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BEFORE THE  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON HIGHWAYS, TRANSIT & PIPELINES  
U.S. HOUSE OF REPRESENTATIVE  
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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,<sup>1</sup> 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),<sup>2</sup> TSA issued an interim final rule on May 5, 2003,<sup>3</sup> in coordination with the Federal Motor Carrier Safety Administration (FMCSA) and the Pipeline and Hazardous Materials Safety

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<sup>1</sup> Pub. L. 107-56, 115 Stat. 272 (October 25, 2001).

<sup>2</sup> 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.

<sup>3</sup> 68 FR 23852 (May 5, 2003).

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

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

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<sup>4</sup> 69 FR 68720 (November 24, 2004).

<sup>5</sup> 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 waiver 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 15<sup>th</sup>. 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.