states were stripping the hazmat endorsement from drivers who moved from one state to another, thus making them ineligible to haul hazardous materials loads until TSA processed the results of their background checks. Since a large number of carriers require drivers to have hazardous materials endorsements as a condition of work, these workers are eventually unable to work for a period of time.

Admittedly, some, but not all, of the problems cited above have since been addressed, but it is unconscionable that these problems were allowed to detrimentally affect drivers' livelihoods and carriers' business for months after the program went into effect. Notably, these problems arose from implementation for new applicants, who are a mere fraction of the population that will be affected beginning on May 31. One can only suppose that the trucking industry has witnessed only a mere fraction of the problems to come.

There are problems that the trucking industry still faces today that do not appear likely to be corrected in advance of May 31. In its analysis of its regulation, TSA estimated that there would be a 20% reduction in the number of drivers with hazardous materials endorsements. If the reduction is a result of individuals who are identified as threats being excluded from the transport of hazardous materials, then so be it. However, ATA cannot stand idly by if the reduction is attributable to a poorly designed process that dissuades drivers from seeking or renewing their hazardous materials endorsements. At a time of driver shortage, I would argue that the Nation's economy cannot afford this process to continue.

Inconvenient and Inadequate Locations: Universally, drivers and carriers in the states that elected to use the TSA contractor are very concerned about the lack of an adequate number of approved fingerprint submission sites. In those 34 states plus the District of Columbia, there are a total of 91 sites where drivers can submit fingerprints for the hazmat background check process (as of May 6). In many large states, there are only two locations (some states, like Connecticut, Delaware and Maine only have one), which results in long travel times for drivers. For example, in North Dakota, some carriers' drivers are more than 200 miles away from an approved collection site. Six hour roundtrip commutes to and from the collection site are common in many states. The time spent getting to and from a fingerprint location translates into lost wages for the driver and lost productivity for the carrier. <u>This is simply unacceptable!</u>

Adding to the inconvenience for the drivers is the limited hours of operation for many sites. Some drivers in Michigan had 10 hour roundtrips to Michigan's sole initial location. Since then, Michigan has added two more locations (Saginaw and Lansing), but they only accept prints on Monday from 2 pm – 6 pm and Tuesday and Thursday from 2 pm – 6 pm, respectively. Nebraska added a second location that only accepts prints on Monday and Wednesday from 2 pm – 6 pm. Finally, a number of these locations are at office buildings with no adequate parking facilities for trucks. The design of this system certainly tests a driver's incentive to seek a hazardous materials endorsement.

Turn-Around Time: Additionally, the turn-around times from fingerprint submission to driver receipt of notification from TSA varies greatly among the states. In an informal survey of carriers doing business throughout the country, ATA found that the turn-around time ranges from

two weeks to 120 days. 120 days is clearly too long. In the case of renewals, it would likely lead to expiration of the original hazardous materials endorsement, since state licensing agencies are required to send out notices of the screening requirement to drivers only 60 days in advance of expiration. TSA believes it resolved this problem by allowing states to temporarily extend the expiration date, but a number of states have noted that they do not have the legislative authority to do so. This variation in turn-around times, and the unacceptable lengthy turn-around times, can be attributed to the lack of a uniform, nationwide program.

The costs of the hazardous materials background check program are unnecessarily high.

In the states that opted to use the TSA contractor for fingerprint and information collection, the fee is $94 broken down as follows: $38 for the Information Collection fee (i.e., fingerprint capture); $22 for the FBI fee (this fee is $24 if the state elects to capture fingerprints itself); and $34 for the Threat Assessment fee. The 17 states that opted to collect prints on their own must still charge the $24 FBI fee and the $34 Threat Assessment fee, but they are free to charge whatever they like for the information collection portion. Some states are charging significantly more. For example, New York charges $75 for information collection. TSA admitted in its rulemaking that if all the states had participated in the program, the information collection fee would have been significantly lower (TSA had estimated closer to $25). Nothing in the statute required a decentralized approach. Now, however, the industry is paying more than necessary for this approach.

Unfortunately, these costs represent the tip of the iceberg. As noted earlier, there are significant costs to the driver associated with taking a day off work in order to travel to submit fingerprints. There are fuel costs associated with going to and from the collection site. The program implementation has negatively affected driver training and hiring programs. For new entrants, it used to be routine for drivers to go to a truck driving school and be eligible for hire and work by the time they graduated. With the new requirement, states do not allow new applicants to begin the background check until they have already obtained their CDL, meaning a new entrant cannot have his/her hazardous materials endorsement by the time they graduate from truck driving school. This usually means they are not very useful or attractive to a carrier that hauls hazardous materials. **There are better ways to accomplish the background check, but nobody seems willing to entertain them.**

The disparity in costs of other transportation-related background check programs makes the implementation of the hazardous materials background check program particularly difficult for the industry to swallow. For example, a worker at an airport seeking a badge for unescorted access to secure areas generally pays under $50 and submits his/her prints at his/her place of work. That seems pretty convenient when compared to what the truck driver must endure. Further, a driver seeking certification under the Northern Border Free and Secure Trade ("FAST") program undergoes a background check that involves review of the criminal and immigration databases in Canada and the United States. Presently, the total fee for the FAST driver application is $50, which includes the issuance of a FAST card with radio frequency identification tag. Again, the hazardous materials background check is $94 in TSA contractor states and that does not include the cost of the actual credential.

Finally, ATA is deeply troubled by the thinly veiled admission by TSA that the trucking industry is bearing the costs of establishing a system that will be used by applicants from other modes of transportation in the future but at significantly lower costs. In TSA's Air Cargo Rule, which would broaden the background check requirements for certain aviation workers to include screeners and supervisors of screeners of cargo to be carried aboard all-cargo aircraft and which TSA proposed on the same day that it proposed the fees for the hazardous materials background check program, TSA stated:

> [W]here possible, TSA would leverage existing processes, infrastructure and personnel that are envisioned to be in place for other Security Threat Assessment programs at the time this program begins operation. Existing infrastructure that would be leveraged include the HAZMAT Endorsement Program's Hazardous Materials Endorsement Screening Gateway System (HMESG); however, some modifications to these systems would be necessary to meet the proposed requirements. The changes would include connectivity with additional government agencies, software enhancement and additional backup capabilities.[2]

TSA then estimated that total start up costs for the above air cargo system would be $690,000, compared to total start up costs of $4,760,000 for the HMESG, a differential of more than $4 million. As discussed further herein, ATA supports the concept of government agencies leveraging resources to implement the requirements for security threat assessments more efficiently. In fact, the coordinated, nationwide, transportation-wide system that ATA could support would do just that. In this instance, however, it is unconscionable to require the trucking industry to bear the burden of what amounts to a subsidy for other transportation sector workers.

Has commencement of fingerprint-based checks contributed to enhanced security in a cost-effective manner?

TSA's uneven application of security requirements across the transportation sector calls into question the need for the current fingerprint-based background check program that is so costly and inconvenient to drivers. In the same Air Cargo Rule which was cited earlier, TSA proposed to require individuals who have unescorted access to air cargo but had not undergone the background check required for Secure Identification Display Areas ("SIDA") access (i.e., secure areas of an airport) "to undergo a security threat to verify that they do not pose a security threat."[3]

In that rule, TSA proposed that such individuals should only be subjected to a name-based background check. Part of its rationale included:

> TSA recognizes that the number of individuals with access to cargo is large—approximately 63,000—and that the companies they work for run the gamut from complex organizations to "mom and pops." Therefore, requiring all these individuals to undergo fingerprint-based criminal history background checks would be a time-consuming and costly process. TSA believes that potential security concerns related to unescorted access to cargo by these individuals would be best addressed by requiring individuals to submit to a Security Threat Assessment program, focused on the threat of terrorism. A Security Threat Assessment, as proposed in this NPRM, would rely on checks of existing intelligence-based records and databases to ensure that an individual who is a known or suspected threat is prohibited from working in positions that could

[2] 69 Fed. Reg. 65258, 65276 (November 10, 2004).
[3] 69 Fed. Reg. at 65265.

> allow that individual to have unescorted access to air cargo. This program adopts best practices from the financial services and transportation security communities to reduce the likelihood that a terrorist could gain access to cargo.[4]

Applying that rationale to the trucking industry, how TSA ended up with the process that the trucking industry now faces is inexplicable. The affected trucking industry population is large—approximately 2.7 million by TSA's numbers—and trucking companies certainly run the gamut from complex organizations to "mom and pops." The period of time since January 31 has certainly shown that the fingerprint-based records check process designed by TSA is both time-consuming and costly. And in the end, a hazardous materials endorsement essentially allows an individual unescorted access to cargo. A number of hazardous materials are sent by air on all-cargo aircraft. Consistent rationale points to the conclusion that name-based checks should suffice – at least until such time as a system is established that is less time-consuming and less costly.

TSA itself has recognized the adequacy of name-based checks against terrorist databases on a number of occasions. In the April 6, 2004 Federal Register, TSA stated, with respect to checking terrorist-related databases, "TSA believes that this name-based check of all drivers who are currently authorized to transport hazmat will enable the agency to focus on individuals who may pose a more immediate threat of terrorist or other dangerous activity." TSA further stated, "The terrorist-related information that TSA will search prior to January 2005, is the best indication of an individual's predisposition to commit or conspire to commit terrorist attacks." Finally, TSA concluded that the process of first searching terrorist-related databases and then searching criminal databases that include outstanding wants and warrants and immigration records is consistent with the USA PATRIOT Act. Later, in a November 10, 2004 Docket Exemption Notice, TSA stated, "Moreover, TSA has completed a name-based threat assessment of all current HME holders and repeats this check periodically. TSA has disqualified the individuals TSA has concluded pose or may pose a security threat. Therefore, TSA has determined that delaying [fingerprint-based checks] for individuals who currently hold an HME and must renew or transfer them within the next several months will not adversely impact security."

If a check of the terrorist and immigration databases alone is insufficient, a name-based check of criminal history records is also possible. Name-based checks are conducted in compliance with the Brady Act for gun purchases and by Customs and Border Protection officials for customs and immigration purposes every day. Again, the trucking industry asks if the costs and burdens justify the fingerprint requirement.

ATA is not aware of anything magical about either January 31 or May 31 for commencing fingerprint-based checks. There have been a number of delays associated with this program, but it seems that TSA was convinced that conducting name-based checks was satisfactorily addressing the real threat. The arbitrariness of starting on these dates (when TSA and the states clearly are not ready) is underscored by the actions of states like Minnesota and Pennsylvania. Minnesota provided a period of time where drivers could come in and pay a fee and extend their hazardous materials endorsements to 2009. Pennsylvania, on the other hand, was suggesting that drivers come in and get their hazardous materials endorsement renewed prior to May 31 to avoid

[4] 69 Fed. Reg. at 65265.

the burdens associated with the fingerprint process. The TSA rule allows this, which again indicates that TSA believed their name-based check of current holders was a significant and sufficient security screen. ATA agrees and urges that the name-based check be continued periodically in lieu of the fingerprint-based process.

I must bring to your attention what appears to be a glaring lapse in the TSA regulation from a security standpoint. The motor carrier for whom the driver is driving is not informed as to whether TSA has ultimately determined the driver to be a security threat or not. As mentioned earlier, ATA has raised this issue repeatedly with TSA, yet TSA did not include a notification requirement. Practically speaking, what does this mean? At my company, we note when a driver's hazardous materials endorsement is set to expire. We also conduct the required motor vehicle records search. However, in the case of an existing driver, the driver will presumably initiate the renewal process well in advance of expiration. If the driver is in a state that allows renewal six months in advance, and the driver initiates the background check that far in advance, and TSA notifies the driver a month later that the driver is a security threat and ineligible to haul hazardous materials, how would I as a carrier find out? Thus, the driver would have the remaining five months (which is when my company's records would indicate a need to check to see the endorsement has been renewed) to drive for my company. Since the driver has been deemed a security risk, this type of situation would place my company in jeopardy. This must be resolved to allow carriers to be part of the solution of ensuring secure drivers.

<u>There is a better way to screen drivers seeking hazardous materials endorsements</u>.

As this testimony has stressed throughout, there is no need to subject the trucking industry to the burdensome fingerprint-based process concocted by TSA to achieve Congress's security objective – I remind you, an objective shared by the industry. The solution is to continue to conduct name-based checks of drivers and design and put in place a proper a nationwide, coordinated transportation-wide security credentialing program for access to secure areas or hazardous materials. The fact that TSA has implemented a hazardous materials background check program that is clearly broken should not encourage Congress or TSA to fix it.

Truck drivers go everywhere and connect the various legs of cargo transport. Therefore, drivers are subject to SIDA checks if they do business at the airports. They will be subject to background checks if they do business at maritime ports pursuant to the requirements of the Maritime Transportation Security Act. If the driver crosses the border, the driver may undergo a background check as part of the FAST program. If the driver hauls arms or ammunition for the Department of Defense, the driver is subject to a background check. The same is true if the driver hauls cargo for the U.S. Postal Service. Additionally, states and localities are beginning to layer their own background check requirements that will affect truck drivers. **A coordinated, nationwide system that preempts state and local background check requirements for those involved in interstate commerce is desperately needed. It makes no sense for the same driver to be checked against the same databases multiple times for different background check programs.**

The Transportation Worker Identification Credential was originally intended to be the type of program that ATA requests. However, some of the key elements noted in the paragraph above

need to be incorporated into the program. When such a program is in place, the costs will be shared over a larger population and thus lower for everybody. And if fingerprints are to be part of the program (as they seem to be), then at least a more robust nationwide fingerprint collection network could be established to ease the burden and inconvenience on truck drivers. This program will assist in securing the trucking industry without crippling it.

Conclusion

Mr. Chairman and members of the committee, on behalf of ATA, I thank you for giving me the opportunity to appear here to discuss these critically important issues. The industry stands willing to be a supportive partner in the effort to secure our homeland. However, as the primary transporters of commerce, we also have a responsibility to the economic security of our Nation. Unfortunately, the industry now faces a background check program that enhances the trucking industry's security by reducing the trucking industry's ability to transport those every day hazardous materials upon which this Nation's economy depends. As my testimony today has shown, it does not have to be a zero-sum game. Working together, we can enhance security while preserving the ability to transport goods. The industry looks forward to working with Congress, and the new leadership at the Department of Homeland Security and TSA, to make this happen.

STATEMENT OF

SCOTT MADAR
ASSISTANT DIRECTOR OF SAFETY AND HEALTH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE'S
SUBCOMMITTEE ON HIGHWAYS, TRANSIT, AND PIPELINES

UNITED STATES HOUSE OF REPRESENTATIVES

MAY 11, 2005

HAZARDOUS MATERIALS ENDORSEMENT
BACKGROUND CHECKS

International Brotherhood of Teamsters
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
202/624-6960

Mr. Chairman and Members of the Subcommittee:

My name is Scott Madar, and I am the Assistant Director of the Safety and Health Department of the International Brotherhood of Teamsters. Thank you for the opportunity to testify today on behalf of our 1.4 million members regarding such an important issue: the Background Check Requirements for Commercial Drivers with Hazardous Materials Endorsements. The Teamsters Union represents hundreds of thousands of drivers who make their living driving on our nation's roads, from interstate highways to city streets, oftentimes carrying hazardous materials.

As a general matter, the International Brotherhood of Teamsters recognizes that in the post 9/11 world, there is clearly a need to strengthen security in the United States and in particular in the nation's transportation system. However, the Teamsters Union continues to question the efficacy of the current criminal component of the background checks of commercial drivers with hazardous materials endorsements as a means to prevent terrorism. With that being said, the Teamsters have accepted that these background checks are part of the government's efforts to make the nation more secure. We recognize that conducting security threat assessments across the transportation network is part of the Federal Government's responsibility, and are therefore making every effort to ensure that the system balances the needs for a safe and secure industry with the rights of drivers to hold good jobs.

While the Teamsters appreciate the attempts of the Transportation Security Administration (TSA) to balance security with the rights of drivers, the Teamsters Union continues to believe that the process could be improved to root out true risks, provide a level of fairness and due process for affected workers, ensure privacy rights, provide for

timely processing of applications and threat assessments, and ensure that workers are not unfairly kept from their chosen profession. I will detail some of these recommendations below.

Loss of HME = Loss of Work:

Section 1012 of the USA PATRIOT Act directed States not to issue licenses to individuals to transport hazardous materials unless a background check of the individual has been conducted and the Department of Transportation has determined on the basis of the background check that the person does not pose a security threat. The hazmat "license" referred to in the statute is actually an endorsement on the individual's commercial driver's license (CDL) which permits that driver to transport hazardous materials. A hazmat endorsement (HME) is necessary for any driver to transport a shipment of any amount of hazardous material that requires placarding.

It is important to point out that although a hazmat endorsement is not technically required for a driver to possess a CDL, from a practical standpoint it is usually necessary for professional truck drivers to have such an endorsement. The vast majority of drivers do not exclusively transport hazardous materials or non-hazardous materials. Particularly in the less-than-truckload (LTL) sector, any given shipment may contain a placardable amount of hazardous materials. For this reason, LTL carriers generally require, as a condition of employment, that their drivers have HMEs. Thus, the loss of an endorsement will in most, if not all, cases have the same effect as a total loss of the CDL for a driver employed in the LTL industry.

Because of the negative impact the loss of an HME has on a driver's ability to work, it is imperative that the process be made as fair as possible.

Disqualifying Offenses:

The list of disqualifying offenses must be improved. The December 2004 Interim Final Rule published by the TSA continues to disqualify drivers from possessing an HME for a variety of offenses, some of which have little or no relation to whether the person poses a national security threat. The list of disqualifying offenses should be better defined to include only those offenses that have a consistent and direct link to national security.

In the preamble to the December 2004 Rule, the TSA stated that the crimes listed in §1572.103 indicate an "individual's predisposition to engage in violent or deceptive activity that may reasonably give rise to a security threat." [69 Fed Reg. 68723]. The TSA indicated that it was attempting to model this list of disqualifying crimes on the Maritime Transportation Security Act (MTSA). However, the MTSA requires disqualification only for felonies that could cause "the individual to be a terrorism security risk ..." [Section 70105(c)(1)(A)(i)]. The Teamsters Union contends that the list of crimes adopted in the December 2004 Interim Final Rule do not meet these criteria. The list is overly broad and should be revised to better reflect those crimes that are more closely related to terrorism risks, or threats to national security.

The inconsistencies cited above are especially problematic because some of the offenses included in the Interim Final Rule are not related to whether a person poses a true security risk. For example, any felony involving "[d]ishonesty, fraud, or

misrepresentation, including identity fraud" constitutes a disqualifying offense. This is an extremely broad and somewhat vague description of crimes. The types of offenses covered could include writing bad checks, perpetrating insurance fraud, or other similar offenses. While certainly not admirable, such crimes do not in any way indicate a propensity towards terrorism. In addition, certain dishonesty-based offenses could constitute a felony in one State but not another. If there are specific fraud type crimes that concern the TSA, such as forging passports, immigration papers, or other identity documents, these offenses should be specifically enumerated rather than included in a broad category of fraud offenses. By listing specific crimes instead of broad categories of offenses, the TSA can more narrowly tailor the Rule to better serve the purpose of preventing terrorism, and also help ensure more equal enforcement between the various States. While none of the listed crimes can be condoned (and workers, like all individuals, should and do pay an appropriate criminal penalty) many do not demonstrate a propensity to commit a terrorist or security attack, and the TSA has offered no evidence to the contrary.

The TSA has recognized that "individuals may participate in criminal acts and subsequently become valuable members of the workforce." [68 Fed. Reg. 23861]. We have previously advised the TSA that the ability to obtain productive employment upon release from prison can often play an integral role in the ability of a released convict to remain rehabilitated. In this regard, many corrections departments have rehabilitation programs that steer former prisoners toward the trucking industry. Many trucking companies participate in such programs and will be harmed by the loss of employees if this list of disqualifying crimes is not amended. As discussed above, the loss of an HME

will in many, if not most, cases have the same effect as a total loss of the CDL for a driver employed in the less-than-truckload industry.

Indictment:

Despite the objections of the Teamsters Union, the December 2004 Interim Final Rule continues to disqualify drivers who have been merely accused of an offense, even if they have not yet been convicted. Not only is a person disqualified from possessing an HME if convicted of a listed offense, but under the Rule having a want, warrant or indictment for one of the offenses is also a basis for disqualification. An indictment can often be obtained with little hard evidence and certainly less evidence than is needed for a conviction. To deprive a person of the ability to earn a living under these circumstances is improper and contrary to due process.

Both the aviation background checks and the MTSA require exclusion for felony convictions only. It is patently unfair for the Federal Government to essentially exclude someone from employment because that person has allegedly committed an offense. More importantly, as the Rule is written, it appears that a basic tenet of this country's legal system, innocent until proven guilty, would not apply to commercial drivers who apply for an HME. If disqualification based on an indictment alone were to be permitted, it should only be in the most extenuating circumstances and should be limited to the crimes most likely to be linked to a security threat, such as terrorism, treason, and espionage.

This provision of the Rule effectively extends the period of time that a person is disqualified from holding an HME beyond the periods stipulated in the Rule. An

individual would be disqualified from holding an HME during the period of his/her indictment, and then for another seven years after being released from prison (if convicted). Someone could be under indictment for years before acquittal. During this time, that individual would not be able to hold an HME and could very well be unfairly forced out of a job. If convicted of a crime, we question how the time requirements would apply. As in the above example, if someone is under indictment for two years and then convicted, the regulations would bar that person from holding a hazmat endorsement for nine years (instead of seven) from the date of conviction. If this is the case, then the Rule would serve to extend the period during which an individual would be barred from holding an HME for slow prosecution -- not for a genuine security reason.

Characterization of Offenses:

Despite the Teamsters' objections, the December 2004 Interim Final Rule continues to lack any mechanism for a person to challenge the assertion that a particular crime constitutes a disqualifying offense. This is particularly a problem with the broader offenses. Thus, the problem may be partly resolved if the list of disqualifying crimes is revised to include more specific offenses. Nevertheless, because criminal codes can vary greatly from State to State, as the Interim Final Rule is currently written, there may be circumstances where a person is convicted of an offense that seems to constitute a disqualifying offense but was not necessarily intended by TSA to be one. The Teamsters Union continues to urge for language granting drivers the ability to challenge the characterization of a particular offense either in the appeal or waiver process.

Appeal and Waiver Process:

The Teamsters Union is pleased that the TSA adopted a waiver process and we consider it an essential element in ensuring that individuals who made mistakes in the past are not unfairly denied employment opportunities in the present. However, we continue to believe that modifications must be made to this process to ensure that it serves its intended and stated purpose. In particular, appeal and waiver decisions should be made by an Administrative Law Judge or some other third party not officially included in the TSA hierarchy. This would allow employees to make their case in front of an impartial decision-maker not bound by political pressure or subject to agency interference. The current process forces workers to appeal to or seek a waiver from the same agency that just determined that they are a security threat. Furthermore, given the political realities of security threat assessment, the TSA may be reluctant to grant appeal or waiver requests to convicted felons. Administrative Law Judge decisions would establish case precedent that would better define what constitutes a security risk. This would bring fairness and consistency to a system that is central to both employee rights and national security. For these reasons, we urge the modification of the appeal and waiver processes to include the independent review of these requests.

We would like to thank Chairman Young for his amendment on the pending DHS Reauthorization Bill to provide workers covered by the Maritime Transportation Security Act the right to appeal a TSA determination to an Administrative Law Judge. It is the opinion of the Teamsters Union that Administrative Law Judges will be more independent than political appointees, and workers will be more likely to get a fair and impartial hearing.

Subjective Determination:

The Teamsters Union has serious concerns over §1572.107 of the Interim Final Rule which allows the subjective denial of a hazmat endorsement if TSA "determines or suspects" the applicant of posing a "threat to national security or to transportation security." This provision further allows denial of hazmat endorsement if an individual has "extensive foreign or domestic criminal convictions" or "a conviction for a serious crime not listed in Section 1572.103." The TSA asserts that it needs to have a "level of discretion to carry out the intent of the USA PATRIOT Act and responsibly assess threats to transportation and the Nation, where the intelligence and threats are so dynamic." [69 Fed. Reg. 68736].

We contend that this section grants the TSA overly broad authority and presents opportunities for abuse because §1572.107 essentially allows TSA to make security threat determinations arbitrarily. We have urged the TSA to strike this provision or, at a minimum, to place restrictions on the use of this provision by specifically citing the criteria to be used to disqualify someone under this section.

Despite the added level of review by the Assistant Secretary required by this section, the Teamsters Union again urges the use of a formal, third-party waiver process as discussed above. The TSA claims that because individual circumstances are taken into account under a determination based on §1572.107, there is no reason for a waiver. [69 Fed. Reg. 68727]. We argue that determinations resulting from subjective decisions, based on broad, ill-defined criteria, should be afforded independent review. Additionally, we urge the establishment of a process using either the Inspector General or possibly an

advisory committee, to carefully monitor the use of this provision to ensure that it is used "cautiously and on the basis of compelling information that can withstand judicial review."

Transportation Security Incident:

We are also concerned that the definition of "transportation security incident" is too broad and could be read to encompass a wide range of offenses that are not indeed security threats. We do recognize that the definition adopted by the TSA tracks the language in the MTSA, namely "a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area." Nonetheless, it is incumbent upon the TSA or Congress to further clarify the meaning of this ambiguous definition. In particular, the Teamsters Union notes that the phrases "transportation system disruption" or "economic disruption in a particular area" could arguably be read to include non-violent, yet unlawful, actions that shut down a port or otherwise disrupt a transportation facility. In the preamble to the Rule, it would appear that this is not the intent of the TSA and that the agency is instead attempting to capture the most serious offenses. We urge that this term either be struck from the Rule or further defined in the text of the Rule to accomplish this objective. This is especially important since the TSA has decided to include "transportation security incident" as one of the crimes where no waiver may be granted and there is a permanent bar to an HME.

Time Limits:

The Teamsters Union is concerned that the time limits stipulated in the December 2004 Interim Final Rule are too short. Specifically, each State is now required to notify HME holders at least 60 days prior to the expiration date of their HME. The States must notify the HME holder that he/she may begin the renewal process up to 30 days prior to the HME expiration date. The TSA warns that HME holders should begin the renewal process at least 30 days before expiration, otherwise the background check may not be completed before the expiration date. [69 Fed. Reg. 68732]. The Teamsters Union urges an increase in the notification timeline to at least 90 days. The current notification requirement timeline of 60 days provides insufficient time for the HME holder to complete all aspects of the security threat assessment should there be a need for an appeal or waiver. Remember - these appeal or waiver processes may include a request for releasable materials upon which the Initial Determination was based, as well as a request to correct any inaccurate information that resulted in an unfavorable Initial Determination, all of which will require additional time.

Application Delays:

While we can not speak directly to the difficulties faced by every driver during this initial phase-in of the background checks, we do know that many drivers seeking a new HME are being told that there are long delays, lasting in some cases well over 7 weeks. Additionally, some drivers who are seeking renewals and are not currently subject to the background check requirements are incorrectly being forced by States to submit fingerprints such that a background check could be performed. At this time, it is

impossible to characterize the full extent of the problems and delays faced by applicants seeking renewals; however, it is only a matter of weeks before these problems will likely manifest themselves, as the May 30 deadline fast approaches.

If a hazmat driver's application for a renewal is delayed due to a backlog of other applicants, it is possible that drivers could be unfairly deprived of their ability to work. Since drivers have no control over how long it takes to conduct a background investigation, the Teamsters Union firmly believes that a driver who has timely applied for renewal should not be punished for such delays. Many of the drivers who could be affected have been driving for years without any incident. It would be patently unfair for drivers to lose their livelihood through no fault of their own. Therefore, we recommend that any driver who timely applies for renewal of his/her endorsement should be granted an automatic extension until the State is given notice of a final determination. The Teamsters Union does not believe that an automatic extension is an unreasonable request since every existing commercial driver with an HME has had a name-based background check already performed, and the TSA will continue to include this intelligence-based check as part of the procedures of the security threat assessment described in §1572.15. While we recognize that §1572.13(d) allows States to issue extensions of up to 90 days, it does not appear to be automatically triggered and may remain up to each State to initiate.

The need for an extension is further seen in the case of individuals who do not initially receive a Determination of No Security Threat. Persons who have received an Initial Determination of Threat Assessment are permitted to appeal that determination. However, the appeal process itself (without any extensions) can take up to 90 days. Thus, in instances where there is an initial threat assessment, the driver's existing

endorsement will almost certainly expire before final resolution unless the endorsement is extended pending resolution of the appeal. Although the TSA would be justifiably more concerned about these individuals continuing work after an Initial Determination has been issued, the Interim Final Rule already provides a safeguard for immediate revocation of endorsements under §1572.13(a) in cases where there is evidence of a serious threat. In all other cases, an individual should be permitted to correct any errors before he or she is deprived of the ability to work. Thus, we again request that the Rule be amended to make clear that the validity of an endorsement is automatically extended during any timely filed appeals.

Application to Foreign Drivers:

Another area of concern is how foreign drivers will be treated under the new Rule. The Teamsters Union has asserted previously (Docket No. TSA-2003-14610) that the TSA should be certain to ensure that foreign drivers are subject to equally thorough background investigations and that they are disqualified on the same grounds as U.S. drivers. In addition, a mechanism must exist for U.S. inspectors to determine easily whether foreign drivers are disqualified from transporting hazardous materials pursuant to such disqualification. It would be utterly unconscionable to permit Mexican or Canadian drivers to carry hazardous materials under the same circumstances in which a U.S. driver would be prohibited from doing so. The TSA must strive to achieve one level of security for all drivers - including foreign drivers.

Costs to Drivers:

The Teamsters Union has gone on record (TSA-2004-19605) stating that it does not believe that the drivers should have to bear the cost of these requirements. In the Department of Homeland Security Appropriations Act, Congress intended for the TSA to charge fees to recover the costs associated with performing the credentialing and background checks [P.L. 108-90, Section 520]. However, when this language is examined carefully, it is clear that there is no requirement for drivers alone to bear the brunt of these fees, nor is there a requirement that these fees recover start up and other infrastructure costs. As the Teamsters Union has stated previously, this is a Federal program that already imposes a substantial additional burden on drivers. Drivers should not be required to also sustain the burden of funding the program. The fees imposed should be divided among all affected parties, including the employers and the Federal Government. In other sectors of transportation, the Federal Government has provided security assistance and this sector of transportation should receive the same benefit.

The TSA has indicated in its fee rulemaking that a significant portion of the costs being passed on to the drivers are those associated with the creation and maintenance of databases, disaster recovery, and other infrastructure costs, including over $4.7 million in start up costs. The Teamsters Union contends that these fees should not be passed on to the drivers. These costs should be absorbed by the Federal Government as they should not be considered part of "providing the credential or performing the background record checks." [P.L. 108-90, Section 520] Only those fees associated with collecting information should be passed on to the drivers and employers.

The TSA has also made it clear that these fees will likely go up, as they are scheduled for biennial reviews. "Pursuant to the Chief Financial Officers Act of 1990, DHS/TSA is required to review these fees no less than every two years (31 U.S.C. 3512)." [69 Fed. Reg. 65335, November 10, 2004] and these fees have not been adjusted for inflation [*id.* at 65337]. In addition, there are costs that will be associated with States that choose to get involved in this process by performing the information collection and transmission functions themselves. These States are allowed to charge a fee under their own user fee authority and are responsible for establishing their own State fee to recover the costs of performing these services. Currently, drivers in different States are being charged different amounts to obtain their HME. Lastly, the cost estimates by the TSA do not include the costs associated with the appeals or the waiver process, as any driver who needs to use these procedures undoubtedly would incur additional costs. Therefore, the costs as proposed are likely to underestimate the actual costs being imposed on drivers.

In light of the estimated costs ($72 million) for the implementation of this program, the Teamsters Union questions whether a different program could be established that would achieve the same results in a more efficient and less costly manner. We have suggested that the TSA carefully reevaluate all aspects of this program to determine if the same level of security could be achieved in a more cost effective manner. Any monetary savings that are realized could be used for other security measures. An expenditure of this size addressing another area of security, such as chemical plant security, would protect a larger portion of the population from a terrorist event. (An event involving a breech of chemical plant security has the potential to be

much more devastating than any that could be achieved by a single hazardous material-carrying commercial motor vehicle.)

Duplication of Effort:

The Teamsters Union continues to question why the TSA has not further studied the possibility of combining other programs currently underway within the Department of Homeland Security with the security threat assessment program for hazmat drivers. The TSA indicated that it will consider the consolidation of several programs to improve efficiency while fulfilling security needs. [69 Fed. Reg. 68723].

It seems logical to the Teamsters that all security threat assessment programs should utilize the same, or nearly the same, standards for security threat determinations, as well as the same infrastructure such that the costs associated with these programs (both to the agency responsible for the programs and to the individuals involved) can be minimized. We believe that consolidation of security programs will offset some of the costs associated with this program and minimize any additional fees that will be assessed on the hazmat endorsed drivers as a result of this program. To that end, the Teamsters urge examination of all security threat assessment programs, as well as the infrastructure needed to administer these programs, with the ultimate goal of consolidating as many as possible.

7/5 Year Look-Back Period:

We would again like to thank Chairman Young for his amendment on the pending DHS Reauthorization Bill that would prevent the use of felonies older than seven years to

disqualify a worker covered by the Maritime Transportation Security Act unless the felony was related to terrorism (as defined in the Homeland Security Act of 2002[1]). The Teamsters Union encourages the implementation of similar restrictions with regard to the hazardous materials background checks for commercial drivers.

Additionally, the Teamsters urge the reconsideration of the existing look-back periods. Currently, the Interim Final Rule provides for individuals to be disqualified for a period of seven years following a conviction for a disqualifying offense or for five years following release from incarceration for a disqualifying offense. It is clear that these time frames were adopted from the Maritime Transportation Security Act (MTSA), in an effort to allow for unity in the way in which transportation workers are treated. The Teamsters Union notes, however, that the USA PATRIOT Act gives the TSA greater discretion in determining the appropriate look-back period in relation to hazardous material endorsements than does the MTSA. As such, the TSA should exercise its discretion to impose shorter look-back periods under the USA PATRIOT Act and still allow for consistent requirements to be implemented under the MTSA. We urge the reconsideration of the five and seven year periods for disqualification.

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[1] *The term "terrorism" means any activity that—*
(A) involves an act that—
(i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and
(ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and
(B) appears to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

Conclusion:

The Teamsters Union appreciates the efforts made to balance the interests of increased security with the protection of drivers' rights. It is our hope that these efforts will continue and that the recommendations discussed above will be incorporated to further improve this balance.

With that, I thank you again for the opportunity to testify today. I'd be happy to answer any questions you may have.

Oberstar

COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE
Subcommittee on Highways, Transit, and Pipelines

Oversight Hearing: Hazardous Materials Endorsement Background Checks

May 11, 2005
2:00 p.m.
2167 Rayburn House Office Building

Mr. Chairman:

I want to thank you, Mr. Chairman, and Ranking Member DeFazio, for convening this hearing to examine the conduct of the background checks required for CDL drivers seeking hazardous materials endorsements. I know I echo the sentiments of many of my colleagues on this committee when I say that I am glad the background checks have finally begun.

I also commend the vigilance of you, Mr. Chairman, and of Ranking Member DeFazio in convening this oversight hearing during the early stages of the implementation of the background check process so that we can identify any emerging difficulties and move to correct them before they become major problems.

Every day, more than one million shipments of hazardous materials move across the United States. These shipments constitute 20 percent of total freight tonnage shipped in this country each year.

The U.S. Department of Transportation estimates that more than 90 percent of all individual hazardous materials shipments are transported by truck, and that approximately 400,000 individual large trucks are used in hazardous materials transportation.

These shipments move to and through every corner of our nation. For example, tank trucks deliver gasoline – which accounts for 40 percent of all hazardous materials shipments – to an estimated 150,000 gas stations nationwide.

These shipments are critical to our daily lives – but the presence of these trucks on our highways and in our communities poses real dangers to drivers and residents. In January 2004, a tank truck carrying premium gasoline fell from an overpass onto I-95 near Elkridge, Maryland. The truck exploded, and the resulting fire killed four people. This incident disrupted traffic on I-95 for more than 7 hours.

This was not a security incident. Investigators have concluded that the driver of the tank truck most likely experienced a heart attack or other

medical emergency that caused him to lose control of his truck. However, this terrible accident dramatically illustrated to me and to many in this region the risks associated with the shipment of hazardous materials by truck.

It is imperative that we do all that we can to ensure that hazardous material shipments are both as secure and as safe as possible. The efficient conduct of background checks on those licensed to drive trucks containing hazardous materials is one step in achieving safety and security.

I look forward to working with my colleagues in the months ahead to address the loopholes and deficiencies that still exist in both the security and safety of hazardous materials transportation – by truck and by all other modes.

I also look forward to hearing from today's witnesses and I hope that today's hearing will be the first of many hearings this Congress on hazardous materials transportation.

Thank you and I yield back.

STATEMENT OF ANNETTE SANDBERG, ADMINISTRATOR
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

BEFORE THE HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON HIGHWAYS, TRANSIT AND PIPELINES
May 11, 2005

Chairman Petri, Ranking Member DeFazio, and Members of the Subcommittee, thank you for inviting me to discuss hazardous materials (HM) endorsement background checks. I am pleased to appear before you to describe the Federal Motor Carrier Safety Administration's (FMCSA's) role in enforcing these background checks and how we work with our partners at the Transportation Security Administration (TSA) to ensure the safe and secure transportation of hazardous materials across our nation's highways.

The Commercial Vehicle Safety Act of 1986 established the Commercial Drivers License (CDL) Program and CDL Information System (CDLIS). The goal of the CDL program is to ensure that persons who operate commercial motor vehicles have only one driver's license at a time. CDLIS enables States to exchange commercial driver licensing information. It includes the databases of fifty-one licensing jurisdictions and the CDLIS Central Site. FMCSA's role in the CDL program is to verify the CDL program is uniformly and properly administered by all 51 jurisdictions, including enforcing State compliance with the TSA's HM security threat assessments.

To obtain a CDL, applicants must complete an application form certifying they are medically qualified and not subject to a disqualification in another State. Additionally, the applicant must pass a general knowledge and applicable endorsement knowledge tests and a skills test in a representative commercial motor vehicle. Upon

surrender of a current non-CDL license, the applicant is issued a CDL with applicable Class and endorsements.

Drivers wishing to transport hazardous materials must obtain an HM endorsement to the CDL. As a part of the licensing process, applicants are required to satisfactorily pass a knowledge test related to HM transportation. The second part of the HM endorsement process requires the driver to undergo a criminal background check, otherwise known as security threat assessment. TSA is responsible for conducting all security threat assessments. To obtain an HM endorsement, the driver submits to fingerprinting by a State or TSA agent and provides proof of citizenship or immigration status. Fingerprints are sent to the Federal Bureau of Investigations (FBI) for a criminal background check while TSA checks information from national and international databases. TSA provides the results to the State DMV, which issues or denies the endorsement. If an applicant is deemed to be a security risk and, therefore, denied an HM endorsement, the applicant may appeal the risk determination to TSA. If overturned on appeal, the applicant may then be issued a CDL with an HM endorsement.

FMCSA has a significant role to play in promoting and verifying State compliance with TSA's HM security threat assessment requirements. FMCSA verifies State compliance in two ways. First, we conduct a regular CDL State compliance review every 3 years. Second, we conduct a special CDL compliance review anytime the Agency receives a complaint that a State is not following proper procedures.

FMCSA conducts compliance reviews (CRs) on the CDL program not only to verify State's compliance with the TSA HM security threat assessment but to promote nationwide compliance and uniformity of Part 384 of the Federal Motor Carrier Safety

Regulations (FMCSRs). The CR program is a comprehensive on-site examination of the State's CDL program. During the review, FMCSA works with the States to improve highway safety and reduce CDL fraud by assessing the effectiveness of the State's CDL program and compliance with the 29 requirements listed in Part 384. FMCSA identifies legal, technical, operational, and administrative deficiencies in State CDL programs, establishes a mechanism for monitoring States' progress in correcting serious program deficiencies or areas of non-compliance, and assesses State vulnerability to CDL fraud.

FMCSA averages about 15 CDL CRs a year. In FY 2004 and 2005, FMCSA made improvements to its CDL program, including developing on-site review training for States, incorporating Motor Carrier Safety Improvement Act (MCSIA) implementation and CDL fraud vulnerabilities assessments into the process, and established a CDL sanctioning process for States found to be in substantial non-compliance. States found to be out of compliance with any of the CDL requirements will have 5 percent of certain Federal-aid highway funds withheld the first year and 10 percent the second and subsequent years of non-compliance. FMCSA may decertify a State's CDL program, prohibiting the State from issuing CDLs, if the deficiency that caused the substantial non-compliance affects a substantial number of either CDL applicants or drivers.

FMCSA has modified the CR process to ensure, through proper oversight, that a State (1) has the statutory authority to enforce the TSA threat assessment requirements; and (2) is following proper procedures in issuing a CDL with an HM endorsement. Since TSA implemented the security threat assessment on January 31 for drivers obtaining an HM endorsement for the first time, three CRs with the HM component have been

conducted in the District of Columbia, Tennessee, and Idaho. No substantial non-compliance findings regarding the HM endorsement process were found in these reviews.

Mr. Chairman, TSA has the lead in developing and implementing the process that States must follow to conduct the HM security threat assessments. FMCSA reviews State compliance with TSA's requirements and verifies all States have a solid and compliant CDL program. By verifying regulatory compliance, FMCSA activities are a significant contribution to increased safety and security for HM transport.

Mr. Chairman, I look forward to continuing this partnership as we move forward with the implementation of this very important program. FMCSA will continue to work with TSA to iron out any differences and inefficiencies to ensure that the program works seamlessly across agency and departmental lines, keeps unsafe and unsecure drivers off our nation's highways, and provides for adequate State compliance and enforcement of the CDL program. Accomplishing these goals will allow us to maintain the safety and security of America's communities.

American Association of Motor Vehicle Administrators

Testimony of

D.B. Smit
Commissioner
Virginia Department of Motor Vehicles

On behalf of the

American Association of
Motor Vehicle Administrators

Hazardous Materials Endorsement Background Checks

Submitted to the
House Committee on Transportation and Infrastructure
Subcommittee on Highways, Transit and Pipelines

Washington, DC

May 11, 2005

4301 Wilson Blvd, Suite 400 • Arlington, VA 22203 • Tel 703.522.4200 • Fax 703.522.1553
www.aamva.org

Good Afternoon, Chairman and distinguished Members of the House Select Highway, Transit and Pipelines Subcommittee. My name is D.B. Smit and I am the Commissioner of the Virginia Department of Motor Vehicles. I also serve as both Treasurer and Chair of the Government Affairs Committee for the American Association of Motor Vehicle Administrators (AAMVA). Thank you for the opportunity to testify on behalf of AAMVA to discuss successes and concerns regarding implementation of the hazardous materials endorsement (HME) background record checks (BRC) program with the Transportation Security Administration (TSA).

AAMVA is a state-based, non-profit association representing motor vehicle agency administrators, senior law enforcement officials and industry in the United States and Canada. Our members are the recognized experts who administer the laws governing motor vehicle operation, driver credentialing, and highway safety enforcement. AAMVA plays an integral role in the development, deployment and monitoring of both the commercial driver's license (CDL) and motor carrier safety programs. The Association's members are responsible for administering these programs at the state and provincial levels. As a non-regulatory organization, AAMVA uses membership expertise to develop standards, specifications and best practices to foster the enhancement of driver licensing administration

Background

When Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism also known as the USA PATRIOT Act (P.L. 107-56). Section 1012 required that background record checks be performed on CDL holders with HMEs. State driver licensing agencies and AAMVA then quickly got to work on the following tasks:

- Delivering data regarding existing CDL drivers with hazardous materials endorsements to federal agencies, who then in turn applied that data to various databases and search algorithms with the intent of identifying any drivers whom that they felt posed a security risk to the country. This project was termed "Name-based Background Checks".

  The Federal Bureau of Investigation (FBI), Federal Motor Carrier Safety Administration (FMCSA) and TSA all requested identification data (name, birth date, Social Security Number, and other identifiers) on existing CDL/HME drivers from the states since September 11, 2001. AAMVA, the Operator of CDLIS on behalf of FMCSA, served as the focal point for those requests, and from the states' perspective, this process was successful. AAMVA has limited visibility to the end result of those checks. The FBI and TSA would be in the best position to answer questions about drivers that were identified using this process.

- Defining criteria, processes, and procedures for the "fingerprint-based background checks" needed for new applicants, renewal applicants and transfers. For this part of the effort, TSA and the states needed to determine how to:
    - Capture, store and transmit data that is not currently handled by state driver licensing agencies (the Data Capture Process)
    - Receive and administer responses from TSA regarding the eligibility of a driver to receive the endorsement (the Eligibility Process)
    - Capture, store and transfer data regarding the results of the background check to other states when the driver changed state of residence (the History Process)

This fingerprint-based background checks project has been fraught with problems since the outset. The states view the problems to be caused by the lack of focus, continuity, and decision making on the part of TSA. After working with TSA for three years, the agency still lacks a solid understanding of the state driver licensing environment and what it takes to get things done. TSA has not viewed the state driver licensing agencies and its advocate, AAMVA, as a partner in the planning and execution of this portion of the effort and the program has suffered greatly as a result.

Working Relationships with Federal Agencies

In October 2002, AAMVA began to work with FMCSA, which was originally assigned responsibility within the Department of Transportation (DOT), to implement the HME background record check.[1] In 2003, responsibility of the program was transferred to TSA which at the time was in DOT and later moved to the Department of Homeland Security. In April 2003, AAMVA began to work with TSA to start implementing the HME background record check program. TSA, FMCSA and the former Research Special Programs Administration (RSPA) issued interim final rules on May 3, 2003.

In November 2004 and January 2005, TSA issued more interim final rules on the process and on the fees that could be collected at the time of application.

Throughout the course of this effort, AAMVA senior management has met several times with TSA senior management. These meetings were always at the request of AAMVA and were prompted by concerns voiced by the AAMVA membership regarding the lack of focus and decision making on the part of TSA. AAMVA's message in these meetings was consistent:

- TSA needs to involve the state driver licensing agencies in the planning and execution of the program; and
- TSA needs to make decisions more quickly in order to make deadlines.

[1] Appendix I, AAMVA USA PATRIOT Act Timeline, April 2005.

These meetings seemed to have some short-term, positive impact on progress; however we believe that the high rate of personnel turnover and the competing demands within TSA for resources caused the CDL/HME program to repeatedly lose focus within TSA. In the two years since TSA assumed responsibility for this program, AAMVA and the states have worked with five different TSA project managers.

AAMVA's CDL/HME Working Group

In July 2003, AAMVA put together a USA PATRIOT Working Group, which consists of AAMVA, state motor vehicle agencies[2], TSA, FMCSA, FBI, Lexis Nexis and CJIS (the FBI's Criminal Justice Information Systems Division). This working group has provided expert advice to TSA about whether the requirements for the HME program are obtainable and how requirements should change in order for motor vehicle agencies to implement the HME program.

AAMVA would like to thank the agency for addressing some of the issues identified by the PATRIOT Act Working Group which resulted in further amendments to the regulations. Based on comments from state motor vehicle agencies, TSA decided to do a phased implementation so DMVs would not be burdened all at one time. TSA changed the 180-day notification of drivers to 60 days and separated the name based check from the fingerprint based background check. TSA also decided to require CDL holders, instead of the states, to notify the agency of disqualifying crimes. Additionally, TSA changed the rule to allow HME background record checks to transfer from state to state if within the five-year expiration. Otherwise, CDL holders would have to get new HMEs BRCs if they moved to another state. Another significant change is that TSA is notifying drivers of whether they passed the security threat assessment. In the beginning, the state motor vehicle agencies had the responsibility to notify the driver and with this change, DMVs will not bear an administrative burden.

Key Operational and Implementation Concerns

The following were three key elements to the fingerprint-based background check program:

- Capture, store and transmit data that is not currently handled by state driver licensing agencies (the Data Capture Process).
- Receive and administer responses from TSA regarding the eligibility of a driver to receive the endorsement (the Eligibility Process).
- Capture, store and transfer data regarding the results of the background check to other states when the driver changed state of residence (the History Process).

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[2] States on the AAMVA Patriot Act Working Group are: Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Montana, Ohio, Pennsylvania and Texas.

For the Data Capture Process, states could choose to use an agent, provided by TSA, to capture, store, and transmit the data to TSA, or the state could capture, store and transmit the data itself. States that chose to capture the data on their own anticipated that they would transfer the data to TSA via the Commercial Driver License Information System (CDLIS). AAMVA and the states are still awaiting a decision and commitment by TSA on that request.

For the Eligibility Process and the History Process, the states also anticipated that TSA and the states would use CDLIS as the mechanism for delivering the data. AAMVA and the states are still awaiting a decision by TSA on that request.

There were identified in TSA rulemaking three deadlines with respect to the program:

- January 31, 2005 – Fingerprint-based checks for first time applicants
- May 31, 2005 – Fingerprint-based checks for renewal and transfer applicants
- July 31, 2005 – For those states that chose to implement the Data Capture Process themselves, they must use an automated process to exchange the data with TSA by this date.

All states met the January 31, 2005 deadline; however, TSA and the states are using what all agree is an interim process to do so. Currently, the HME background record check program is conducted through manual processes: fax, telephone and email. This manual process is burdensome and expensive for both TSA and the states, but because of the relatively small numbers of new applicants, this process has been manageable. However, there problems exist with matching up the threat assessment disposition returned from TSA with the driver's application in the state and with the timeliness of the response from TSA. For example, Florida has submitted 2,179 applications since January 31, 2005 and has only received 735 responses back.

The May 31 deadline is a concern for the state driver licensing agencies. The current interim process, if expanded to include renewal and transfer applicants, will cause applications for renewals to be mired in manual effort at TSA and in the states and will ultimately impede commerce.

With respect to the July deadline, the states have asked that CDLIS be used pursuant to all previous design discussions. However, TSA has not committed to CDLIS' use in this project and, moreover, TSA would have had to make that decision last year in order for the states' systems and the CDLIS central site to be modified in time for July, 2005. Since that decision has yet to be made by TSA, modification to has not started to support the Data Capture Process.

TSA Needs to Better Understand Driver Licensing

There are many examples we could use to underscore the fact that TSA does not understand the driver licensing environment and has not worked closely enough with state driver licensing agencies. However there is one situation that shows it best.

For those states using the TSA agent, TSA decided to change the commercial driver's license number when it is being collected by the agent. The agency made this decision without telling the state driver licensing agencies. Driver license number is THE key element to tie an individual to a driver license. All state driver license databases use this number as the primary identifier for drivers.

TSA's decision has huge consequences and therefore states like Texas and Montana cannot readily match the security threat assessment to the CDL driver with an endorsement. Also, states such as Georgia have been getting threat assessment determinations regarding drivers not holding CDLs, therefore there is no way to match the security threat assessment to a CDL.

The CDL/HME program will never be successful if TSA continues its decision making in a vacuum.

Additional State Concerns

- State motor vehicle agencies and AAMVA are concerned about the lack of funding for state implementation and expedition. California stated to AAMVA that the interim process is very costly to California, and as such, feel it is necessary that CDLIS be the long-term method used to transmit the data from TSA to DMV and for CDLIS to be used to transmit the HME information from California to other States.
- TSA and FMCSA regulations appear to be in conflict regarding whether person's with certain immigration classifications can receive a HME.
- States have petitioned TSA to incorporate information kept in state criminal history repositories into the CDL/HME background check. TSA has decided not to consider this information. States are concerned about language contained in the Senate's version of the highway bill allowing the Department of Homeland Security to preempt a state's decision to deny a HME based on information contained in the state criminal history repositories.
- States who decided not to use the TSA agent, such as Illinois with 95,000 CDL/HME holders, feel that they are treated as a low priority for TSA when it comes to resolving problems.
- States that use the TSA agent such as California, Ohio, Minnesota and Alaska have stated that there are not enough locations throughout their state to service their CDL holders/HME population, some locations are not accessible to commercial vehicles and are hours of operations are too limited.
- TSA should be change the fee regulation to allow the states who use the TSA agent, such as Maryland, recoup costs incurred by the state to process the threat determination.

TSA needs to work with the state motor vehicle agencies to address these issues.

Solutions for Success

AAMVA and the state motor vehicle agencies stand ready to assist TSA and continue to commit resources to help further refine the process. AAMVA recommends the following to improve the process.

1. ***Apply the model of communication used by USDOT/FMCSA as a proven and effective process to ensure the right people and organizations within the jurisdictions can contribute to the success of the program.*** In addition to using its own communications plan, FMCSA's strategy is to use AAMVA's existing infrastructure to communicate with the people across the nation responsible for implementing and operating the CDL program.

2. ***Allow the states to determine how to integrate these new requirements into their existing business and technical programs for the long-term solution (i.e., through CDLIS) and give them the funding and time to do so.*** States are clear in their preference to use CDLIS because it causes a tight integration of the application for an HME with the corresponding disposition returned from TSA. Congress should require TSA to use CDLIS. This approach will take longer to implement but will be the most cost effective and will stand the test of time.

3. ***Limit the fingerprint-based background check to new CDL/HME applicants until the CDLIS solution is ready.*** Renewal and transfer CDL/HME holders have been run through the name-based check several times since September 11, 2001. There is little risk in waiting until the CDLIS solution is ready.

Conclusion

TSA's interim processes, when accurately implemented and fully tested, meet the requirements of the USA PATRIOT Act. There is no increased risk in terms of threat to the homeland by continuing these procedures beyond July 2005. All parties must have the opportunity to take the time necessary to implement what will undoubtedly be the most efficient and cost effective long-term solution.

Thank you. I've concluded my testimony and welcome any questions from the subcommittee.

Appendix 1

USA PATRIOT Act Timeline

September 11, 2001

Terrorists attacked United States.

October 2001

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act was enacted on October 25, 2001. Section 1012 established requirement for background record checks (BRCs) on Commercial Driver License (CDL) holders with HAZMAT endorsements (HMEs).

AAMVA collected batch data from the 51 licensing agencies in response to the FBI's request for the data. Approximately 3.5 million records were collected. This number is high because the states also included some licenses that had already expired.

November 19, 2001

Congress passed the Aviation and Transportation Security Act (ATSA), which established the Transportation Security Administration (TSA). TSA was created as an Agency within the Department of Transportation (DOT).

October and November 2002

AAMVA began to work with the Federal Motor Carrier Safety Administration (FMCSA), originally assigned responsibility within DOT to implement the USA PATRIOT Act. AAMVA, FMCSA and Lexis/Nexis (FMCSA's contractor) met twice in October (9th and 10th) and once in November (6th) to discuss roles, responsibilities, initial design options and implementation strategy. On October 17, 2002, AAMVA sent Lexis/Nexis (L/N) a high-level overview of the CDLIS solution. On November 6, 2002 AAMVA met directly with L/N Program Manager to discuss open issues.

March 2003

TSA became an agency of the Department of Homeland Security (DHS) on May 1, 2003.

AAMVA collected batch data from the 51 licensing agencies in response to the FBI's second request for the data.

April 2003

TSA held first meetings with AAMVA and TSA's Contractor Lexis/Nexis (contract turned over from FMCSA).

On April 7, 2003, AAMVA briefs TSA Assistant Administrator for Transportation Security Policy Tom Blank and Director for Maritime, Land and Cargo Policy Elaine Degenski.

May 2003

TSA, FMCSA and RSPA issued joint Interim Final Rules (IFRs) on May 5, 2003: Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License. The following are requirements that were originally defined by TSA in this rule, but were later changed via additional rulemakings:

- Implementation deadline: November 3, 2003
- TSA to begin name-based BRCs on existing CDL holders with HMEs
- Immigration/Citizenship requirements
- 180-day advance notification from state to CDL holder
- Driver must start BRC process no later than 90-days before expiration of endorsement
- List of disqualifying crimes
- Appeal and waiver process
- Self-disclosure of disqualifying crimes by CDL holder to State
- BRC results and therefore HME are not transferable to a new state
- Data collected from the applicant
- Application must advise the individual that TSA will provide a copy of the criminal history record upon written request
- Initial determination of threat goes to both driver and state
- State required to notify driver of determinations of 'no security threat'
- Costs of implementing rule
- States have 15 days from receipt of determination to issue CDL with HME
- TSA may issue 'withdrawal of initial notification' to driver and 'no security threat' to state after 'initial notification' of threat
- Successful appeals result in a specific notification to the state and driver

TSA and AAMVA met on May 2, 2003 and May 3, 2003 to discuss the project.

July 2003

AAMVA established USA PATRIOT Act Task Force to develop products to assist the jurisdictions with meeting the requirements for the November 3, 2003 deadline, such as a model HME application form and letters.

TSA established Application Working Group (WG) whose role is to develop the data element requirements for the batch file for Phase 1 (name-based) BRCs. LN and AAMVA worked together to develop the requirements using existing CDL data element standards and other national standards. WG meets in July and August.

AAMVA sent TSA information necessary to establish network connectivity.

July 2003 through December 2004

TSA established regularly scheduled HME Screening Gateway (HMESG) status meetings. AAMVA attended meetings regularly.

August 2003

AAMVA and LN submitted the Phase 1 name-based batch file layout to TSA for approval. The file layout will be used to collect data from the 2.7 million existing CDL holders with HMEs.

October 2003

On October 3, 2003 legislation (DHS Appropriations Act, 2004) enacted authorizes DHS to collect fees to cover the costs of implementing section 1012.

TSA established regularly scheduled HMESG technical committee meetings (TCM). Meetings continued through January 2005. Now that the Phase 1 batch format has been submitted for approval, AAMVA requested to begin work on Phase 2 (fingerprint based BRCs). TSA is focused on Phase 1 and does not put resources into the Phase 2 effort. AAMVA advised TSA that it takes at least 2 months to develop the specifications once the requirements are fully defined and up to 6 weeks for the review process to be completed. Once specifications are developed, they are sent to the AAMVA community.

The community provides feedback to AAMVA on how long it will take to implement the changes. Detailed project plans are developed. AAMVA can't start programming, update the UNI software or develop acceptance and structured test plans until specifications have been finalized and frozen. The states cannot start analysis and design without finalized specifications.

November 7, 2003

TSA issued Interim Final Rule. The following are requirements that were originally defined by TSA in the May 3, 2003 rule, but were changed via this rule:

- Implementation deadline: changed from November 3, 2003 to April 1, 2004, allows for request for extension to December 1, 2004 (note that states were not notified of the change in deadline until publication of this rule that was after the November 3, 2003 deadline)
- TSA establishes deadline of December 2004 for it to complete name-based BRCs on existing CDL holders to mitigate risk
- Indicates future rulemaking will define critical implementation requirements of minimum federal standards for fingerprint collection, criminal history adjudication, appeal process and potential costs

January 2004

TSA provided feedback on Phase 1 batch file format submitted for review in August 2003.

February 2004

AAMVA sent notices to 51 licensing agencies for the collection of Phase 1 CDL data.

February 2004 through May 2004

AAMVA collected 2.7 million records from 51 licensing agencies for the Phase 1 named-based BRCs. AAMVA requested, received, reviewed and validated test files from the states. The states must successfully pass the testing phase before AAMVA requests a production run against their actual CDL files. AAMVA reviewed production files against specifications and transmits the data to TSA for processing. Records that contain errors were returned to AAMVA who works directly with the state to fix the problem and resubmit the data. This process is repeated until all 2.7 million records are collected. AAMVA provided TSA with weekly updates that showed the dates the states sent the test files, when they passed the testing phase, the date AAMVA received production files, the number of records received and comments on the process.

April 2004

On April 6, 2004 TSA issues a Final Rule, which changed the implementation date from April 1, 2004 to January 31, 2005

AAMVA met with Administrator Stone and Executive Staff on April 14, 2004 to discuss four general categories of state DMV concerns:

- **Not all requirements are known.** This is causing inactivity on behalf of most states because they don't want to expend resources until they know what they need to do. States that are trying to implement something are taking risks by assuming that what they are doing will eventually be acceptable by TSA.
- **Funding mechanisms are not in place.** Many states can't use the federal authority that TSA has to establish and use new fees. They need state legislation to do so. Therefore, they have no way to fund the start-up and operational costs of the program. No federal grants are available to offset the inability of states to establish user fees quickly.
- **The dates for implementation are unrealistic for the majority of the states.** Since states are waiting for the requirements to be finalized before they engage their resources, even the January 2005 date is not going to be met.
- **There is complete buy-in that the state DMV's need to help with homeland security, however there is not widespread belief that implementing fingerprint based background checks on HAZMAT drivers is as valuable as other efforts would be to deter terrorism.** Many believe that a terrorist would just hijack a truck of gasoline as opposed to going through the process of obtaining a CDL with a HAZMAT endorsement.

AAMVA held USA PATRIOT Act Working Group Meetings

- Bi-weekly meetings from April 2004 through August 2004, Weekly meetings during September 2004 and October 2004, Bi-weekly meetings December 2004 to present (April 2005), scheduled through at least July 2005.
- For the first several months, TSA attendance is sporadic. After many requests, TSA assigns a staff liaison to the WG.
- AAMVA held almost daily meetings with TSA during October and November 2004 to work through the most pressing open issues.

TSA sent a request to state Governors to request a HAZMAT point of contact (POC). TSA developed a list of HAZMAT POCs, through which all project correspondence flows. Many of the contacts were not

within the departments responsible for implementing the Act. States frequently complained to both TSA and AAMVA that this communications plan is not effective. AAMVA communicated this to TSA as well and offers to help distribute materials to the AAMVA community. TSA decided to continue communications plan through HAZMAT POCs.

June 2004

After months of requests from AAMVA to start work on Phase 2, TSA held a kick-off meeting on June 9, 2004 with AAMVA and Lexis/Nexis. AAMVA reminded TSA that it takes at least 2 months to develop the specifications once the requirements are fully defined and up to 6 weeks for the review process to be completed. Once specifications are developed, they are sent to the AAMVA community. The community provides feedback to AAMVA on how long it will take to implement the changes. Detailed project plans are developed. AAMVA can't start programming, update the UNI software or develop acceptance and structured test plans until specifications have been finalized and frozen. Based on AAMVA's experience implementing changes to CDLIS, AAMVA told TSA that there are always some states that can't make the implementation date. TSA asks AAMVA which states won't make the USA PATRIOT Act implementation date. AAMVA informs TSA that we can't predict that.

To assist TSA in its development of cost estimates, AAMVA gathered statistical and anecdotal trend analysis from the states on new CDL issuances with HMEs, renewals, transfers and upgrades (adding an HME to an existing CDL).

TSA puts out RFI for fingerprint services.

July 2004

AAMVA offered 2-hour CDLIS 101 training to USA PATRIOT Act WG and TSA. TSA does not attend training.

TSA publishes its findings that 29 "people of interest" had their HMEs revoked as a result of the 2.7 million name-based BRCs.

August 2004

TSA released fingerprint specification through HAZMAT POCs. When AAMVA held the next USA PATRIOT Act WG meeting, several of the states in attendance were unaware that TSA has released the specification.

FMCSA issued companion rule on August 8, 2004 to change compliance date to agree with TSA's new date of January 31, 2005.

AAMVA assists TSA as they request a new file of the CDL holders with HMEs that have been added to the state database since the first file was requested by TSA in February 2004.

September 2004

AAMVA met with Administrator Stone on September 20, 2004 to discuss existing issues with the program. AAMVA continued to stress that the requirements must be fully defined and frozen. AAMVA can't develop a detailed project plan to estimate the project end date.

October 2004

AAMVA provided TSA with a consolidated list of the business and technical issues and questions that still remain open.

On October 22, 2004 AAMVA issued CDLIS USA PATRIOT Act Data Definitions Document. This document provided the states with the final data element requirements for the HME Application and the Threat Determination Response.

November 10, 2004

TSA issued its Fee NPRM. The rulemaking identified the fee options and established procedures for fee collection.

TSA also issued an Exemption from 49 CFR §1572.5(c)(2)(i), issuance of renewal and transfer HMEs. Under this exemption, processing of security threat assessments for transfer and renewal HMEs may begin March 31, 2005 and becomes effective on May 31, 2005. The effective date of January 31, 2005 remains the same for new HMEs.

November 24, 2004

TSA issued IFR. The following are requirements that were originally defined by TSA in previous rules, but were changed via this rule:

- Section 1572.105 (a) (3) of the rule (69 FR 226, page 68720) allows a broader range of non-citizens to apply for a HAZMAT endorsement including lawful nonimmigrants, refugees and asylees. This conflicts with FMCSA regulations 49 CFR Section 383.71 (a) (9), which clearly states that jurisdictions must require applicants for an HME to provide proof of their citizenship or that they are a lawful permanent resident by presenting documents enumerated in Table 1 of that section. In January 2005, FMCSA issues an interpretation consistent with earlier USA PATRIOT Act rulemaking and current regulations. FMCSA determined that lawful nonimmigrants, refugees and asylees are not permanent residents of the U.S. Their alien status is indefinite and can be cancelled at any time. Since U.S. citizens and lawful permanent resident aliens are the only persons that can be lawfully domiciled in the U.S. and qualify for a CDL, lawful nonimmigrants, refugees and asylees are not eligible for an HME or a CDL. FMCSA is in the process of developing formal interpretations on this issue. TSA will not issue a clarification to point out that although they are qualified to get the BRC under TSA's rules, they cannot be issued a CDL with an HME under FMCSA's rules.
- Finalizes the list of disqualifying crimes
- Increases response time for appeals and waivers
- Allows states to transfer BRCs and therefore HMEs
- Allows extensions of HME expiration dates up to 90 days
- Requires states to make a declaration of their intent to use the TSA Agent
- If states will not be ready to transmit data via CDLIS by July 2005, they are instructed to consider using the TSA Agent

December 2004

TSA held national conference calls with the states on December 2, 2005 and December 3, 2005 to introduce the TSA Agent and Agent process. The timing conflicted with AAMVA's previously scheduled CDL Coordinators meeting. AAMVA's USA PATRIOT Act Program Manager attended TSA's meeting and then updated the CDL Coordinators presentation over night to update everyone who missed the conference calls first thing the next day.

AAMVA held CDL Coordinators meeting on December 4, 2004. AAMVA developed detailed presentations and holds open forums so states can ask questions. AAMVA invited TSA and the newly appointed TSA Agent to present. The TSA Agent presented their solution to the group.

AAMVA reminded the community that it takes at least 2 months to develop the specifications once the requirements are fully defined and up to 6 weeks for the review process to be completed. Once specifications are developed, they are sent to the AAMVA community. The community provides feedback to AAMVA on how long it will take to implement the changes. Detailed project plans are developed. AAMVA can't start programming, update the UNI software or develop acceptance and structured test plans until specifications have been finalized and frozen. AAMVA asked the states if they thought they would meet the January 31, 2005 deadline. At least half of those present said they would not be in compliance on January 31, 2005.

AAMVA's WG developed a Draft National Application Form and 60-day Notification Letter. Both deliverables were posted to AAMVA's Web site. The community is notified.

State declarations are due to TSA on December 27, 2004. States must choose between collecting the fingerprints, fees and application data themselves and electing to allow a TSA Agent to assume these responsibilities.

January 2005

TSA issues Fee Final Rule on January 13, 2005. The rule established user fees, defined the fee structure and procedures for fee collection. The rule moves the responsibility to notify the driver of a no security threat determination from the states to TSA.

On January 27, 2005, TSA issued Clarification of 49 CFR § 1572.13(g), of the Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement (HME) on Commercial Drivers License (CDL) in response to questions from the states. The states asked TSA to clarify the conditions under which a state may require a driver who is transferring an HME on a CDL from another state, to undergo a new security threat assessment.

Paragraph (g) of section 1572.13 applies when a driver with an HME granted by State A moves to State B and applies to transfer the HME. If State B permits drivers to transfer the HME from State A, then the security threat assessment also transfers without conducting a new security threat assessment. The driver's HME security threat assessment expires on the date it would expire under the laws of State A. State B is responsible for establishing a recordation system that tracks transfer applicants, so that State B and the driver are aware of when the HME security threat assessment expires.

However, if a state decides as a matter of policy that it will not allow a transfer of an HME from State A, paragraph (g) of 1572.13 would not apply. In this case, an HME driver from State A moving to State B would have to obtain a new HME from State B. This would require a new security threat assessment, which would expire according to the laws of State B.

February 2005

After FMCSA provided clarification on its immigration and citizenship requirements for the CDL program, AAMVA notified the USA PATRIOT Act WG that it planned to annotate the deliverables impacted with the interpretation. TSA will not allow AAMVA to modify the deliverables, even as a cover page, so AAMVA is forced to remove the Draft National Application Form and 60-day Notification Letter from its Web site. AAMVA cannot knowingly produce documentation that would put the states out of compliance with the CDL program.

AAMVA released the draft CDLIS Threat Determination Specification to the USA PATRIOT Act Working Group, FMCSA and TSA on February 23, 2005. Feedback is due by March 4, 2004. AAMVA continued to develop the draft CDLIS State to State Status, History and Change State of Record Specification. Work began on the Apply for Security Threat Assessment Specification.

TSA started discussions of adding new data elements to the application form.

The Systems Analysts (SA) created detailed project plans for the specification development months earlier. The SA updated the project plan to include the review cycle dates based on the dates the draft documents were released to the WG. However, the rest of the AAMVA team needed the specification deliverables to begin their impact analysis and project planning.

The CDLIS Central Site programmers began an impact analysis and draft a project plan to meet the requirements. The Quality Assurance team started an impact analysis and project plan to project the time it will take to develop the test plans and test each state.

March 2005

On March 11, 2005, AAMVA incorporated feedback received from the states into an updated draft of the CDLIS Threat Determination Specification and re-released it to the USA PATRIOT Act Working

Group. AAMVA has not yet received feedback from TSA on the deliverable. Feedback requested by March 18, 2004. FMCSA signs off on the revised document March 17, 2004. TSA missed deadline for a second time.

The first completely integrated (across all AAMVA project areas) project plan was developed. It is clear to AAMVA that it will take months for all parties to be ready in the production environment. AAMVA spent a week working with the plan to get it as accurate and complete as possible.

On March 18, 2005, AAMVA requested that TSA provide a date when they can complete their review of the CDLIS Threat Determination Specification. AAMVA offered to come to TSA's offices to walk-through the specification. TSA replied their review will be completed on March 27, 2004. TSA does not complete the review of the CDLIS Threat Determination Specification as requested. AAMVA sent follow-up email to TSA on March 27, 2005 to determine when the review will be complete. TSA replied their review will be completed on April 4, 2004.

AAMVA released draft CDLIS State to State Status, History and Change State of Record Specification to the USA PATRIOT Act Working Group, FMCSA and TSA on March 23, 2005. Feedback was due March 29, 2005.

AAMVA scheduled a meeting with Administrator Stone for March 24, 2005. For a full business week prior to the meeting, AAMVA made daily calls to our contacts requesting a discussion of the July date. On March 23, 2005 after 5 days of unreturned messages, AAMVA's call is returned. TSA admitted that it has not even looked at the specifications that were released on February 23, 2005, a month ago. They admitted that they realize no one will make the July date, they are thinking it will be at least six months later than that.

AAMVA met with Administrator Stone on March 24, 2005 to discuss the July 2005 deadline. AAMVA staff predicted that the schedule for completing all of the CDLIS work (programming, testing and implementing the three major CDLIS requirements) for all of the states goes at least into July 2007. Additional resources could move that schedule up one year.

AAMVA reminded TSA that it has always said that it takes at least 2 months to develop the specifications once the requirements are fully defined and up to 6 weeks for the review process to be completed. Once specifications are developed, they are sent to the AAMVA community. The community provides feedback to AAMVA on how long it will take to implement the changes. Detailed

project plans are developed. AAMVA can't start programming, update the UNI software or develop acceptance and structured test plans until specifications have been finalized and frozen. Based on AAMVA's experience implementing changes to CDLIS, we toldl TSA that there are always some states that can't make the implementation date.

TSA acknowledged that they must provide feedback on the specifications and freeze them so that we can move forward. They indicated they would be looking at alternatives for the July deadline and that they would get back to us on our requests.

TSA's new CIO came to AAMVA's offices on March 31, 2005 to better understand our environment. AAMVA asked if we should continue to work on the specifications or if we should stop work. We explained that we had put significant resources into the effort and if TSA was going to bypass CDLIS entirely, we should stop work on the specification now rather than continue to expend resources. He indicated we should continue.

April 2005

On April 4, 2005, TSA provided review of CDLIS Threat Determination Specification as expected. They also provide partial review of the CDLIS State to State Status, History and Change State of Record Specification. Specifications are pending legal review. AAMVA requested a meeting to discuss the feedback, which was held on April 8, 2005. Legal review was not completed as of April 22, 2004.

AAMVA and TSA talked on April 4, 2005. AAMVA offered TSA an alternative method to implement the Apply for Threat Assessment process. We could still use AMIE and the CDLIS application ID, but the transmission would be directly from the state to TSA, bypassing the CDLIS central site. This would eliminate the need to modify the CDLIS central site and significantly reduce the implementation timeframe. If TSA would approve the design AAMVA could get the specification out within 2 days of the approval. We discussed the option at the USA PATRIOT Act WG meeting on April 6, 2005. AAMVA sent TSA 2 diagrams to help them understand the options. As of April 22, TSA has not commented on the design options presented.

On April 14, 2005 TSA told AAMVA that July was not a regulatory date so TSA couldn't hold AAMVA to it. There were no funds for AAMVA and TSA was continuing to look at alternatives to meet the July date. AAMVA asked if we should continue with the specification development and TSA said yes.

On April 18, 2005 AAMVA was informed of the following:

- TSA is considering using the interim method for the permanent solution, bypassing CDLIS
- Admiral Stone expects TSA to make the July date. TSA plans to implement a web-based solution that the states can use to enter application data. States may also use an FTP method. According to TSA, states will make the July deadline using these methods. TSA may decide that this method will be the permanent solution. CDLIS would not be used to transmit the data. [During subsequent calls to states AAMVA asked then if they would make the deadline of July with the interim procedures, several said no.]
- The same methods may be used to transmit the Threat Determination data. That may also become a permanent solution.
- Despite discussing the new option for the Apply for Threat Assessment process during several calls, TSA indicated that they did not understand what AAMVA had meant and had not in fact even opened the documents AAMVA sent them the week before.
- AAMVA told TSA that it needs to know immediately whether or not TSA plans to use these interim methods for the long-term solution. We met with them on March 24, 2005. That was 4 weeks ago and AAMVA did not receive a reply. AAMVA cannot continue to work through issues on specifications that TSA may decide not to use at all.

During the April 20, 2005 USA PATRIOT Act WG conference call, TSA said they had not made a decision on the use of CDLIS. When asked when a decision would be forthcoming, TSA could not provide an answer.

May 9, 2005

Before the Committee on Transportation and Infrastructure
Subcommittee on Highways, Transit, and Pipelines
U.S. House of Representatives

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Background Checks For Holders of Commercial Drivers Licenses With Hazardous Materials Endorsements

Statement of
Todd J. Zinser
Deputy Inspector General
U.S. Department of Transportation

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to testify today on the Commercial Drivers License (CDL) program and the new rules governing the hazardous materials endorsement background records check. As we reported in our November 2004 Management Challenge report,[1] a critical post-September 11th issue is the interdependency among the Department of Transportation (DOT) and other Federal agencies to carry out programs that have both safety and security elements. For the DOT, this intersection of safety and security is most pronounced in the area of hazardous materials oversight and enforcement.

There are 702,277 active motor carriers under the jurisdiction of the Federal Motor Carrier Safety Administration (FMCSA), with more than 11 million CDL holders on record and an estimated 2.7 million CDL holders with a hazardous materials endorsement. More than 3 billion tons of regulated hazardous materials are transported nationally in over 292 million shipments each year. Each day there are more than 800,000 hazardous materials shipments, and while more than 95 percent are being transported by highway, the shipments by rail, air, pipelines and ships, as well as the safety standards for containers and packaging, are also part of the Department's responsibilities. The Department has a strong record and commitment to safety. The large truck fatality rate decreased from 2.65 fatalities per million truck miles traveled in FY 1999 to 2.31 in FY 2003. However, significant progress is needed to reach the Department's goal of reducing these numbers to 1.65 fatalities (per million truck miles traveled) by 2008.

As we have been reporting since September 11th, the imperative for the Department and the Congress is to effectively integrate new security measures into the Department's existing safety regimen and to do so in a way that promotes stronger security without degrading transportation safety and efficiency. The requirement for a background records check CDL holders with hazardous materials endorsement is one such effort. Since the Transportation Security Administration (TSA) was transferred to the Department of Homeland Security in March 2003, the background records check for these CDLs holders is now a Department of Homeland Security responsibility. However, processing background records checks is not new to TSA.

When TSA was part of the Department of Transportation, it established a similar program for airport workers and since 2002, over 1.6 million employees working at the Nation's 400-plus commercial airports have had a criminal history records check completed.

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[1] OIG Report Number PT-2005-008, "Top Management Challenges, Department of Transportation," November 15, 2004.

While initially a concern, the issue of timeliness turned out to be a non-factor. In these cases, the American Association of Airport Executives[2] served as a clearinghouse to facilitate the processing of fingerprints for the airports and airlines. While we do not know the details of TSA's system for processing the background records checks for holders of CDLs, based on our observations of the experience with airports and airlines, strong cooperation and coordination with all stakeholders is critical to make the process efficient and effective.

The CDL program and the requirement for hazardous material endorsements represented a significant step forward for transportation safety. Under the CDL program, states are required to check drivers' records to ensure that they have not been disqualified from operating a commercial vehicle and that their non-commercial driving privileges have not been revoked, suspended or canceled. The purpose of the hazardous materials endorsement is to improve the safety of transporting hazardous materials on the Nation's highways by requiring drivers to demonstrate their knowledge of hazardous materials regulations, hazardous materials handling, and operation of emergency equipment and emergency response procedures in the event of an accident.

In 1999, at the request of this Subcommittee, we reviewed the CDL program and made recommendations to strengthen it.[3] We also audited the program in 2002, and made recommendations to counter vulnerabilities to fraud.[4] FMCSA has concurred with our recommendations and is continuing its efforts to strengthen the program.

Curbing CDL fraud is important to highway safety since it helps ensure that only drivers with the requisite skills obtain CDLs. Over the past 5 years we have investigated and prosecuted CDL fraud schemes in 23 states and found over 8,000 CDLs that were issued to drivers through corrupt state or state-approved testing processes. We have found too many cases where, in exchange for a bribe, an examiner will pass applicants without a test or will supply test answers to applicants. For example, a driver who caused a fatal crash in 2003, which killed a family of five in Pennsylvania, had been tested by a third-party examiner who was convicted of fraudulently certifying CDL test results.

The new background records check for holders of CDLs with hazardous materials endorsements, if properly implemented, adds an additional layer of both safety and

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[2] The American Association of Airport Executives is the largest professional organization for airport executives in the world, representing thousands of airport management personnel at public-use airports nationwide.

[3] OIG Report Number MH-2000-106, "Disqualifying Commercial Drivers," June 30, 2000.

[4] OIG Report Number MH-2002-093, "Improving the Testing and Licensing of Commercial Drivers," May 8, 2002.

security because the background records checks (through identity, immigration and fingerprint-based criminal history records checks) ensure we know that the drivers (1) are who they say they are, (2) are legally present in the United States, and (3) can be trusted with the public's safety and security when operating a commercial vehicle transporting hazardous materials.

Given that this critical safety program now intersects with an added security requirement, we encourage the Subcommittee and the Department to take action to ensure that the proper balance between safety and security is reached and that the program continues to receive the Subcommittee's attention.

Today, I would like to discuss:

- The CDL Program as a significant safety initiative and the continued efforts to strengthen its effectiveness.
- The background records checks for hazardous materials endorsements and how they serve both safety and security purposes.
- Areas to watch as the background records check process gets underway.

The CDL Program as a Significant Safety Initiative and the Continued Efforts To Strengthen Its Effectiveness

The CDL program is a key element of the Transportation Department's efforts to ensure the safety of our highways.

Before Congress established the CDL program through the Commercial Motor Vehicle Safety Act of 1986, drivers could obtain a license to operate a large truck or bus in more than a third of the states without obtaining a special license. Moreover, commercial drivers often obtained licenses from several states, making it easy to hide bad driving records.

As a result of the reform measures in the 1986 Act, commercial drivers were prohibited from obtaining more than one license and were required to demonstrate a minimum level of knowledge and driving skills. States were also required to disqualify drivers convicted of serious traffic violations, such as driving a

commercial motor vehicle while intoxicated. See Attachment 1 for a list of disqualifying traffic violations.

According to FMCSA, approximately 880,000 drivers were disqualified at least once from 1992 through 1996 as the program was implemented. The 1986 Act also required a nationwide information system for exchanging data on commercial drivers, the Commercial Driver's License Information System. This system now has more than 11 million CDL holders on record and will become a vital resource in maintaining additional information about CDL holders that transport hazardous materials over the Nation's highways.

Work by our office, initiated at the request of this Subcommittee, has identified successes in the CDL program, as well as areas for improving the program's operations. We found that the program achieved the goal of limiting commercial drivers to one CDL, but improvements in Federal oversight were needed to make sure that unsafe commercial drivers were disqualified. We also reported in 2002 that existing Federal standards and state controls were not sufficient to defend against individuals who seek to fraudulently obtain CDLs.

Well before September 11th, we were investigating schemes whereby corrupt state Department of Motor Vehicle officials or third-party testers would take bribes from CDL applicants to circumvent the requirements for obtaining a CDL. Since 2000, we have investigated and prosecuted CDL fraud schemes in 23 states and found over 8,000 CDLs that were issued to drivers through corrupt examiners, mostly third-party examiners working on behalf of the state. What we have learned through our casework is that people are motivated to pay bribes to circumvent CDL licensing requirements for a variety of reasons. These include (a) the inability of foreign nationals to pass the written examination due to language barriers, (b) unwillingness to wait the time necessary for completion of

the CDL knowledge and skills test and issuance, (c) lack of required legal residency or citizenship, and (d) insufficient training to pass the skills test.

After September 11th, several CDL fraud cases gained the attention of the Joint Terrorist Task Forces (JTTF) because the cases involved foreign nationals. Currently, for example, 2 of the 28 CDL fraud investigations that we are conducting are in conjunction with members of a JTTF. In one case, the JTTF initiated a proactive project to analyze CDL, immigration, and other database records, with particular focus on hazardous materials endorsements. In the other case, the initial allegations of CDL fraud concerned foreign nationals from Eastern Europe with potential links to terrorism that needed to be checked out. To date, our investigations have found that CDL fraud has essentially involved attempts to circumvent the safety regulations through criminal acts but has not involved any terrorist activity.

Our coordination with JTTFs is similar to the work our office did at airports in the wake of September 11th, where we participated in law enforcement sweeps at more than 30 airports nationwide. This effort resulted in the arrest or indictment of more than 1,000 persons who had falsified records about their identities, criminal histories, or immigration status. None of those prosecutions, however, involved terrorism.

In our Report on Top Management Challenges for DOT in 2004, we recognized that FMCSA had taken positive steps to improve its oversight of the CDL program, but we continued to call for further improvements such as establishing a requirement that all CDL applicants demonstrate citizenship or legal presence.

Background Records Checks for Hazardous Materials Endorsements Serve Both Safety and Security Purposes

In our opinion, requiring a background records check for a hazardous materials endorsement has an important deterrent value: individuals that pose both a safety

and security threat are not likely to apply for, renew, or transfer a hazardous materials endorsement, even though they may hold a CDL. If implemented properly, the background records check should provide a higher degree of confidence in the integrity of the CDL program by ensuring that the drivers (1) are who they say they are, (2) are legally present in the United States, and (3) can be trusted with the public's safety and security when operating a commercial vehicle transporting hazardous materials.

What the Rules Require. To implement portions of the law[5] that mandated the background records check for a hazardous materials endorsement, TSA and FMCSA issued companion interim final rules in May 2003, as amended.

TSA's interim final rule establishes a procedure to conduct a background records check for holders of a CDL who apply for a hazardous materials endorsement. Under TSA's interim final rule, a holder of a CDL applying for a hazardous materials endorsement will be disqualified from holding an endorsement if he or she was:

- convicted or found not guilty by reason of insanity within the past 7 years,
- released from prison within the last 5 years, or
- wanted or under indictment for crimes such as extortion, rape, arson, bribery, smuggling, or immigration violations.

Also, an applicant will be permanently disqualified from holding a hazardous materials endorsement if he or she was ever convicted or found not guilty by

[5] Responding to September 11, 2001, Congress, on October 26, 2001, passed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (Public Law 107-56 known as the USA Patriot Act), mandating that the Department of Transportation require routine background records checks, including reviews of criminal, immigration, and FBI records, for U.S. commercial drivers with hazardous materials endorsements. The Secretary delegated the authority to carry out this mandate to the Under Secretary of Transportation for Security, whose position was later transferred to TSA.

reason of insanity for crimes such as murder, terrorism, espionage and treason. See Attachment 2 for the list of disqualifying crimes.

The rule was effective May 5, 2003 and background records checks were to begin no later than November 3, 2003. TSA extended this deadline given the debate among FMCSA, TSA, the states, and the trucking industry on how the new rules would be implemented, how much it would cost to implement the new rules, and who would pay what and when.

The new deadline for beginning background records checks for new CDL hazardous materials endorsement applicants was January 31, 2005; and May 31, 2005, for CDL holders who wish to renew their existing hazardous materials endorsement when it expires and for CDL holders who wish to transfer their existing hazardous materials endorsement to another state and have not received a background records check. TSA estimates that for each year from 2004 to 2013, 407,000 fingerprint applications will be collected from new applicants, renewals, and transfers.

FMCSA's interim final rule incorporated TSA's rule and prohibits states from issuing, renewing, transferring, or upgrading a CDL with a hazardous materials endorsement unless TSA has first conducted a security threat assessment of the applicant and determined that the applicant does not pose a security risk warranting denial of the hazardous materials endorsement. FMCSA shares with TSA the responsibility for implementing the background records check requirements by ensuring the states comply with TSA's rule. FMCSA tied the compliance date for the background records check to the rule issued by TSA and added the background records check requirement to the list of 29 requirements that states must meet to be in substantial compliance with CDL requirements. According to FMCSA, it is conducting compliance reviews of the states every

3 years, or anytime FMCSA receives a complaint that a state is not following proper procedures.

These 29 requirements cover areas such as test standards, notification to other states of traffic violations, and CDL records checks that must be performed on CDL applicants. Under Federal rules, a state that does not meet one or more of the requirements as determined by FMCSA is in non-compliance. The possible consequences of state non-compliance include the withholding of funds and the decertification of that state's CDL program.

How the Hazardous Material Endorsement Process Works. Prior to the new hazardous materials endorsement requirement, the administrative process for issuing a hazardous materials endorsement to a CDL holder was a state responsibility and a process that focused strictly on safety. A holder of a CDL would submit an endorsement application to the appropriate state licensing agency and take a test on hazardous materials regulations, hazardous materials handling, and operation of emergency equipment and emergency response procedures in the event of an accident. If the applicant passed the test, the state licensing agency would then issue the hazardous materials endorsement as part of the CDL. See Attachment 3 for further details on this process.

Under TSA's rule, the administrative process for issuing a hazardous materials endorsement is the same as before but now the applicant must also be fingerprinted and undergo a background records check. If the results of the background records check turns up *no* disqualifying crimes, and other TSA intelligence checks come back clear, TSA approves the issuance of the endorsement by the states. If the results of the background records check identify a disqualifying crime or other disqualifying information, TSA denies the issuance of the endorsement by the states. See Attachment 4 for further details on this process.

Areas To Watch as the Background Checks Requirements Are Implemented

The implementation of background records checks on hazardous materials endorsements is an important step in advancing safety and security, but it will take strong cooperation from FMCSA, TSA, the states, industry groups, and other stakeholders to effectively and efficiently implement the program. TSA estimates that there are 2.7 million U.S. CDL holders authorized to carry hazardous materials. However, criminal history record checks and intelligence checks of these individuals have only recently begun and are far from completed.

Since TSA was transferred to the Department of Homeland Security in March 2003, the background records check for CDL holders is now a Department of Homeland Security responsibility. However, processing background records checks is not new to TSA. In aviation, TSA has statutory authority to conduct background records checks on employees with unescorted access to secure areas of the Nation's commercial airports. When this mandate went into effect in 2000, the aviation industry had concerns about, among other things, whether the background records checks could be processed in a timely manner. While initially a concern, the issue of timeliness turned out to be a non-factor. To illustrate, since 2002, over 1.6 million employees working at the Nation's 400-plus commercial airports had a criminal history records check and turnaround times for those records checks were generally *within 5 days.*

In theses cases, the American Association of Airport Executives (AAAE) served as a clearinghouse to facilitate the processing of fingerprints for the airports and airlines. AAAE established the Transportation Security Clearinghouse that, among other things, expedited processing and resolution of fingerprint records through required Federal channels, offered a centralized billing tied to record submittals, and allowed the airports and airlines to submit fingerprints either electronically or on cards.

While we do not know the details of TSA's system for processing the background records checks for CDL holders, based on our observations of the experience with airports and airlines, strong cooperation and coordination with all stakeholders is critical to make the process efficient and effective.

Since TSA is now a component of the Department of Homeland Security, we do not have authority to audit TSA's programs, including its process for implementing the background records checks. We can audit FMCSA's oversight efforts to ensure that states comply with the requirements for issuing, renewing, transferring, or upgrading a CDL with a hazardous materials endorsement, but we have not done so since the background records check requirement is just now getting underway.

Based on our past experience with reviewing FMCSA's oversight of state CDL programs, we would suggest a few areas that the Subcommittee and FMCSA should be aware of as they address state implementation of the background records check requirement.

- Any future oversight reviews of state implementation will need to address the operation of computer systems that are used to communicate information on hazardous materials endorsements among TSA, FMCSA, and the states. This would include ensuring that states comply with any requirements established for reporting hazardous materials endorsement information to the Commercial Driver's License Information System. Tests of the computer systems are important because in the past we have found that systems did not always work properly. For instance, states did not use convictions to disqualify drivers even when the convictions had been received by the states because the state computer systems did not properly identify records that merited disqualification. We recommended that FMCSA conduct tests of the state computer systems during CDL compliance reviews to catch this

problem and it agreed to hire a contractor to conduct these reviews. This example suggests that similar tests of hazardous materials endorsements may be needed to ensure that information is properly communicated and acted upon.

- Our past work also shows that it is useful to monitor data to identify problems. For example, we have found that FMCSA was not routinely monitoring trend data on the operation of states' testing and licensing processes. Thus, one state had not sent data to the central site on 30,000 new commercial drivers over a 20-month period, but no one had noticed the situation. Routine monitoring of reports on hazardous materials endorsements could alert FMCSA and TSA to problems and lead to faster corrective actions.

- While FMCSA's previous experience with conducting reviews of state CDL programs will be a benefit in overseeing the implementation of the hazardous materials endorsement rules, in-depth oversight of states' adherence to these rules may call for additional compliance review steps and added expertise. FMCSA responded to our prior recommendations by expanding its compliance reviews of state CDL programs to include contractor assistance. Such actions could be an option for future reviews that include examining compliance with hazardous materials endorsement requirements.

- Also, FMCSA's experience with conducting regular on-site reviews of state CDL programs would enable it to promote uniformity in the implementation of the hazardous materials endorsement rules. We previously recommended clarifying Federal regulations on residency requirements to correct variations found across the states we visited. Similarly, FMCSA should look into whether the states capture and record the results of CDL holders' background records checks in a consistent and uniform manner.

The new hazardous materials endorsement process is another step in improving the safe transportation of hazardous materials. FMCSA will need to work with the states and TSA to ensure that the new hazardous materials endorsement process is efficiently and effectively implemented. Mr. Chairman, that concludes my statement. I would be happy to answer any questions that you or other members of the Subcommittee might have.

Federal Disqualifying Violations

States must take action to disqualify commercial drivers for specific time periods after a driver commits certain violations. Some violations require disqualification after a single conviction and other violations require more than a single conviction before a disqualification is imposed. The specific disqualifying violations are summarized in the tables that follow. New disqualifying violations addressed in the Motor Carrier Safety Improvement Act of 1999 are provided separately. Under the rule issued by FMCSA on July 31, 2002, states must adopt these new requirements no later than September 30, 2005.

Violations Requiring Disqualification After a Single Conviction

Violation	First Offense Penalty	Second Offense Penalty	Third Offense Penalty
Driving a CMV under the influence of alcohol—blood alcohol content of 0.04 percent	1 year disqualification if no hazardous material involved, 3 years if hazardous material involved	Life disqualification (eligible for reinstatement after 10 years*)	Life disqualification (not eligible for reinstatement)
Driving a CMV under the influence of a controlled substance	1 year disqualification if no hazardous material involved, 3 years if hazardous material involved	Life disqualification (eligible for reinstatement after 10 years*)	Life disqualification (not eligible for reinstatement)
Leaving the scene of an accident involving a CMV	1 year disqualification if no hazardous material involved, 3 years if hazardous material involved	Life disqualification (eligible for reinstatement after 10 years*)	Life disqualification (not eligible for reinstatement)
Committing a felony while in a CMV but not involving manufacturing, distributing, or dispensing a controlled substance	1 year disqualification if no hazardous material involved, 3 years if hazardous material involved	Life disqualification (eligible for reinstatement after 10 years*	Life disqualification (not eligible for reinstatement)
Committing a felony while in a CMV involving manufacturing, distributing, or dispensing a controlled substance	Life disqualification (not eligible for reinstatement)	Not applicable	Not applicable
Violating an out-of-service order	90-day minimum disqualification	1 to 5 years disqualification in any 10-year period	3 to 5 years disqualification in any 10-year period
Violating any of six railroad crossing rules (Rule went into effect October 4, 1999)	60-day disqualification	120-day disqualification (if offense within 3 years of first offense)	1-year disqualification (if offense within 3 years of first offense).

* Reinstatement requires successful completion of an appropriate rehabilitation program that meets the standards set by the state-licensing department.
CMV: Commercial Motor Vehicle

Violations Requiring More than a Single Conviction Before a Disqualification is Imposed			
Violation	First Offense	Second Offense Within a 3-Year Period*	Third Offense Within 3 Years of First Offense*
Excessive speeding	Recorded	60-day disqualification	120-day disqualification
Reckless driving	Recorded	60-day disqualification	120-day disqualification
Improper or erratic lane change	Recorded	60-day disqualification	120-day disqualification
Following too closely	Recorded	60-day disqualification	120-day disqualification
Violation in connection with a fatal accident	Recorded	60-day disqualification	120-day disqualification

*Multiple offenses may be a combination of different violations.

Additional Disqualifying Violations Required Under the Motor Carrier Safety Improvement Act of 1999

- Driving a commercial vehicle with a revoked, suspended, or canceled CDL or driving while disqualified
- Conviction for causing a fatality through the negligent or criminal operation of a commercial vehicle
- Driving a commercial vehicle without obtaining a CDL
- Driving a commercial vehicle without a CDL in possession
- Driving a commercial vehicle when the individual has not met the minimum testing standards for the specific class of vehicle or type of cargo
- Being convicted of a serious offense involving a **noncommercial vehicle** that resulted in license suspension, cancellation, or revocation
- Being convicted of a drug or alcohol-related offense involving a **noncommercial vehicle**

Crimes Disqualifying an Individual from Obtaining a Hazardous Material Endorsement

These crimes are only disqualifying if they are considered felonies in the appropriate jurisdiction, civilian, or military.[6] An applicant is disqualified from holding a hazardous materials endorsement if he or she was convicted[7] or found not guilty by reason of insanity within the past 7 years, was released from prison within the past 5 years, or is wanted or under indictment, for any of the following crimes:

- Assault with intent to murder
- Kidnapping or hostage taking
- Rape or aggravated sexual abuse
- Extortion
- Robbery
- Arson
- Bribery
- Smuggling
- Immigration violations
- Racketeer Influenced and Corruption Organizations Act (RICO) violations
- Distribution of, possession with intent to distribute, or importation of a controlled substance ("simple possession" of a controlled substance without an intent to distribute is not considered disqualifying)
- Dishonesty, fraud, or misrepresentation, including identity fraud (e.g., felony-level embezzlement, tax evasion, perjury, and false statements to the Federal Government)
- Unlawful possession, use, sale, manufacture, purchase, distribution, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in firearms or other weapons
- Conspiracy or attempt to commit any of these crimes

An applicant will be **permanently disqualified** from holding a hazardous materials endorsement if she or he was ever convicted or found not guilty by reason of insanity of any of the following crimes:

- Murder
- Terrorism
- Espionage
- Sedition

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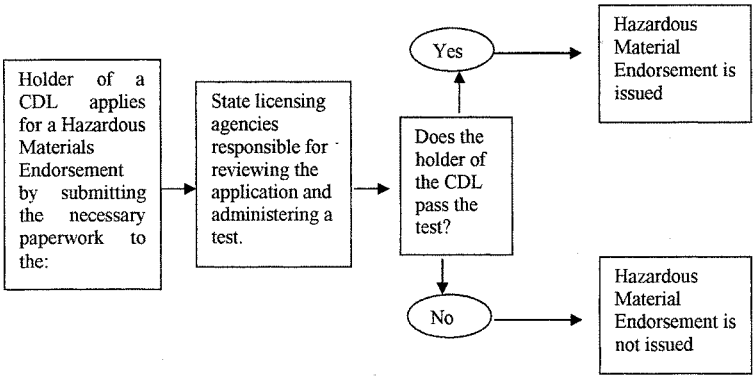
[6] 49 Code of Federal Regulations §1572.103, "Disqualifying Criminal Offenses."
[7] "Convicted" means any plea of guilty or nolo contendere or any finding of guilt.

- Treason
- Unlawful possession, use, sale, distribution, manufacture, purchase, receipt, transfer, shipping, transporting, import, export, storage of, or dealing in an explosive or explosive device
- RICO violations (if the crime underlying the RICO conviction is on the list of permanently disqualifying crimes)
- A crime involving a transportation security incident (i.e., security incident involving a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area)
- Improper transportation of a hazardous material (minor infractions involving transportation of hazardous materials will not disqualify a driver; for instance, no driver will be disqualified for minor roadside infractions or placarding violations)
- Conspiracy or attempt to commit any of these crimes

Attachment 3

State Licensing Agencies' Hazardous Materials Endorsement Process Before TSA's Rule Requiring a Background Records Check



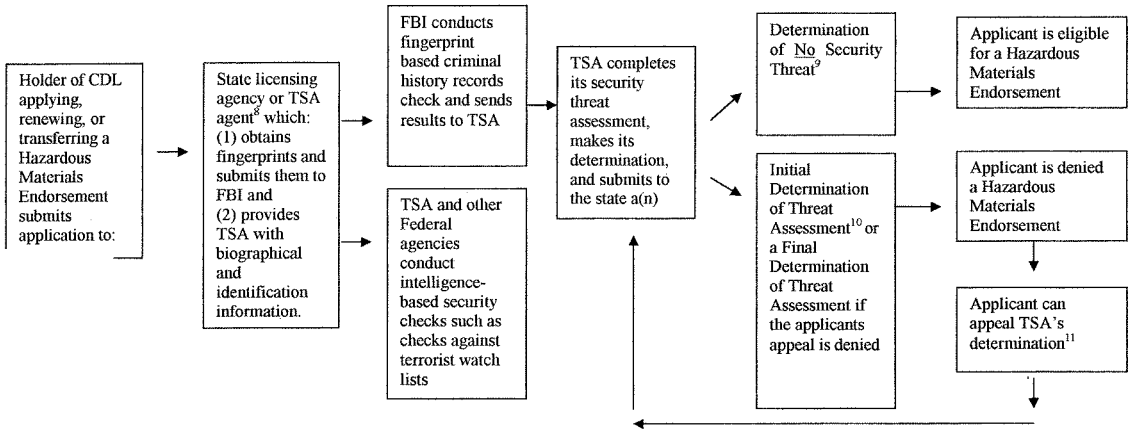
To initiate the process:

- A holder of a CDL would submit an endorsement application to the appropriate state licensing agency.
- The state licensing agency was required to verify that the individual had the requisite general knowledge and skill tests required for a CDL.
- The applicants were then tested on their knowledge of hazardous materials regulations, hazardous materials handling, and operation of emergency equipment and emergency response procedures in the event of an accident.

If the applicant passed the test, the state licensing agency would then issue the hazardous materials endorsement as part of the CDL.

Attachment 4

Hazardous Materials Endorsement Process Under TSA's Rule Requiring a Background Records Check



[8] TSA's rule requires each state to declare whether it wishes to capture and submit fingerprints, applicant information, and fees itself, or alternatively chooses to have TSA complete those tasks.

[9] If the results of the criminal history records check turn up *no* disqualifying crimes, and other TSA intelligence checks come back clear, TSA sends to the state a Determination of No Security Threat, whereupon the state can issue the endorsement after the applicant passes the hazardous materials knowledge test.

[10] If the results of the criminal history records check identifies a disqualifying crime or other information disqualifies the applicant TSA sends forward to the state an Initial Determination of Threat Assessment notifying the state that the applicant poses or is suspected of posing a security threat warranting denial of the hazardous materials endorsement, or a Final Determination of Threat Assessment if the applicant's appeal is denied.

[11] If the applicant chooses to do so, he or she can appeal the TSA's disposition.

Agricultural Retailers Association
Before The
Subcommittee on Highways, Transit and Pipelines
Committee on Transportation & Infrastructure
U.S. House of Representatives
On
Hazardous Materials Endorsement Background Checks

May 11, 2005

The Agricultural Retailers Association (ARA), which represents the retail sector of the U.S. agricultural industry, is pleased to submit this written statement on behalf of our members concerning the Transportation Security Administration's (TSA) new finger print and background check regulations for all persons with commercial driver's license (CDL) with hazardous materials endorsement (HME). We would like to thank Subcommittee Chairman Tom Petri (R-WI) for holding this hearing today. ARA also thanks Representatives Tim Johnson (R-IL) and Jerry Costello (D-IL) for raising concerns with TSA about these new regulations and problems that the Ag retail industry is facing.

Ag retailers and distributors have and continue to be pro-active in trying to address all security concerns related to the storage, handling and transportation of hazardous materials (HAZMAT). It is important for Congress and the Administration to know that our nation's agricultural industry is committed to support effective measures that will prevent terrorists or other criminals from gaining access to HAZMAT materials. At the same time, ARA has several concerns related to these new fingerprint and background check regulations that could have a long lasting and costly impact on Ag retailers and distributors. While these regulations have only been in place for a short amount of time, we believe they could cause undue hardship for rural HME drivers, their small business employers, and their farm customers. For example, information presented in TSA's final rule indicated that of the total of 2.7 million current CDL holders with an HME, it is likely that 20 percent or 700,000 will be eliminated by the implementation of this rule. This finding is disturbing to ARA since there is already a current shortage of CDL drivers with HME in many rural areas throughout the country. According to USDA's Economic Research Service, one in four rural counties lost population between 1990 and 2000, many of which are largely dependent on agriculture. This loss of population has increased the burden on Ag retailers and distributors to find qualified, experienced drivers.

Another area of concern relates to the fees being imposed by TSA and the states. While the decision to implement the CDL HME fees was made in good faith by TSA, it may have an unexpected dramatic impact on agricultural crop input shipments to America's farmers. ARA

disagrees with TSA's conclusion that this regulation will not cause an undue financial burden to the regulated businesses. In the agricultural industry the employer usually pays the CDL application fee, which under the regulations could result in fees that easily surpass $100. Ag retailers generally employ several CDL HME drivers. While a few hundred dollars may not seem like a lot on its own, it is necessary to view this additional financial burden in conjunction with other costly federal security regulations to get a clearer picture.

ARA believes it is very possible this regulation will impact small rural businesses due to the loss of HME drivers to urban areas where wages tend to be higher and risks lower. In general the transportation of HAZMAT materials in commerce comprises 5 percent of all shipments in the United States; however in the agricultural community the HAZMAT percentage is significantly higher. Many crop protection chemicals and some fertilizers are categorized as HAZMAT and some require placarding and an HME qualified driver. The ARA estimates that there will be a higher shortage of HME drivers to service our rural members in future years. ARA recommends Congress and the Administration consider an agricultural contingency plan in areas where the loss of HME drivers could have an adverse economic impact on small rural businesses and their local communities.

ARA has urged TSA to select appropriate locations for fingerprinting and background check facilities that can adequately serve rural agricultural industry drivers. TSA estimated that one half of the states will operate their own service while TSA contractors will be selected to serve in the other states. ARA is concerned that there will be an uneven service application favoring urban clients. For example, it is our understanding in the state of Nebraska that there is currently only one facility located in Omaha, Nebraska, to cover all state applicants. If the TSA agents or state administration facilities are only in major cities, the agricultural community will unduly suffer. The lack of available vendors will result in drivers having to take several days off work just to get their fingerprints and applications collected and submitted. The productivity down time from this regulation for the very seasonal agricultural industry needs to be addressed. ARA recommends TSA and the states consider the impact on rural businesses when selecting vendors and locations.

Additional Recommendations for Congress concerning HME Background Check Procedures:

- Require that a federal entity, not the states, implement a name-based background check.
- Ensure drivers are subject to only one *federal* background check. Currently, drivers may be subjected to multiple separate background checks administered by the Department of Defense, FAA, ATF, U.S. Postal Service, and other federal programs. Federal background checks should be harmonized to the maximum extent possible and duplicative checks should be eliminated.
- Preempt separate state and local background checks. National security is a federal interest and the state issuance of CDLs already is subject to federal standards and oversight. Moreover, separate state background checks do not enhance security as drivers from other states may operate motor vehicles in all states.

- Ensure that DOT (not HHS or DOJ) retains exclusive authority to designate hazardous materials, including those materials that trigger the background check requirements.
- Ensure that the motor carrier receives timely notice of a driver's disqualification or HME revocation

ARA and our members strongly support the war on terrorism and are committed to do our part to address security related concerns. We believe it is important to have commonsense, workable regulations in place that do not place unreasonable and unnecessary burdens on the Ag retail industry.

Thank you for the opportunity to comment. If you have any questions or need additional information, please contact ARA Director of Legislative Policy & Counsel Richard Gupton by phone at (202) 457-0825 or by e-mail at richard@aradc.org. ARA looks forward to working with Congress and the Administration on this important matter.

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