

# REFORMING HAZMAT TRUCKING SECURITY

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## HEARING

BEFORE THE

### SUBCOMMITTEE ON ECONOMIC SECURITY, INFRASTRUCTURE PROTECTION, AND CYBERSECURITY

OF THE

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## REFORMING HAZMAT TRUCKING SECURITY

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Tuesday, November 1, 2005

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON HOMELAND SECURITY,  
SUBCOMMITTEE ON ECONOMIC SECURITY,  
INFRASTRUCTURE PROTECTION, AND CYBERSECURITY,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 2:02 p.m., in Room 311, Cannon House Office Building, Hon. Daniel Lungren [chairman of the subcommittee] presiding.

Present: Representatives Lungren, Linder, Sanchez, and Jackson-Lee.

Mr. LUNGREN. [Presiding.] The Committee on Homeland Security, Subcommittee on Economic Security, Infrastructure, Protection and Cybersecurity will come to order.

The subcommittee is meeting today to hear testimony on reforming the HAZMAT trucking security program.

I would like to welcome everybody to this hearing. Today, we will review the current TSA security program for transporting hazardous materials by truck and the impact of these regulations on the trucking industry.

Four years ago, Congress mandated security threat assessments of all individuals who operate a motor vehicle under the Department of Transportation's HAZMAT program. It is extremely important that we prevent dangerous material that could be used in a terrorist event from falling into the wrong hands, and I am a strong supporter of this program.

Yet I am concerned that the current approach is neither the most effective nor efficient manner to address this very real program. There are over 4,000 substances currently classified as a hazardous material for a variety of environmental, corrosive, health, safety or security reasons. They include items such as nail polish remover, corn syrup, dish detergent, and alcohol spirits.

Drivers transporting these materials must undergo the same rigorous background checks as those transporting chlorine and phosphine. While the vast majority of HAZMAT has zero risk of being used in a terrorist incident, current law subjects 90 percent of the 3 million commercial truck drivers to this burdensome requirement.

Only 5 percent of HAZMAT drivers have completed their assessments. And already 672 men and women have been denied their HAZMAT endorsement. At that rate, the program could put as many as 15,000 truckers out of work.

Furthermore, there are a number of substances that do pose significant risks that appear to be exempt from the DOT HAZMAT rules, including certain quantities of black powder explosives and ammonium nitrate for farming purposes.

Recent terrorist incidents worldwide revealed an increased use of explosives made from common household products. These homemade explosives can be as powerful as commercially available explosives and are, in this regard, impossible to regulate.

Many have argued that we need to take a step back and refocus this program on the most dangerous and most likely substances to be used by terrorists to inflict casualties and economic damage, such as toxic-by-inhalation materials, certain classes of explosives and radiological materials. I hope today that we begin a discussion as to whether that makes sense and, if so, how best to do it.

On a side note, I know there are many security issues involved in the different ways that we transport hazardous materials. But the focus of this hearing and the expertise of these panelists is on the HAZMAT endorsement for the trucking industry.

The issue in and of itself is complex. And I would hope that we can use this time today to really delve into this and explore some different options for this program. The goal of today's hearing is to ensure that the efforts undertaken by DHS are not spread so thin that we are left with inadequate security in the areas that need it most.

I would like to thank our witnesses for joining us today. I also appreciate our witnesses' indulgence in today's panel structure. While it is a bit of a departure from normal protocol, I believe that we in the federal government have a responsibility to listen to and respond to the concerns of some of the stakeholders.

And on that regard, I am going to say something I did not intend to say originally. But I have been informed that Mr. Brigham McCown, the acting administrator and deputy administrator, Pipeline and Hazardous Material Safety Administration, Department of Transportation, who was scheduled to testify on the second panel has indicated to us that he does not desire to testify on the second panel, in part because he believes that it is his right to be on the first panel and that it is somehow inappropriate for us to organize hearings as we wish to organize them.

And we were told in the last week that if he were not on the first panel that he might not show up. And now we have been told that he will not show up and somebody else is being sent here. The reason articulated to us through their office was that, "You know, the press may not stay for the second panel. And if the press is not here for the second panel, I am not going to show up."

Well, I did not return to Congress to be told by someone in the administration that they are the ones that control the way we do oversight. I have dealt with criminals on death row, and I am not going to have somebody over in the Department of Transportation tell me how to deal with this oversight responsibility I have.

Oversight means the legislative branch of the government takes oversight responsibility over the executive branch, and to have somebody in the executive branch tell me how to run my hearing, because they do not think the press is going to be here to hear

what they have to say and therefore they are not going to show up, is totally unacceptable.

And I am shocked that a department that is headed up by a former member of Congress would treat Congress in this way. Nobody in the administration is going to tell us how to run our hearings over here.

And the only reason I am saying it right now is that because Mr. McCown was concerned that the press might not hear what goes on in the second panel. So I want to make sure everybody, including the press, hears my response to the word I got from the administration, the Department of Transportation.

Oh, yes. This committee does not have prime responsibility for DOT, we were told by representatives of DOT. Well, Congress made its decision that we share responsibility in this regard. And I am not going to have somebody over in DOT decide when and where they are going to show up when they have been asked to.

We do have the right of subpoena in this Congress, and we will seek it, if that is necessary. But this kind of high-handed nonsense is not going to be accepted by this committee. And I do not care whether it is a Republican or Democratic administration, this is unacceptable.

And I hope those who are here from DOT will deliver that message directly to Mr. McCown and the others who happen to think that they rule the Congress. They do not.

If he wishes to run for Congress and be here a few years and become a chairman, then he could run the hearings the way he wants to run the hearings. But last I checked, he had not announced his candidacy for any office.

And now I would recognize my ranking member, Ms. Sanchez, for any comments she might have.

Ms. SANCHEZ. Thank you, Mr. Chairman. I appreciate you getting tough on these guys. Thank you.

There are over 11 million commercial drivers, licensed (CDL) holders, on record and an estimated 2.7 million CDL holders with a hazardous materials endorsement. These drivers transport more than 3 billion tons of regulated hazardous materials in the United States each year, amounting to more than 800,000 hazardous material shipments every day.

Ensuring that the secure transportation of this hazardous material happens needs to be a priority of this nation. At the same time, our country's economic health depends on the continuous flow of commerce. So a successful risk management strategy is necessary to ensure that the actions taken to secure the nation's transportation system are properly balanced.

I have some questions about the aspects of DHS risk management strategy with regards to hazardous material.

I question whether all of the disqualifying crimes that would prevent a commercial trucker from receiving a hazardous materials endorsement are an accurate indication of whether someone would be a terrorism security risk to the United States. The current list of disqualifying crimes seems to include writing bad checks.

Similarly, I have concerns about how broadly the Transportation Security Administration defines a "transportation security incident." This is especially important, as a driver can be permanently

disqualified from obtaining a hazardous material endorsement if he or she has committed a crime involving a transportation security incident.

I have also heard reports that there are not enough fingerprint locations and that these locations are not open at convenient times for truckers to go and get that done.

So I look forward to our first panel. Thank you, lady and gentleman, for being before us.

I look forward also to Mr. Oberman, with respect to the October 1st report, mandated under the Safe, Accountable, Flexible, Efficient Transportation Equity Act, a legacy for uses that is supposed to include information about the adequacy of fingerprinting locations, personnel and resources.

I am also interested in TSA's efforts to minimize the redundancy of background checks for transportation workers. We should not have to undergo multiple background checks by different agencies within the same and different departments. I think consolidating our resources and doing it once is enough, and it would also save taxpayers' money.

Finally, I want to know when the Transportation Security Administration is going to develop an overall plan for hazardous material. Hazardous material endorsements should only be one part of this plan.

So I thank you all for being here today. I look forward to hearing from everyone today.

And I yield back. Thank you, Mr. Chairman.

Mr. LUNGREN. I thank the gentlelady.

We are pleased to have two distinguished panels of witnesses before us today on this important subject. And let me remind the witnesses that their entire written statement will appear for the record.

Also, other members of the committee are reminded that opening statements may be submitted for the record.

We ask that, due to the number of witnesses on our panel today, that you would please strive to limit your oral testimony to about 5 minutes. We will have a clock here. And when the red appears, that means 5 minutes is up.

We will also allow each panel to testify before questioning any of the witnesses, that is to receive the testimony from all of you on the first panel before we would begin our round of questions.

I would call the first panel together and recognize Mr. Stephen Russell, the chairman and CEO of Celadon Group, to testify on behalf of the American Trucking Association.

#### **STATEMENT OF STEPHEN RUSSELL**

Mr. RUSSELL. Thank you very much. And I appreciate the opportunity. Thanks for inviting me to testify today on behalf of the American Trucking Association on the subject of reforming HAZMAT security.

My name is Steve Russell. I am chairman and CEO of Celadon Group, a publicly traded truckload carrier headquartered in Indianapolis, with operations throughout the U.S., Canada and Mexico. We operate approximately 700 tractors, 7,200 trailers, and have roughly 2,400 employee drivers and owner-operators in the U.S.



And I have submitted my written testimony for including in the record.

Celadon won the national large-fleet first place award for safety in 2002 and again for 2004, the most recent year it was awarded. Although not required, we take the extra step of conducting criminal history record checks on all of our drivers and do not hire trainees, only experienced drivers.

We do this to ensure that we are putting quality people behind the wheel on the road. Our trucking company is committed to safety and security, as are my peers in the industry.

Today, security spotlights has increasingly focused on transportation of HAZMAT by truck. The Patriot Act mandated background checks of truck drivers with HAZMAT endorsements. And there is a critical problem with the approach to the regulation of the security of HAZMAT transportation by truck, namely a failure to align the scope of regulation with the security objective.

My testimony will focus on the overreaching and burdensome nature of the HAZMAT background check and, secondly, the nature of goods that are defined as HAZMAT.

Today, there are approximately 2.7 million truck drivers that have HAZMAT certification. In the new regulations, to recertify, drivers are required to provide their fingerprints in approved locations and take at least one more trip to obtain that new certification.

Today, all of Celadon's drivers are required to have been HAZMAT-certified, even though less than 2 percent of our movements involved hazardous material. After months of requesting our drivers to consent to the new process, we estimate that only 10 percent will choose to be recertified. Accordingly, we now no longer require our drivers to be HAZMAT-certified.

From an industry standpoint, in my role as chairman of the homeland security committee of the American Trucking Association, I have talked to many of my peers. They are experiencing the same reluctance on the part of drivers to consent to fingerprinting and consent to the process.

The cost, about \$100, plus the loss of two or three days of pay at a typical pay rate of about \$200 a day is something the drivers simply do not want to do.

When the existing 2.7 million HAZMAT certificates expire, we believe a substantial majority of the drivers will not reapply. And that is the cost of shippers of HAZMAT, which today includes the products that you outlined, such as soft drink syrup, nail polish remover, et cetera, will soar.

Shortage of qualified drivers will require increased dead-heading to service the HAZMAT shippers, which will add significantly to the cost to the HAZMAT shippers.

The process of recertification needs to exclude fingerprinting and should be done at the federal, rather than the state, level. We understand that the TSA has proposed name-based screening for the 63,000 workers who handle air cargo.

The terrorist databases are checked by name, not fingerprints. Likewise, criminal records can be checked using names, as evidenced by the successful implementation of the Brady check system for gun buyers.

The second issue relates to what is defined as HAZMAT. Lubricants, paint, batteries, matches, perfumes, et cetera, are now defined as HAZMAT. They are not weaponable, but rather may require clean-up procedures in the event of accidental release. Not to be facetious, but the only way paint could be lethal is if it is ingested, and it certainly cannot be used to make a weapon of mass destruction.

As required by Congress, DOT in 2004 came up with a special list of HAZMAT and certain quantities that would, in fact, require a carrier hauling these materials to obtain a federal HAZMAT permit. We agree with this approach. And while the trucking industry understands that the federal HAZMAT permit is not exhaustive, it is the right approach and a good start from which to base future HAZMAT truck transportation security regulations.

The HAZMAT background check requirement should be limited to drivers who carry security-sensitive HAZMAT, such as the federal HAZMAT permit list. Doing so would provide relief to a large number of drivers that haul only HAZMAT that cannot be used a terrorist weapon and the shippers of those non-weaponable HAZMAT materials.

By DOT count, the materials and the quantities specified in the federal HAZMAT permit list represent an estimated four-tenths of 1 percent of the 800,000 average daily HAZMAT shipments, or roughly 3,200 shipments a day.

I thank you for the opportunity to testify today. And I hope Congress and the industry can work together to bring about a rational approach to achieving our mutually interested shared security objective.

Thank you, sir.

[The statement of Mr. Russell follows: ]

PREPARED STATEMENT OF STEPHAN RUSSELL

Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify today on behalf of American Trucking Associations, Inc. ("ATA") on the subject of hazmat trucking security. My name is Steve Russell. I am Chairman and CEO of Celadon Group, Inc., headquartered in Indianapolis, Indiana, a truckload carrier with approximately 2,700 power units, 7,200 trailers and 2,400 employee-drivers and independent contractors operating nationwide. My company has won the Truckload Carriers Association's National Fleet Safety Award for large trucking fleets in 2002 and 2004 (the most recent prize to be awarded). 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.

*Overview:*

According to the U.S. Department of Transportation, there are over 800,000 shipments of hazardous materials ("hazmat") by truck every day. The 1997 Vehicle Inventory and Use Survey found that 8.2 percent of the nation's licensed or registered large trucks transported hazmat at some point during the year. Finally, the 2002 Commodity Flow Survey estimated that hazmat accounted for 14.8 percent of all tons transported by trucks. Despite this, trucks transporting hazmat account for just roughly 4 percent of large truck crashes. Additionally, to date, no truck belonging to a registered carrier and transporting hazmat has been used in a terrorist attack in the United States.

From the above, it is clear that the trucking industry has safely and securely transported hazmat for decades. In the midst of today's heightened security environment, the trucking industry continues to play its part in ensuring the secure trans-

portation of all goods, including hazmat. However, the trucking industry has borne the brunt of government-imposed hazmat transportation security programs that are over-reaching and are not properly aligned with the primary objective of preventing a terrorist from using a large truck hauling hazmat to do catastrophic harm.

In this testimony, I will focus on the security threat assessment requirement for hazmat-endorsed drivers that was enacted by Congress in October 2001 as part of the USA PATRIOT Act (hereinafter “the hazmat background check”) and further implemented by the Transportation Security Administration (“TSA”) as a glaring example of government’s failure to adopt a risk-based approach to security regulation. Yet the lessons learned from the hazmat background check program and the need for a risk-based approach apply equally to current and future regulations concerning the security of hazmat transportation. The hazmat background check, although just recently fully implemented, is hurting trucking companies and their drivers. Drivers are incurring the higher than necessary costs associated with the hazmat background check and bearing the costs associated with taking a day(s) off work to submit fingerprints at approved locations. Companies are beginning to see their numbers of hazmat-endorsed drivers go down, which diminishes their ability to haul hazmat. As set forth further in this testimony, these negative impacts can be avoided while still preserving the security objective.

A misconception of what constitutes hazmat seems to be at the heart of the problem. A number of everyday commodities such as paint, perfume, nail polish, soft drink syrup, batteries, and matches are considered hazmat and require placarding—and thus a hazmat endorsement to the commercial driver’s license (“CDL”) to transport them by truck—when transported in certain threshold quantities. These products do not represent any more of a threat to our homeland than carrying a truckload of bread. They cannot be used as weapons of mass destruction and are unlikely to be attractive to terrorists. Nevertheless, a driver seeking to transport these products must now undergo an expensive, time-consuming fingerprint-based background check. As presently administered, the background check would apply to the 2.7 million hazmat endorsement holders—well over two-thirds of the estimated active over-the-road truck drivers.

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. At my company, even though it is not required, we do criminal history record checks on our drivers using third party services that available records from pertinent jurisdictions. However, the imposition of burdensome and costly programs governing the transportation of hazmat, such as the hazmat background check program, threatens to erode the industry’s ability to continue to deliver the goods that the consumer expects. I urge this Congress to approach homeland security from a true risk-based viewpoint in order to ensure that our Nation’s commerce may flow as freely as possible.

*A. The hazmat background check program has been marred by a number of bad decisions.*

*1. The hazmat background check program should not have been linked to the CDL/hazmat endorsement.*

Congress was rightly concerned about the security of transportation of certain hazmat. Admittedly, some hazmat could be readily used to cause widespread harm; however an overwhelming majority of the hazmat transported does not pose a significant security risk. By tying the security program to the issuance, transfer or renewal of the hazmat endorsement to the CDL, Congress greatly overshot the mark. As a result, drivers who haul ordinary freight and hazmat that cannot be used as a weapon must expend significant monies and time to submit fingerprints for a check against databases that are equally searchable using names and other unique identifying information. As discussed further in section B.2 of this testimony, Congress has previously identified a list of hazmat deserving of special consideration. In my business, we look at every activity we engage in to determine whether it is cost-effective. It does not seem that securing the transportation of hazmat that can do no real harm provides benefits remotely commensurate with the costs it imposes on drivers and/or carriers.

Materials that have been designated as hazmat by the Secretary of Transportation have been so designated due to characteristics that require special consideration while handling or during clean-up in the event of an accidental release. Some of these materials are hazardous only when ingested or touched, others are hazardous to the environment or are ignitable but would not be attractive to a terrorist as a weapon. In a similar vein, the CDL has always been utilized to indicate a driver’s qualification to *safely* drive a commercial motor vehicle and, with respect to the

hazmat endorsement, as a measure of the driver's knowledge of the hazmat regulations to *safely* transport placarded quantities of hazmat.

The PATRIOT Act background check mandate focused solely on security, with the objective of preventing a terrorist from using a truck loaded with hazmat to do harm. That security objective is vastly different from the safety objective underlying the hazmat regulations and the hazmat endorsement. Trying to fit a square peg into a round hole is an apt analogy for TSA's attempt to take a safety-based system and try to transform it into a security-based system without modification. The safety-based hazmat universe is simply too broad to serve as the foundation for a program to regulate transportation security.

*2. By requiring a fingerprint-based check for all hazmat-endorsed drivers and implementing the program in the manner that TSA has, the costs to drivers and carriers are unacceptably high and serve as a disincentive to obtaining a hazmat endorsement.*

TSA designed the hazmat background check program to be fingerprint-based, although the terrorist databases and watch lists are populated with names only and the criminal history records databases can be searched using names (as evidenced by the National Instant Criminal Background Check System ("NICS") utilized to check the criminal backgrounds of gun purchasers). This requirement has added significant costs: both direct costs in terms of fees charged to offset the costs of collecting and processing fingerprints and indirect costs in terms of driver time off work. These costs and the added inconvenience to drivers—not the prospect of being found to be a terrorist—are dissuading more and more drivers from obtaining hazmat endorsements.

Briefly, the fees charged for the hazmat background check program vary depending on whether or not the driver is in a state that opted to use the TSA contractor for fingerprint collection. In those states that opted to use the TSA contractor, the fee is \$94 broken down as follows: \$38 for the Information Collection fee (i.e., fingerprint capture); \$22 for the FBI fee; and \$34 for the Threat Assessment fee. The 17 states that opted to collect prints on their own must charge \$24 for the FBI fee and \$34 for the Threat Assessment fee but are free to charge what they desire for fingerprint collection. In New York, this fee is \$75 for a total security threat assessment fee of \$133. Drivers are required to go through the fingerprinting process at least once every five years, thus these fees are recurring. The fees charged to truckers does not compare favorably to: 1) an airport worker with unescorted access to secure areas who pays \$29 or \$31 (which includes the \$22 FBI fee) for his/her check, depending on collection method; 2) the proposed fee for checks of workers with unescorted access to air cargo, which is \$39; or 3) a driver participating in the Free and Secure Trade border-crossing program who pays \$50 for his/her check and receives a credential with an RFID for that price. ATA finds it particularly appalling that TSA has made clear the trucking industry is paying these significantly higher fees to subsidize the establishment of a screening system that will be used for screening of other transportation workers in the future, but at significantly lower costs to them.<sup>1</sup>

These higher than necessary fees are, unfortunately, just one part of the problem. The other significant issue with the hazmat background check program is the location and operating hours of the approved fingerprint collection sites. Many drivers have to take significant periods of time off work—most often without pay—to submit their fingerprints. For example, a driver based in Montana who works for a large carrier with operations nationwide had to travel 150 miles one way from Great Falls to Butte in order to submit prints at the TSA-approved location. As if that was not

<sup>1</sup> 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.

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. 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.

bad enough, that same driver had to make the round-trip again when he was notified that the collection agent had failed to capture the fingerprints properly. In a state like Montana, it is roughly 270 miles one-way to go from Eastern Montana (where a lot of oil activity takes place and where hazmat endorsements are necessary) to Billings (the closest approved collection site). At Celadon, my drivers tell me they have to make a minimum of two visits and in some locations three visits, in order to complete the hazmat endorsement process. Assuming my drivers make roughly \$200 per day, you can begin to calculate what the costs are to them. Add to that my costs as a company due to having a driver miss a day of work at a time when I am looking for additional drivers. Drivers also complain about the hours of operation of the approved fingerprint collection sites. Many locations are only open two days per week for only four hours per day.

It is easy to see why drivers are discouraged. The repercussions are just now starting to be felt and portend to be significant. For many carriers, hazmat represents roughly 5 percent of their overall freight. However, for scheduling and efficiency reasons, many carriers used to require all their drivers to maintain hazmat endorsements so they could haul any load. This allowed carriers to dispatch the closest driver to pick up a load, whether it was a hazmat placarded load or a load of ordinary freight. As a result of the cost and inconvenience associated with the hazmat background check program, many carriers are no longer requiring their drivers to maintain hazmat endorsements. We at Celadon are one of those companies. Hazmat such as lubricants, soft drink syrup, and nail polish represents 1.5–2 percent of our total freight, yet, until recently, we required all 2,400 of our U.S.-based drivers to have a hazmat endorsement. Now we face the likelihood of increased costs associated with sending hazmat-endorsed drivers greater distances to pick up a hazmat load even though we may have other drivers closer to that load. Carriers, like my company, are seeing, or expect to see, fewer drivers obtaining or renewing their hazmat endorsements and several carriers expect to be out of the business of hauling hazmat altogether in the future. By TSA's own estimate, the hazmat background check program will result in a loss of 20 percent of the hazmat-endorsed driver population. ATA has submitted for the record a letter signed by 39 motor carriers of various sizes and operations who have expressed concern about their continued ability to haul hazmat in the future as a result of the costs and burdens imposed by the hazmat background check program. The program needs immediate attention.

*3. TSA's failure to implement a uniform, nationwide system has led to uneven implementation by the states, which poses problems that disrupt a carrier's operations.*

The lack of uniformity in the administration of the hazmat background check program has caused problems for drivers that have sought to transfer a valid hazmat endorsement between states. This issue was brought to ATA's attention by carriers with drivers in South Carolina, New York and Illinois. Drivers that were legally authorized to transport hazmat nationwide one day were being stripped of their endorsements (and in many cases, thus unable to drive for their employers) by these states. Since this was not the agency's intent, TSA tried to correct the problem by issuing guidance to the states on the spirit of the regulations. However, the problem is that it was just that—guidance—and did not have any obligatory force or effect.

Notwithstanding the fact that TSA issued a permissive exemption to states from the prohibition against issuing a transfer hazmat endorsement prior to receiving a Determination of No Security Threat Assessment, Illinois continues to revoke hazmat endorsements issued by other states upon submission of a transfer application. This means that a driver holding a valid hazmat endorsement that moves into Illinois must surrender his/her hazmat endorsement and await completion of the security threat assessment process. In this circumstance, the affected driver, through no fault of his/her own, may be unable to earn a living—for several weeks—until TSA issues a Determination of No Security Threat and Illinois reissues a CDL with a hazmat endorsement.

*B. A new approach could provide the same level of security for transportation of hazmat by truck without the same overwhelming costs.*

As previously stated, the trucking industry supports common-sense, effective measures to secure the transportation of hazmat by truck. With respect to the hazmat background check program, ATA believes there are two alternative approaches which would continue to achieve the security objective while reducing the negative impact on the trucking industry's ability to move the Nation's goods. It is up to this Congress to provide the leadership and direction to fix a program that is fundamentally broken.

*1. According to TSA's past statements, name-based checks could achieve the primary security objective.*

As demonstrated above, the primary cause of the exorbitant costs and inconvenience associated with the hazmat background check program—and thus driver and carrier dissatisfaction with the program—is the submission of fingerprints. Congress did not explicitly require fingerprints in the PATRIOT Act. ATA believes the primary objective of the hazmat background check problem is and should be to reduce the likelihood of a terrorist gaining authorized access to hazmat with the potential to do harm. In light of this reasonable objective, ATA is convinced by TSA’s past statements that name-based checks are effective.

In the April 6, 2004 Federal Register, TSA stated, with respect to checking terrorist-related databases in advance of fingerprint-based criminal history record checks, “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.” 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.”

In its Air Cargo Rule, 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 assessment to verify that they do not pose a security threat.”<sup>2</sup> 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 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.<sup>3</sup>

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, which is approximately 45 times larger than the air cargo population TSA considered—and trucking companies certainly run the gamut from complex organizations to “mom and pops.” Experience has certainly shown that the fingerprint-based records check process designed by TSA is both time-consuming and costly. And in the end, a hazmat endorsement essentially allows an individual unescorted access to cargo. Consistent rationale points to the conclusion that name-based checks should suffice.

ATA understands that Congress also directed a search of criminal history record databases. As discussed earlier, this is already being done in other contexts using names and other unique identifiers. Name-based checks are conducted every day in compliance with the Brady Act for gun purchases and by Customs and Border Protection officials for customs and immigration purposes. These checks are made against the NCIC 2000 database, which contains records on wanted persons, and the Interstate Identification Index, which contains over 35 million criminal records. One is thus left with the question of whether requiring fingerprints helps further achieve the security objective to such extent that it justifies the disruption to the transportation of everyday hazmat commodities. We think not.

2. *A risk-based approach that limits the background check requirement to drivers hauling hazmat that truly poses a risk of causing catastrophic harm would achieve*

<sup>2</sup> 69 Fed. Reg. at 65265.

<sup>3</sup> 69 Fed. Reg. at 65265.

*the security objective and limit the disruption to the transportation of non-threatening hazmat.*

One would surmise that the underlying rationale for screening a person before giving them access to hazmat would be that hazmat could readily be used to do significant harm. However, that is not the case for a wide variety of hazmat currently covered under the hazmat background check program. For example, we are well aware that certain explosives could be used to take down a building; however, placarded explosives also include a large shipment of airbag components or emergency flares, which are not weaponizable and pose no significant security risk. Similarly, the transportation of a tanker full of liquefied natural gas may pose security concerns that are not present in the transportation of 5 drums of paint. Since many companies—and drivers—never haul any hazmat that could readily be used as a weapon, it seems that the trucking industry is being directed to expend significant resources protecting the public against a potential harm that does not exist. A more appropriate, risk-based approach would focus on hazmat that truly pose a threat of significant harm to the public.

It would be disingenuous for ATA to take sole credit for proposing to narrow the list of hazmat that require special attention. As mentioned earlier, Congress set the framework for such a list. In 2004, the Federal Motor Carrier Safety Administration (“FMCSA”) promulgated regulations requiring carriers that haul certain hazmat in certain threshold quantities—not all hazmat requiring placarding—to obtain a federal hazmat permit. The regulations require a permit for the materials listed below if transported at or above the indicated quantities:

- *Radioactive Materials*—A highway route-controlled quantity of Class 7 materials.
- *Explosives*—More than 25 kg (55 pounds) of a Division 1.1, 1.2 or 1.3 material, or an amount of a Division 1.5 material requiring a placard under 49 CFR part 172, subpart F.
- *Toxic-by-Inhalation (Division 2.3 and 6.1) Materials*—Hazard Zone A materials in a packaging with a capacity greater than 1 liter (0.26 gallons); a shipment of Hazard Zone B materials in a bulk packaging (capacity greater than 450 L [119 gallons]); or a shipment of Hazard Zone C or D materials in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500) gallons.
- *Liquefied natural Gas*—A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent, in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gallons) for liquids or gases.

FMCSA’s composition of this list took into consideration both safety and security concerns.

While ATA understands that the federal hazmat permit list is not exhaustive and that other materials in certain quantities should be added due to their potential to do harm, ATA also firmly believes that this list represents a solid foundation from which to launch a comprehensive review of the regulations addressing security of transportation of hazmat by truck. A narrowing of the hazmat background check program to cover only security-sensitive hazmat would provide relief for a large number of truck drivers from unnecessary burdens while adequately protecting the homeland. Moreover, developing a list of security-sensitive hazmat would also provide a rational foundation for other current and future regulation of hazmat transportation security.

In its regulatory flexibility analysis accompanying the above regulation, FMCSA estimated that there were 1.2 million shipments of the above-covered commodities per year, which means an average of 3,288 shipments daily. This represents just 0.4% of the average daily hazmat shipments. This is where the appropriate focus should be.

ATA understands that some will argue that the problems the industry complains of now with respect to drivers not getting their hazmat endorsement and thus a diminished capacity to transport hazmat will now be shifted to those materials that are deemed security-sensitive. Some fear that there will be nobody around to haul those security-sensitive materials. These arguments are based on a fundamental misunderstanding of the industry. Carriers that haul what would likely be deemed security-sensitive hazmat are specialized. They have already made a conscious decision to get into that market and deal with the potential increased liability that comes with hauling, for a lack of a better descriptor, higher-level hazmat. This type of freight often represents a significant portion of their business. These carriers will likely continue to haul these materials and require their drivers to get the appropriate clearances. However, a large majority of carriers have consciously decided not to haul these types of materials and instead haul non-threatening hazmat. These

are the carriers who may get squeezed out unless Congress delivers the necessary reform.

*Conclusion*

Mr. Chairman and members of the Subcommittee, I thank you for the opportunity to share with you the trucking industry's concerns with the current approach to regulating the security of hazmat transportation. While hazmat is a small portion of the Nation's general freight, it is an important portion that is crucial to the manufacture of the products that contribute to our general welfare. To continue our economic prosperity, we cannot overly burden the transportation of hazmat as a whole for the sake of protecting the Nation against that significantly smaller portion of hazmat that can be attractive as a weapon to do harm. The trucking industry stands ready to work with this Congress to protect our homeland without unnecessarily burdening the movement of commerce.

Mr. LUNGREN. Thank you very much, Mr. Russell, for your testimony.

The chair now recognizes Mr. Michael Laizure, owner-operator of Time Critical Ordnance Transport, to testify on behalf of Owner-Operator Independent Drivers Association.

**STATEMENT OF MICHAEL LAIZURE**

Mr. LAIZURE. Good afternoon, Chairman Lungren, Congresswoman Sanchez and the members of the subcommittee.

My name is Michael Laizure. I am the owner of Time Critical Ordnance Transportation, and I am from College Place, Washington. It is my privilege to be here today on behalf of the more than 130,000 small business truckers and professional drivers who comprise the membership of the Owner-Operator Independent Drivers Association.

I have been a truck driver for more than 13 years, 10 of them as an owner-operator. And I have driven over a million accident-free miles. Roughly 50 percent of the loads I haul would be classified as hazardous materials, security-sensitive materials, or both.

In the course of my business, I have personally completed several background checks and have been fingerprinted six different times. I have been cleared to haul loads for the Department of Defense, the Department of Energy, and other federal agencies.

I have hauled various sorts of chemicals, weapons, munitions, radioactive material, as well as other things that I am not at liberty to discuss. Some business truckers believe that the security threat assessment process has been put in place by the TSA for general HAZMAT endorsements are an overreaching solution to a problem that has not been fully identified and for which truckers are saddled with unnecessary burdens and expenses.

What good does it do to check the backgrounds of U.S. citizens who have held a commercial drivers license for more than 10 or 20 years? It is hard for me to conceive that these veteran drivers are likely to turn into terrorists, nor do I believe that most of the HAZMAT cargoes they transport would appeal to terrorists.

TSA's security threat assessment systems waste scarce government resources with no real corresponding benefit in reducing the likelihood of a terrorist incident. The program is unnecessary, time-consuming, expensive, and redundant.

I have been cleared, like I said, again, by DOE, DOD and other federal agencies to haul just about anything there is. How much sense does it make for me to go through another less intensive fingerprint and background check to haul nail polish?



Along with OOIDA, I support the amendment to the Patriot Act HAZMAT background check requirements to narrow the TSA security threat assessment to focus on individuals wishing to haul hazardous materials that have been deemed as security-sensitive.

There are intensive security assessment processes for truck drivers already being utilized by the federal agencies. And integrating these background checks and clearances with the TSA and allowing agencies and industry to look to one database for drivers with security-sensitive clearance is not only consistent with the principles promoted by the 9/11 Commission, but it will also save the government and private individuals time and money.

A general hazardous materials endorsement for loads that are not classified as security-sensitive should be preserved in the CDL licensing process.

Also, until the TSA has the ability to complete background check on Mexican, and Canadian, and other drivers of foreign origins that are at the very least as stringent and comprehensive as being completed on American drivers, foreign truck drivers should not be provided the clearance to haul hazardous materials, let alone security-sensitive materials.

The rationale that has been used to justify allowing non-citizens and non-permanent residents the right to obtain a hazardous material endorsement is based on economics, not on security.

It is no secret that large companies in the U.S. trucking industry are pursuing cheap foreign labor to fill seats. It is also important to point out that persons who wish to obtain a truck and hazardous materials to commit a terrorist act most likely will not bother to get a hazardous endorsement or even a CDL. Most likely, they will hijack them while in transport and exposed.

On a final note, once again, I have clearances to carry just about anything there is to haul, but I cannot carry a weapon in the cab of my truck. Simply put, if I am targeted by someone intending to seize my rig and intent on using it to harm the American public, there is nothing I can do to stop them; I do not have the authority or the tools to stop them.

Mr. Chairman, Congresswoman Sanchez, members of the subcommittee, thank you for providing me with the opportunity to testify before this panel. And I would be happy to answer any further questions.

[The statement of Mr. Laizure follows:]

PREPARED STATEMENT OF MICHAEL LAIZURE

Good afternoon Chairman Lungren, Congresswoman Sanchez, and members of the Subcommittee. My name is Michael Laizure. I am the owner of Time Critical Ordinance Transportation and hail from College Place, Washington. It is my privilege to be here today on behalf of the Owner-Operator Independent Drivers Association (OOIDA).

OOIDA is a not-for-profit corporation established in 1973, with its principal place of business in Grain Valley, Missouri. OOIDA is the national trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small business truckers. The more than 130,000 members of OOIDA are small-business men and women in all 50 states who collectively own and operate more than 190,000 individual heavy-duty trucks. Owner-operators represent nearly half of the total number of Class 7 and 8 trucks operated in the United States.

The Association actively promotes the views of small business truckers through its interaction with state and federal government agencies, legislatures, the courts,

other trade associations, and private businesses to advance an equitable business environment and safe working conditions for commercial drivers. The TSA's hazardous materials endorsement and security threat assessment process directly affects owner-operators, motor carriers and professional drivers, including members of OOIDA.

I have been a truck driver for more than 13 years, the past 10 as an owner-operator. I drive between 120,000–140,000 miles each year throughout the country. In my trucking operation I use a specialized trailer and equipment to haul a wide variety of loads. Roughly 50 percent of those loads would be classified as hazardous materials and much of that would be considered as “high hazmat” or security sensitive materials. I have been through numerous background checks and have been cleared to haul loads for the Department of Defense, the Department of Energy and other federal agencies. I have hauled various sorts of chemicals, weapons, ammunition and radioactive materials as well as some other materials that I am not at liberty to discuss.

The USA PATRIOT Act of 2001 contained a provision requiring background checks for individuals operating motor vehicles transporting hazardous materials. The TSA took on this responsibility initiating a security threat assessment requirement that has caused a considerable number of problems state administrators, the trucking industry and the shipping community that depends on that industry. Initially the TSA did a name based check on all present hazmat endorsement drivers, but have since instituted an arduous assessment process that has required a new system to be put in place by state governments and federal contractors to complete fingerprinting and background checks.

#### **Security Threat Assessments for Hazardous Materials Endorsements**

Small business truckers believe that the security threat assessment process that has been put in place by the TSA for general hazmat endorsements are an over-reaching solution to a problem that has not been fully identified, and for which truckers are saddled with unnecessary burdens and expenses.

From my standpoint, what good does it do to check the backgrounds of U.S. citizens who have held a commercial drivers license for more than 10 or 20 years? There must be a better way of identifying a smaller population of truckers that must go through a background check, or at least exempting a significant part of the population where there is little if any chance of finding potential terrorists. Long-time drivers are particularly offended by the suggestion that they need to go through such background checks. Hasn't TSA figured out a way to identify persons who are more likely than not to be terrorists?

TSA's background check/security threat assessment system is cumbersome and problematic for all involved parties. The chief complaints that OOIDA hears from drivers about the present system is the shortage of facilities, available times of operation for the facilities and the amount of time necessary to get results. In addition, substantial out-of-pocket costs and lost revenue are commonly voiced concerns.

The program was conceived without understanding the unique challenges of the truck driving population. Even today, after several months and a loud chorus of complaints from truck drivers, the fingerprint locations are often at sites hundreds of miles from the driver's home or terminal. The sites are often located in areas where large trucks are not allowed to venture or park and are only open at the prime driving time for drivers.

My co-driver had to have the background check done recently for TSA for his hazmat endorsement. In the state of Washington there are only two places provided by the TSA. The closest facility for him to complete the process was roughly 170 miles away from his home.

The TSA also never considered that driving to and from the fingerprint location as well as the time involved in the process often counts against the federal hours-of-service regulations that the drivers must abide by and significantly infringe upon their income.

Fees collected by States or TSA's contractors at the time of application and fingerprinting total from \$94 to \$134. But that is certainly not the only cost incurred by truck drivers, particularly owner-operators like myself. Everyday that my truck is not rolling with a paying load, my business is losing more than \$1,000 in revenue. With the best-case scenario for going through the security threat assessment process that TSA has developed, I will lose two days of income—a day for application and fingerprinting, another for testing. Delays in response from the TSA or any other bumps in the road that are somewhat common for this process will increase the potential loss of income.

While OOIDA acknowledges a provision was included in the recently passed highway bill to prompt the agency to look further into and potentially address the ade-

quacy and availability of finger printing locations, TSA's track record in understanding the problems faced by drivers does not leave OOIDA with significant hope. Using local law enforcement agencies for the collection of fingerprints and background information (already used by the Department of Defense, the Department of Energy and others) would certainly help to diminish these problems.

OOIDA also receives numerous complaints about the redundancy of background checks that many truck drivers must go through. I only half jokingly say that I have been through so many background checks that I might as well publish my fingerprints. In the course of my business, I personally have completed several background checks and been fingerprinted six different times.

Even though I have been cleared by the Department of Defense, the Department of Energy and other federal agencies to haul highly specialized and security sensitive loads, I will also have to make the same 340 mile roundtrip drive as my co-driver to a TSA associated facility to be fingerprinted again and to go through yet another background check.

Again, OOIDA acknowledges a provision was included in the transportation reauthorization bill calling for the agency to report back to Congress on their plans to eliminate duplicative federal background checks, however interactions with TSA staff thus far seem to indicate a mindset that there are no equivalent background checks being conducted. The Association is somewhat encouraged that the TSA has recently said it would combine hazmat checks with the Transportation Worker Identification Card (TWIC) background process.

#### **Focusing TSA on Security Sensitive Hazardous Materials**

While we do not fault lawmakers or federal agencies for their rapid response to the tragedy of 9/11, the background check requirement for hazmat drivers contained in the Patriot Act was overly broad in its scope toward existing veteran hazmat drivers while it seriously missed the mark in addressing some of the more obvious or likely ways a commercial vehicle could be used to do great harm.

The typical owner-operator member of our organization has nearly twenty years of experience driving trucks. They are proven professionals, driving safely and responsibly meeting the needs of our nation's citizens. Well over 2 million of these Americans and their fellow drivers will have to undergo background checks when their current commercial drivers licenses (CDLs) come up for renewal next and at subsequent renewals thereafter.

OOIDA does not believe these veteran drivers are likely to turn into terrorists nor do we believe that most of the hazmat cargoes they transport would have any appeal to terrorists. By requiring them to undergo TSA background checks, scarce resources in time and money are simply wasted with no corresponding benefit in reducing the likelihood of a terrorist incident.

OOIDA strongly supports the concept of narrowing TSA's security threat assessments to focus on individuals wishing to haul hazardous materials that have been deemed as security sensitive by amending the Patriot Act's hazmat background check requirements. There are intensive background check/security assessment processes for truck drivers already being utilized by other federal agencies. Integrating those background checks with the TSA and allowing agencies to look to one database for drivers with security sensitive clearance is not only consistent with principles promoted by the 9/11 Commission, but it will also save the government and private individuals both time and money.

A general hazardous materials endorsement for loads that are not classified as "Security Sensitive" should be preserved in the CDL licensing process for truck drivers. Hazardous materials that are not deemed to be security sensitive do pose safety risks to truck drivers, dockworkers, the general public and first responders. OOIDA believes that along with mandated training and increased testing requirements for those wishing to obtain a Commercial Drivers License, compulsory training in the handling and transporting of non-security sensitive hazardous materials must also be a part of the licensing/endorsement process.

#### **Foreign Drivers Operating in the United States**

Allowing foreign drivers to essentially be exempt, such as Canadian drivers, because they have their own standards and not recognizing that the Department of Defense, C-TPAT and FAST have rigorous standards is completely unjustified. Accepting Mexican drivers without background checks is unconscionable. To date, there are no known background checks for truck drivers used in Mexico. This implies that foreign drivers are less likely to be terrorist than American drivers. The rationale used to justify allowing non-citizens and non-permanent residents the right to obtain a hazmat endorsement is based on economics and not security. It is no secret that large companies in the U.S. trucking industry are pursuing cheap foreign labor to fill driver's seats.

It makes no public policy sense to allow persons who are not citizens or permanent residents to obtain HME or haul hazardous materials without a properly obtained HME. OOIDA opposes allowing non-citizens and non-permanent residents, including Mexican and Canadian drivers, the ability to possess an HME or haul hazardous materials with a U.S. issued HME. It is grossly unfair to U.S. drivers to allow persons whose backgrounds cannot be effectively checked to have the same rights and privileges as U.S. drivers.

OOIDA agrees with other organizations in the industry that the issue of Mexican and Canadian drivers' compliance with these rules must be resolved before the HME threat assessment requirement be finalized. OOIDA sees no rationale, from a fairness and public policy standpoint, to give persons from foreign countries an exception to this rule. OOIDA understands that Canada may have a similar security check for its drivers in place. But an analysis must be made, with public comment, comparing the two systems before the TSA can determine that the Canadian system is an adequate substitute for U.S. rules. OOIDA is unaware of any such system in Mexico, and if there were, would consider its accuracy suspect.

Even if the TSA were to allow these foreign drivers to apply for a U.S. hazmat endorsement, OOIDA does not believe that TSA would have access to sufficient information from other countries to perform a threat assessment equivalent to those performed on U.S. drivers. This inability of TSA to perform an adequate threat assessment on foreign drivers is also the basis for OOIDA's concern about TSA's loosening of the immigration status requirement.

The TSA amended its original rulemaking to weaken the original hazmat threat assessment rule to allow non-citizens and non-permanent residents to obtain an HME. In justifying the modification, TSA made no analysis based on homeland security policy that non-citizens and non-permanent residents may be granted HMEs without any diminution in security. The only issues stated by the rulemaking are that these persons are legally allowed to work in the United States, that they have properly obtained a CDL, and that the trucking industry is in search of cheap labor. None of these issues bear on the risk that this population may or may not pose to homeland security.

The fact that a person has come into this country recently gives that person a greater likelihood that they will "survive" a HME background check. The TSA likely has access to more information on the background of an individual who has spent their entire life or a significant amount of time here. How will TSA know whether that a person who has come into this country recently has committed crimes or acts in their previous country that would disqualify them from holding an HME? This is just the kind of advantage a terrorist may try to exploit. The focus of Homeland Security to protect our country against threats from foreign persons underscores the seriousness of this issue. How can the TSA justify allowing foreign persons whose backgrounds they cannot properly examine to operate 80,000 pound vehicles, let alone those loaded with materials that have the potential to cause great harm?

#### **Vulnerability of Hauling Hazardous Materials**

The central problem with hazmat background checks is that they will, in no way, address the greatest vulnerability of the trucking industry to terrorists. As someone who regularly hauls hazardous materials loads, I believe it is also important to point out some of the regulations and practices within the trucking industry that leave drivers vulnerable to terrorist attacks.

While there is evidence and a past history of terrorists using trucks as weapons, OOIDA does not believe that persons who wish to obtain a truck and hazardous materials to commit a terrorist act need or will bother to get a hazmat endorsement or even a CDL. Truckers believe the most likely way that persons will obtain a truck and hazardous materials is to steal or hijack them at an unsecured location. This includes at traffic lights and at the out-of-the-way places across the country that truckers find to park their truck when their hours-of-service are exhausted and the rest areas and truck stops are full.

The lack of secure and safe places for trucks to park, in many areas around the country, when a driver needs to sleep or rest, is a significant vulnerability for hazmat transportation. A terrorist intent on obtaining a truck containing hazardous materials will have a much easier time and spend fewer resources in stealing a truck than he will bothering to get a CDL and hazmat endorsement. This problem remains entirely unaddressed by TSA and FMCSA. Congress did pass a pilot program related to increasing safe and secure truck parking in the highway bill, a small step in the right direction.

Federal regulations for certain hazmat loads require that a placard be posted on the sides of the trailer containing that load. The placarding of a trailer provides first responders with information on the level of danger and assists them in knowing

what measures are needed to respond to a potential emergency should the truck become involved in an accident. This is legitimate and important information, however, anyone with an Emergency Response Guide

(ERG) can look up the code on the placard and have a fairly good idea of the contents of that load. An ERG can be purchased at most truck stops. The placarding requirement essentially equates to advertising loads that have the potential to cause significant damage. Some system or coding process should be instituted that provides appropriate safety information to first responders, but does not provide an easy target for someone with malice in their heart.

If I am targeted by someone intent upon seizing my truck and trailer, there is little I can do to stop them. Ironically, I have clearances to carry just about anything there is to haul in the U.S., but I cannot carry a weapon in the cab of my truck. If someone sticks a gun in my face, I've got two choices and I'm not the one that gets to make them. My truck is equipped with a panic button that is supposed to cause the equivalent of an "officer down" response on the federal level when it's pushed. However, by all accounts that I am aware, the timeliness of responses by local, state and federal entities to engaged panic buttons are questionable at best.

Finally, there have been some proposals to require the GPS tagging of hazmat trucks. Truckers are truly offended by the idea of the government watching their every move. Isn't it the hazardous materials that you would most like to keep track of? Hazardous materials can travel across several modes of transportation. Shouldn't any electronic monitoring be of the materials themselves? Tracking the truck won't be of much use should the materials be stolen from the truck, or the trailer is detached and stolen from the tractor. If hazardous material are taken from the truck or go missing, finding the truck is no guarantee of finding the materials. Track the materials and you will find the materials. If you consider electronic monitoring of hazardous materials, OOIDA suggests that to tag the materials would be far more effective and impose on driver privacy far less.

### **Conclusion**

Although there are some significant security vulnerabilities in the trucking industry, there are steps that the federal government can take towards making the transport of hazardous materials by truck more secure overall without adding unnecessary burdens and expenses on itself or commercial motor vehicle operators. Focusing the resources of the Transportation Security Administration on ensuring that individuals with red flags in their backgrounds are not being afforded access to haul security sensitive hazardous materials is an excellent starting point. There are intensive background check/security assessment processes for truck drivers already being utilized by other federal agencies. Integrating those background checks with the TSA and allowing agencies to look to one database for drivers with security sensitive clearance is consistent with both the principles promoted by the 9/11 Commission and the mandates of the recently passed highway bill. It will also save the government and private individuals both time and money.

Hazardous materials that are not deemed to be security sensitive do pose safety risks to truck drivers, dockworkers and first responders. A general hazardous materials endorsement for loads that do not qualify, as "Security Sensitive" should be maintained in the licensing process for truck drivers. Along with mandated training and increased testing requirements for those wishing to obtain a Commercial Drivers License, compulsory training in the handling and transporting of non-security sensitive hazardous materials must be a part of the licensing/endorsement process.

Until the TSA has the ability to complete background checks on Mexican, Canadian and other truck drivers of foreign origin that are at the very least as stringent and comprehensive as those being completed on American drivers, foreign truck drivers should not be provided with clearance to haul security sensitive hazardous materials. As was suggested with non-security sensitive hazardous materials, non-citizen and non-permanent resident truck drivers should be required to complete comprehensive training in the handling and transportation of hazardous materials before they are allowed to haul those loads within our country's borders. Additionally, the training, assessment and background checking standards should be increased for all individuals wanting to attain a U.S. commercial drivers license who are not American citizens.

The federal government should also review regulations and industry practices to diminish the vulnerabilities of trucks transporting all types of hazardous materials, especially those that may be used as weapons against the American people.

Chairman Lungren, Congresswoman Sanchez, and members of the Subcommittee, thank you for providing me with this opportunity to testify on behalf of the members of the Owner-Operator Independent Drivers Association.

I look forward to answering questions from the members of the Subcommittee and providing you with the perspective of a small businessman and driver behind the wheel.

Mr. LUNGREN. Thank you very much, Mr. Laizure, for your testimony.

The chair now recognizes Mr. Gary Brown, general counsel at Pyro Spectaculars, to testify on behalf of the Institute of Makers of Explosives, et al.

#### STATEMENT OF GARY BROWN

Mr. BROWN. Mr. Chairman, members of the subcommittee, I am pleased for the opportunity to present testimony on the concerns which prompt today's hearing.

Our recommendation is an attempt to balance safety and security with the need to provide for the free flow of goods and to bolster our international competitiveness. This requires that Congress separate two issues that have been confused in some form.

The first is: What material should be subject to security considerations? The answer is based on two factors. First, what materials have terrorists used and what can we deduce from this usage to predict future events? And, second, how do we ensure international harmonization of security-sensitive materials, so that the free flow of goods is not impeded?

Some in our coalition are identified with a small subset of hazardous material, high explosives, highway-route controlled shipments of radioactive materials, and materials that are toxic by inhalation.

While we are not advocating that these materials be dismissed as unsuitable for security-sensitive designation, our review of terrorist events underscores the inadequacy of so limited a list. The vast majority of materials used in terrorist events involves products that are not the regulated commercial material just named, but are other commonly available materials that are easily converted into weapons of mass destruction.

At the same time, the review of terrorist events reveals the proposals to include all hazardous materials, or even just placarded quantities of hazardous materials in assessments of security risks, is unnecessary. While all materials meeting DOT's definition of hazardous materials pose some level of risk, only a subset of these materials have the potential of being used to bring about serious terrorist attacks.

There is a reputable middle ground that addresses both ends of this policy conundrum. The U.N. Committee of Experts on the Transport of Dangerous Goods has identified a list of high-consequence dangerous goods meant to trigger security requirements applicable to the worldwide transport of dangerous goods.

The list is now recognized and used by a number of international organizations and countries. Although the issue currently before this subcommittee is limited to the threat presented by commercial hazardous materials truck drivers, Congress should direct TSA to reference the U.N. indicative security list in the same way DOT references the harmonized hazardous materials list when security issues and requirements are discussed and formulated.

Absent such direction, international harmonization, which has effectively sustained hazardous material safety for decades, is thwarted. A larger list will bring unnecessary regulation. A smaller list will prove to be the weak link in transportation security.

The second issue that must be addressed is, what requirements are necessary to achieve an acceptable level of safety and security for drivers seeking hazardous materials endorsements to their commercial drivers licenses? The answer is based on current experience with the TSA and other federally sanctioned threat assessment programs.

The current requirements used by TSA to assess security threats posed by commercial drivers are unnecessarily burdensome. That burden results from the fingerprint requirement. There are ways to reduce this burden that do not include simply imposing this aspect of the threat assessment on a fraction of security-sensitive hazardous material.

We believe that all commercial drivers seeking an HME, who, in the course of their work, will transport these materials, should be subject to a background check but one without a blanket fingerprint requirement. The precedent for this recommendation has been set in background check programs of individuals seeking to purchase firearms and possibly for those who possess commercial explosives.

Under these non-fingerprint-based programs, computerized criminal justice information is accessed through the National Instant Crime Background Check System, or NICS, which has successfully processed millions of record checks.

Our recommendation is to require a NICS check for all commercial drivers seeking an HME who will transport by truck materials on the U.N. indicative list. In those cases where instant confirmation is not obtained, we recommend that the driver then be required to submit fingerprints.

Subjecting all drivers who will transport materials on the U.N. indicative list to a name-based background check as a condition of obtaining an HME is reasonable and will relieve the vast majority of drivers from the onerous blanket fingerprint filing.

Remember that even before the events of September 11, 2001, those with terrorist intent exploited misused common products for their devices. Until acceptable means are found to reduce these risks, fingerprinting drivers of already highly regulated commodities will not produce security benefits that outweigh the burden.

We are committed to finding appropriate cost-effective solutions to overly burdensome regulation that lull our society into a belief that we are safer than we really are.

Thank you for the opportunity.

[The statement of Mr. Brown follows:]

PREPARED STATEMENT OF GARY BROWN

Mr. Chairman and Members of the Subcommittee:

I am Gary Brown, General Counsel, of Pyro Spectaculars. Pyro Spectaculars is one of the nation's largest fireworks display companies. Based in California, Pyro Spectaculars conducts operations throughout the country and has transportation needs that span the globe. My testimony is supported by several industry associations:

American Pyrotechnics Association  
The Chlorine Institute

Council on Safe Transportation of Hazardous Articles  
 The Fertilizer Institute  
 Institute of Makers of Explosives  
 International Vessel Operators Hazardous Materials Association  
 Nuclear Energy Institute

Collectively, we are shippers and carriers of hazardous materials. The products and services of our member companies underpin the standard of living we enjoy. We employ over a million people. We represent that the largest exporting sector in the economy. We are essential to the economy and the preservation of life. None of these benefits exists without a transportation sector willing and able to move these materials safely and securely.

We have a long history of proactive attention to the safe and secure transportation of our products. We are concerned about security risks in transportation. We have taken independent steps to address security concerns. We also believe that improvements are warranted in the Transportation Security Administration's (TSA) threat assessment program for commercial drivers of hazardous materials.

Our search for solutions to the concerns which prompt today's hearing leads us to recommendations that balance safety and security with the need to provide for the free flow of goods and to bolster our international competitiveness. This requires that Congress separate two issues that in some forums have been confused—what materials should be subject to security consideration and requirements, and what requirements are necessary to achieve an acceptable level of safety and security.

*Security-Sensitive Hazardous Materials (SSHM)*

By way of introduction, some have proposed that the TSA threat assessment program is flawed and the only way to fix it is to limit its application to drivers of a very few select "weaponizable" materials. It should come as no surprise that many believe such a list consists of Division 1.1, 1.2 and 1.3 explosives, highway-route controlled shipments of radioactive materials, and materials "toxic by inhalation" (TIH). Let us be clear that we are not advocating that these materials be removed from such a list. However, a cursory review of terrorist events in the United States and a number of recent highly publicized attacks abroad underscore the inadequacy of so limited a list. In fact, the vast majority of materials used in terrorist events involve products that are not the regulated commercial materials on this list, but are other commonly available materials that are easily converted into weapons of mass destruction.

At the same time, we agree that proposals to include all hazardous materials or even just placarded quantities of these hazardous materials, which is the applicability of the current TSA threat assessment program, in assessments of security risks is unnecessary. The Department of Transportation's (DOT) hazardous materials list was derived to address more than just security concerns. It includes a wide range of materials including consumer commodities in small packages such as cosmetics, medicines and toiletry items. While all materials meeting DOT's definition of hazardous materials pose some level of risk, only a subset of these materials have the potential of being used to bring about a serious terrorist attack.

There is a reputable middle ground that addresses both ends of this policy conundrum. The United Nations Committee of Experts on the Transport of Dangerous Goods, the world's most authoritative body of experts on the safety and security of hazardous materials, has identified a list of "high consequence dangerous goods" in developing its security requirements applicable to the worldwide transport of dangerous goods (hazardous materials). The UN Committee considers these high consequence materials in specified quantities as having the potential to "produce serious consequences such as mass casualties or mass destruction." The United States played a leading role in the UN Committee's technical development of this list. (Attachment A)

The list is now recognized worldwide. It has now been adopted by international organizations such as the International Maritime Organization in its International Maritime Dangerous Goods Code (IMDG) and the International Civil Aviation Organization (ICAO) in its Technical Instructions on the Safe Transport of Dangerous Goods by Air. Both the IMDG Code and the ICAO Technical instructions are mandatory for countries (including the US) that are signatory to the Safety of Life at Sea Convention and the Chicago Convention. In addition the list is used as a basis for regulation throughout Europe and northern Africa through the international regulations for road and rail transportation known as the ADR and RID.

The list is not static and is amended from time to time by the UN Committee as the potential uses of materials in significant terrorist attacks are identified or as new chemicals are manufactured and placed in transportation. At the same time



the list provides a practical yet still conservative means of encompassing materials that could pose a serious security threat.

Virtually all hazardous materials shipments entering or leaving the US by sea or air are shipped today in compliance with these international regulations. By adopting a list of SSHM identical to the indicative list adopted by the United Nations, Congress would be in step with worldwide experts on what materials constitute a security risk in transportation, security of hazardous materials would be more easily enforced, and regulatory confusion diminished.

Although the issue currently before this Subcommittee is limited to the threat presented by commercial hazardous materials truck drivers, Congress should direct TSA to establish the UN indicative security list as the reference point to be used in the same fashion as DOT's harmonized hazardous materials list when security issues and requirements are discussed and formulated. Absent such direction, international harmonization which has effectively sustained hazardous materials safety for decades is thwarted. A larger list will bring unnecessary regulation; a smaller list will prove to be the easily exploitable weak link in transportation security. As with the well-regarded and universally accepted UN harmonized list for hazardous materials safety, if some believe materials on the indicative security list should be removed, they should carry their concern and evidence to the United Nations.

We believe the safe and secure movement of these security-sensitive materials necessitates maintenance of the common carrier obligation and appropriate risk-based security requirements for all carriers. Conversely, a narrow application of security requirements to only a few of the essential materials on the UN indicative list would cripple means of distribution. Loss of common carriers, or even entire modes as happened when the Bureau of Alcohol, Tobacco, Firearms and Explosives attempted to regulate explosives transportation in early 2003, would leave no other option to deliver these indispensable materials than private transportation, which will likely produce costly inefficiencies and increase safety risks. Impairing the safe and efficient transportation of the materials we ship is not the way to guarantee security. Indeed, we know that terrorists do use commonly available materials to harm us, our economy and our way of life.

#### *Refining the TSA Threat Assessment Requirements*

We agree that the current requirements used by TSA to assess security threats posed by commercial drivers are unnecessarily burdensome. That burden results from the fingerprint requirement. There are ways to reduce this burden that do not include simply imposing this aspect of the threat assessment, or any threat assessment at all, on a fraction of SSHMs.

Even though "fingerprint" is not used in the text of the USA Patriot Act provision authorizing the TSA threat assessment program, TSA has been advised by the National Crime Prevention and Privacy Compact Council (Compact Council) that fingerprints must be submitted to gain access to criminal history databases for non-criminal justice purposes. The Compact Council was established pursuant to the 1998 National Crime Prevention and Privacy Compact (Compact) (42 U.S.C. 14616) to promulgate rules and procedures governing the use of the Federal-State criminal history records system for noncriminal justice purposes. One of the rules of the Compact is that identifications based solely upon a comparison of subjects' names or other non-unique identification characteristics do not constitute positive identification. However, there is no reason that the Compact cannot be amended to allow screening without fingerprints. In fact, workable, effective alternatives are available.

In the initial implementation of TSA's commercial hazmat driver threat assessment authority, the Compact Council waived the fingerprint requirement for purposes of gaining access to criminal history databases. According to TSA in testimony provided in May of this year, a name-based check was performed for all drivers with hazardous materials endorsements (HME) on their commercial driver's license. Of the 2.7 million record checks performed only 100 individuals were referred to law enforcement agencies. Between January 2005 when the fingerprint requirement took effect and the May testimony, TSA performed fingerprint-based checks on about 30,000 new HME applicants. Of these, ten were deemed disqualified to hold an HME. We trust that none of the disqualified driver applicants and/or those referred to law enforcement as a result of either the name-based or fingerprint-based threat screen were ultimately determined to be terrorists. Had such a discovery been made, we believe TSA would have publicized the event. These data suggest that the name-based check is a sufficient deterrent and that the fingerprint requirement, the most costly element of TSA's background clearance protocol, is an unnecessary burden.

We believe that all commercial drivers seeking an HME who, in the course of their work, will transport SSHM should be subject to a background check. As the

Subcommittee is undoubtedly aware, individual criminal records are accessed and searches performed to authorize other federally regulated activity without fingerprints. Notable examples are checks of individuals seeking to purchase firearms and those who possess commercial explosives.

Whether a check is performed for purposes of firearms, explosives, or HME possession, the records accessed are maintained in the National Crime Information Center (NCIC), a computerized index of criminal justice information under the control of the Federal Bureau of Investigation. Data in NCIC files is exchanged with, and for the official use of, authorized officials of the Federal Government, the States, US territories and possessions, cities, penal and other institutions, and certain foreign governments. The NCIC is operational 24 hours a day, 365 days a year. Criminal history data is disseminated to justice agencies for use in connection with licensing for local/state employment or other uses, but only where such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States.

Non-fingerprint based access to the NCIC for firearms purchases, and the model for the commercial explosives possession screen, is through the National Instant Criminal Background Check System (NICS) authorized by the Brady Handgun Violence prevention Act (P.L. 103-159). NICS also uses the Interstate Identification Index and the NICS Index. Since inception in 1998, NICS has successfully processed millions of records checks. The records checks are instantaneous, usually within seconds of inquiry. The NICS is programmed to check records that would reveal an individual's disqualification based on statutory standards. The disqualifications applicable to firearms purchases and explosives possession are nearly identical to the disqualifications currently established for the HME threat assessment. (Attachment B) The similarity in disqualifications would minimize start-up costs of adding HME applicant checks to the NICS workload.

Some are quick to criticize the adequacy of NICS given gun violence in the United States. However, the most widely cited surveys of the origins of guns for criminals and juveniles show that a majority of felons acquired their guns from non-retail, informal sources and that the percentage of retail purchases is falling. Much preferred and utilized methods of acquisition include family, friends, the black market and direct theft.

Others argue that a program not based on fingerprints would be taking security back a step. However, the ability of a fingerprint-based check to catch a criminal or terrorist is dependent on that individual's fingerprints already being in the system from some prior crime. Fingerprints cannot predict future acts of violence or terror. One of the traits we have learned about terrorists is that they strive for secrecy, to avoid detection, not to call attention to themselves by committing some prior crime when their motivation and goal is directed toward a future act of terror.

Our recommendation to the Subcommittee is that the current TSA threat assessment program be modified to require a NICS check of all commercial drivers seeking an HME, who will transport by truck, materials on the UN indicative list. We recommend that state commercial motor vehicle licensing officials be authorized to submit inquiries to the NICS at the time the driver is applying for his license. In those cases where instant confirmation is not obtained, we recommend that the driver be required to submit his/her fingerprints at that time or withdraw his/her HME indicative list application. Based on the results thus far achieved by the TSA threat assessment program, we would expect that the number of drivers asked to submit fingerprints would be less than a tenth of a percent of applicants.

The commerce of hazardous materials is too vital to our economy to allow fear and speculation to cripple the distribution of these materials. While no threat assessment screen is foolproof, subjecting all drivers who will transport materials on the UN indicative list to a name-based backed check as a condition of obtain a HME is reasonable, and will relieve the vast majority of drivers from the onerous blanket fingerprint filing. Remember that even before the events of September 11, 2001, those with terrorist intent exploited and misused common products for their devices. Until acceptable means are found to reduce these risks, fingerprinting drivers of already highly regulated commodities will not produce security benefits that outweigh the burden.

#### *Conclusion*

Let me emphasize our commitment to work with this Subcommittee and others in Congress to find appropriate, cost-effective solutions to overly-burdensome regulations that lull our society into a belief that we are safer than we are. We take seriously our responsibility to be a part of that solution.

I want to thank this Subcommittee for the opportunity to provide comment on the issues raised by today's hearing. The subcommittee should be commended for its at-

tention to the sensitive and important issues surrounding the process to ensure that commercial motor carrier drivers meet standards of safety and security.

This concludes my testimony. I would be pleased to answer any questions.

#### ATTACHMENT A

##### United Nations Committee of Experts on the Transport of Dangerous Goods

##### High Consequence Dangerous Goods

High consequence dangerous goods are those which have the potential for mis-use in a terrorist incident and which may, as a result, produce serious consequences such as mass casualties or mass destruction. The following is an indicative list of high consequence dangerous goods:

Class 1, Division 1.1 explosives

Class 1, Division 1.2 explosives

Class 1, Division 1.3 compatibility group C explosives

Class 1, Division 1.5 explosives

Division 2.1 flammable gases in bulk

Division 2.3 toxic gases (excluding aerosols)

Class 3 flammable liquids in bulk of packing groups I and II

Class 3 and Division 4.1 desensitized explosives

Division 4.2 goods of packing group I in bulk

Division 4.3 goods of packing group I in bulk

Division 5.1 oxidizing liquids in bulk of packing group I

Division 5.1 perchlorates, ammonium nitrate and ammonium nitrate fertilizers, in bulk

Division 6.1 toxic substances of packing group I

Division 6.2 infectious substances of Category A

Class 7 radioactive material in quantities greater than 3000 A1 (special form) or 3000 A2, as applicable, in Type B or Type C packages

Class 8 corrosive substances of packing group I in bulk

NOTE 1: For the purposes of this Table, "in bulk" means transported in quantities greater than 3000 kg or 3000 l in portable tanks or bulk containers.

NOTE 2: For purposes of non-proliferation of nuclear material, the Convention on Physical Protection of Nuclear Material applies to international transport supported by IAEA INFCIRC/225(Rev.4).

#### ATTACHMENT B

##### NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM PROGRAM DISQUALIFICATIONS

PROGRAM Agency Citation	Gun Purchase DOJ-ATF 18 USC 922(g) & (n)	Explosives Possessor DOJ-ATF 18 USC 842(i)	HM-CDL Endorsement DHS-TSA 49 CFR 1572.103-109
DISQUALIFICATION			
Felony conviction	X	X	X <sup>1</sup>
Under indictment for a felony	X	X	X
Fugitive	X	X	X
User of or addicted to any controlled substance	X	X	X <sup>2</sup>

<sup>1</sup> All felony convictions are permanent disqualifications in all programs except under the HM-CDL program only convictions for espionage, sedition, treason, terrorism, a crime involving a transportation security incident, criminal conviction under HMTA (or comparable state law), unlawful possession of explosives, murder, conspiracy or attempt to commit these listed crimes.

<sup>2</sup> DOT, not DHS, administers this disqualification for drivers irrespective of whether the driver transports placarded HM.

NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM PROGRAM  
DISQUALIFICATIONS—Continued

PROGRAM Agency Citation	Gun Purchase DOJ-ATF 18 USC 922(g) & (n)	Explosives Possessor DOJ-ATF 18 USC 842(i)	HM-CDL Endorsement DHS-TSA 49 CFR 1572.103—.109
Adjudicated as a mental defective or committed to a mental institution	X	X	X
An alien	X	X	X
Renounced citizenship	X	X	X
Dishonorable discharge	X	X	
Under a court-ordered restraining order	X		
Domestic violence conviction	X		X <sup>3</sup>
Security threat			X <sup>4</sup>

Mr. LUNGREN. Thank you very much, Mr. Brown, for your testimony.

And now the chair recognizes Ms. Linda Lewis-Pickett, president and CEO of the American Association of Motor Vehicle Administrators, to testify.

**STATEMENT OF LINDA LEWIS-PICKETT**

Ms. LEWIS-PICKETT. Good afternoon, Mr. Chairman and distinguished members of the subcommittee. I thank you for the opportunity to testify on behalf of the departments of motor vehicles nationwide. I will touch on three issues today.

The first is our members' concerns with the proposed two-tiers credentialing system, which incorporates a pocket card. As we understand it, a two-tiered credentialing system attempts to differentiate between commercial drivers hauling very hazardous materials and those transporting materials considered to be less hazardous.

Initial response from our members indicates there is concern that, no matter how hazardous materials are classified, it is difficult to reliably tie the actual driver of a hazardous material to the shipments he or she is carrying.

Further concerns indicate that the administrative burden and cost of asking the states to handle gradients of HAZMAT material is substantial. Most DMVs do not know what types of hazardous loads a driver would be required to transport and, therefore, would not be in a position to adequately inform drivers which clearance process they would need to undergo.

Developing additional classifications to the system at this time will most likely result in further customer service complaints and will increase the margin for error.

<sup>3</sup>The DHS only specifies rape or aggravated sexual abuse.

<sup>4</sup>Wanted by Interpol, on terrorist watchlists, or if information reveals extensive foreign or domestic criminal convictions, foreign imprisonment exceeding 365 days, or a conviction for a "serious crime" not otherwise listed.

The development of a pocket card also concerns the DMV. Those concerns include possible document fraud, the lack of a secure issuance process, and a lack of resources to administer such a program. If this two-tiered program were to proceed with the use of a pocket card, the committee must consider the concerns of the state agencies and sanction either TSA, or DHS, or DOT, for that matter, to take full responsibility for the implementation of this program.

To summarize our position of the two-tiered system, in the wake of the upcoming Real I.D. Act, all DMVs are concerned that the administrative costs of implementing a new program focusing on further classification of drivers would cause an undue burden on an already overwhelmed staff and resources.

States fully understand and empathize with the hardships faced by commercial drivers with HAZMAT endorsements. However, please do not solve one problem by creating multiple other problems and increasing the burden on the DMV.

The second issue deals with the HAZMAT program itself. While TSA has made improvements to the program since the last congressional hearing, problems still remain at the state level. For example, in Georgia, commercial drivers are receiving clearance letters before TSA notifies the state. This requires the state to manually verify the clearance with TSA and creates a delay in customer service.

Montana needs more TSA agents to accommodate the drivers who are traveling 200 miles or more to apply for a threat assessment. Virginia is spending countless hours contacting other states to verify if a driver transferring to their state has truly applied for and received a threat assessment from the previous state of licensure. So it is important that TSA follow up with the states to remedy these administrative problems.

And the third and last issue is the use of the Commercial Drivers License Information System, or CDLIS, to communicate the driver's threat assessment from TSA to the DMV. Since 1992, the federal government and the states have partnered to use CDLIS to manage the commercial driver program.

TSA's decision not to use this network has created an added burden on the states to share this information. DMVs have reported that they are making due with the process in place, but most indicate the process is burdensome. Many of state's complaints are directly related to delays in receiving threat assessment information, which is not integrated into their driver licensing process today.

States have to manually contact another state to assess a driver's status relative to HAZMAT endorsements. In addition, states such as Missouri must contact TSA directly for written assessment confirmation to ensure they are signing the correct expiration date based on the transfer requirements defined by the rules.

Congress recently approved the CDLIS modernization project in the highway bill. And the DMV desired solution is for DHS to integrate and to fund a process to transfer driver threat assessment from TSA to the DMV as part of the CDLIS modernization project.

Mr. Chairman, thank you for the opportunity to share our members' concerns. I welcome your questions.

[The statement of Ms. Lewis-Pickett follows:]

## PREPARED STATEMENT OF LINDA LEWIS-PICKETT

Good afternoon, Chairman, and distinguished Members of the House Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity. My name is Linda Lewis-Pickett, and I serve as the President and CEO of the American Association of Motor Vehicle Administrators. Thank you for the opportunity to testify on behalf of AAMVA to discuss reforming the hazardous materials endorsement (HME) background record checks (BRC) program administered by the Transportation Security Administration (TSA).

**AAMVA Background**

Founded in 1933, 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

Today, I will:

- Discuss the impacts of a “two-tier” credentialing system on state DMVs,
- Cite our outstanding concerns and unresolved problems with TSA practices in administering the CDL-HAZMAT program, and
- Recommend this program be integrated into the Commercial Driver's License Information System (CDLIS)—a clearinghouse and depository of commercial motor vehicle operator licensing, identification and disqualification history

**Impact of Two-Tier System**

A “two-tier” credentialing system attempts to differentiate between commercial drivers hauling “very” hazardous materials and those transporting “less” hazardous materials.

Some organizations, working on behalf of hardworking commercial drivers across the nation, have argued for such a change. AAMVA and its member states empathize with the hardships faced by drivers seeking HAZMAT endorsements. However, solving one problem for commercial drivers, by creating a multitude of others for state motor vehicle agencies, creates undue burden without proper consideration of program ramifications.

A “two-tier” system is difficult to implement at the state level because it requires costly and unnecessary DMV system changes to establish additional HAZMAT designations while these agencies are stretching to implement other federal requirements such as the Motor Carrier Safety Improvement Act (MCSIA), the Help America Vote Act (HAVA), REAL-ID and state government mandates. Resources and staff throughout the state agencies have already been stretched thin, and to add a new HAZMAT designation would pull these resources away from the important goals they are already striving to accomplish.

Implementing a two-tier system would also require broad-based training for DMV employees, as well as the revising and republishing of TSA-approved forms and notices. This training requires employees and systems to undergo undue change, and to adjust their business practices accordingly. The effect of revised training could lead to increased customer service wait times. The need to train personnel would further extend beyond the DMV. First responders, emergency personnel, and safety officials alike would also have to be trained in recognition of proper placards and identification documents for HAZMAT shipments. The revision and republication of TSA forms would require transportation officials to be able to recognize, utilize, and adapt to these new processes.

Suggestions have further included an identifiable “pocket card” that would designate which shipments a driver is certified to transport. AAMVA has concerns that creation of additional identification credentials could provide further loopholes for the unscrupulous to exploit. Document security is one of the primary concerns facing our administrators today as they work to shore up homeland security and deter identity fraud and identity theft. In the past few years, state Departments of Motor Vehicles have made great strides in preventing the proliferation of these crimes. AAMVA also has concerns that if such a credential were created, how would the document effectively tie the shipper of hazardous material to the actual shipment the driver is carrying?

It is premature to consider two separate endorsement designations while failing to resolve outstanding issues. The states are currently working within the confines

of a system that is improving, but still developing. Problems in the HAZMAT endorsement program are being identified and resolved. It would be an inappropriate time to complicate matters by adding designations to an already complicated program.

***Outstanding Concerns and Unresolved Problems***

TSA has made improvements to the HAZMAT endorsement background record check program since the last Congressional hearing in May 2005. But the agency must move with haste to remedy all programmatic problems. For example:

- In Georgia, commercial drivers are receiving clearance letters **before** TSA notifies the state. Customers who have received their clearance letters come into a DMV expecting to receive their endorsement while agency staff have received no such approval. In order for the agency to resolve this discrepancy, the state must manually verify the clearance with TSA, creating a delay in customer service.
- The State of Montana needs more TSA agents to accommodate the drivers who are traveling distances of up to 200 miles to apply for a threat assessment.
- States like Virginia are spending countless hours contacting other states to verify if a driver transferring from another state and applying for a new state commercial license has truly applied for and received a HAZMAT endorsement in another state.

***Improving the Program***

Since 1992, the federal government and the states have partnered to use the Commercial Driver License Information System or CDLIS to manage the commercial driver program. Instead of TSA using this network, states were compelled to cobble together an inefficient, costly and vulnerable procedure for processing, sharing and communicating driver threat assessments.

The simple solution is to integrate the transfer of driver threat assessments from TSA to DMV into the CDLIS modernization project. AAMVA's proposal allows TSA to use the Gateway infrastructure it has already developed to seamlessly interface with the State's existing driver license programs. TSA may use the AAMVA Gateway to perform a CDLIS search or verification inquiry transaction on either the front end of the threat assessment process (submission of the application data) or the back end of the threat assessment process (prior to submission of the threat determination). The purpose of the inquiry is to verify that the applicant has been added to both the State's database and the CDLIS central site's database and that the state and driver's license number are correct. Once TSA has validated that this information is correct and that it is entered into both the state and CDLIS systems, TSA may use the Gateway to electronically deliver the threat determination to the States in a manner that is automated and integrated with their existing CDLIS system. The States prefer this option because it searches the CDLIS central site for the current state of record in the event that a license transfer has occurred between the time of application and the time of the report threat determination. If a transfer from one state to another has occurred, then CDLIS notifies both the old and new state of record.

Integration of threat determination into this system could not occur at a more opportune time. Congress has authorized funding for the modernization of CDLIS. As upgrades are being made to the current system, it makes sense to include the capability of transmission of threat determination information to the improvements that will be made.

A complete outline of the proposal of using CDLIS as a solution is detailed in the accompanying attachment.

***Recommendations***

To recap, we strongly suggest that the implementation and administration of HAZMAT class endorsements not be separated into two tiers and forced upon the states.

The **only way** a two-tier system is workable is if TSA assumes **all** responsibility for the funding, administration and oversight of this program, as well as the issuance and security of any credentials associated with it.

Second, we urge Congress to require TSA to work with the states to integrate the HAZMAT threat communications function into the CDLIS modernization project, authorized and funded in the Highway Bill. We ask that Congress consider the attached CDLIS modernization project proposal and require TSA to work with the states to integrate the HAZMAT threat communications function.

On behalf of AAMVA and its members, thank you for the opportunity to testify. I've concluded my testimony and welcome any questions from the subcommittee.

Mr. LUNGREN. Thank you, Ms. Lewis-Pickett, for your testimony.

The chair now recognizes Mr. Scott Madar, the assistant director of the Safety and Health Department at the International Brotherhood of Teamsters, to testify.

**STATEMENT OF SCOTT MADAR**

Mr. MADAR. 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 the hundreds of thousands of Teamster drivers who make their living driving on our nation's roads, oftentimes carrying hazardous materials.

We recognize the need for security threat assessments and are therefore making every effort to ensure that the system balances the need for a safe and secure industry with the rights of drivers to hold good jobs. The Teamsters have testified previously about these issues and have not received any response from TSA.

Many of our concerns still remain. And I briefly highlight some of our recommendations here today.

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 making professional truck drivers to have such an endorsement.

The vast majority of Teamster 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 of a total loss of a CDL for a driver employed in the LTL industry. For this reason, it is imperative that the process be made as fair as possible.

The Teamsters Union understands that one potential revision to this process involves establishing a category of security-sensitive materials. Only those individuals hauling these security-sensitive materials would be required to undergo a background records check.

This proposal would be of no benefit to Teamster drivers, since Teamster companies carry nearly all classes of hazardous materials. Therefore, it would be likely that all Teamster drivers would need to undergo the background records check, even with this revision.

Teamster drivers are frustrated at the limited number of locations where they can be fingerprinted. The TSA Web site provides a list of TSA agent fingerprint collection locations organized by state.

However, the TSA has not made it clear that a resident of a TSA agent state may utilize any TSA agent collection location. It has been our experience that most drivers do not know that they may use a collection location outside of their home state.

There is significant variability among the 17 non-TSA agent states. Information regarding the HAZMAT background check process is often difficult to find. To be fair, there are some states that had developed detailed informational sites on the Internet that are easy to find and easy to navigate. However, there are a number of states that do not have any information available on the Internet.



The fees imposed by the non-TSA agent states vary widely and often exceed the fees imposed by the TSA. Some non-TSA agent states have not embraced technology and still transmit fingerprints on paper, which slows the record check process.

Lastly, there is at least one state, New York, which has implemented regulations that are more stringent than the federal regulation. New York has a look-back period of 10 years. There is no waiver process and a very limited appeals process available to drivers who reside there.

Because of the variability among states, the Teamsters Union would support preemption to create a uniform standard applied to all drivers nationwide.

With regard to the excessive costs associated with this program, the Teamsters Union has stated many times that it does not believe that the drivers should have to bare the costs 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.

The Teamsters Union remains concerned about the inappropriate sharing of personal information with employers. We are committed to protecting the privacy of our members and will work to limit the notification process to the applicant's background check status only. Employers should not be provided a complete and detailed background check of each of their employees, regardless of the security determination.

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 attack, and the TSA has offered no evidence to the contrary.

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 essential to both employee rights and national security.

The Teamsters Union remains concern as to how foreign drivers will be treated under this rule. The highway bill directs that foreign drivers shall be required to undergo background records check similar to those of U.S. drivers. This union continues to believe that the TSA should ensure that foreign drivers are subject to equally thorough background investigations, that foreign drivers are disqualified on the same grounds as U.S. drivers, and that there must be a mechanism for U.S. inspectors to determine the status of foreign drivers.

The Teamsters Union contends that this is absolute minimum that should be acceptable regarding foreign drivers and that the

highway bill requirements do not meet this level of security. The TSA must strive to achieve one level of security for all drivers, including foreign drivers.

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 on 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.

[The statement of Mr. Madar follows:]

PREPARED STATEMENT OF SCOTT MADAR

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 1.3 million members regarding such an important issue: Reforming HAZMAT Trucking Security. 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.

The Teamsters have testified previously, before the House Committee on Transportation and Infrastructure's Subcommittee on Highways, Transit and Pipelines, about these issues and have not received any response from TSA. Many of our concerns still remain and are included here for review. 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 many professional truck drivers to have such an endorsement. The vast majority of Teamster 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.

**Rumored Revisions:**

The Teamsters Union has heard speculation that potential revisions to the hazmat endorsement background check process might include establishing a category of security-sensitive materials. Anyone hauling these security-sensitive materials would be required to undergo a background records check. Those individuals hauling hazmat that are not security-sensitive materials would not need a background records check.

This proposal would be of no benefit to Teamster drivers. The carriers for whom Teamster drivers work carry nearly all classes of hazardous materials. Therefore, it would be likely that all Teamster drivers would need to undergo the background records check, even with this revision.

**Accessibility:**

One of the primary complaints that we have received from our membership revolves around the locations where drivers can get fingerprinted. Drivers are very frustrated at the limited number of locations where they can be fingerprinted.

The Transportation Security Administration has contracted for the collection of fingerprints in TSA-Agent states. Seventeen non-TSA-Agent states have opted to collect and process fingerprints on their own. The TSA website provides a list of TSA-Agent fingerprint collection locations, organized by state. Although a resident of one TSA-Agent state may utilize the collection services of any TSA-Agent collection location, it is not clearly stated in any TSA information. It has been our experience that most drivers do not know that they may use a collection location outside of their home state.

When attempting to contact the TSA by telephone regarding hazmat background checks, it is very difficult to get a live person with whom you can speak. It has been our experience that the TSA staff is generally knowledgeable and helpful. However, it has also been our experience that the states and the field staff are not well informed.

**State Variability:**

In a number of the non-TSA-Agent states, information regarding the hazmat background check process is even more difficult to find. To be fair, there are a number of states that have developed detailed informational sites on the Internet that are easy to find and easy to navigate. However, there are a number of states that do not have any information available on the Internet.

The fees imposed by the non-TSA-Agent states vary widely and often exceed the fees imposed by the TSA. Some non-TSA-Agent states have not embraced technology and still transmit fingerprints on paper, which slows the records check process.

Lastly, there is at least one state, New York, which has implemented regulations that are more stringent than the federal regulations. This state has a look-back period of 10 years. There is no waiver process and a very limited appeals process available to drivers who reside in this state.

Because of the variability among states, the Teamsters Union would support pre-emption to create a uniform standard applied to all drivers nationwide.

**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. 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]. As stated previously, there are costs associated with States that chose to perform 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. Therefore, the Teamsters Union believes the costs as proposed underestimated 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 by taking advantage of existing systems and infrastructure, for example. 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 breach 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.)

**Privacy:**

The Teamsters Union remains concerned about the inappropriate sharing of personal information with employers. The recently enacted SAFETEA–LU included language directing the development and implementation of a process for notifying hazmat employers of the results of the applicant’s background record check. We remain committed to protecting the privacy of our members and will work to limit the notification process to the applicant’s background check status only. Employers should not be provided a complete and detailed background check of each of their employees, regardless of the security determination.

**Disqualifying Offenses:**

The list of disqualifying offenses must be improved. The November 2004 Interim Final Rule published by the TSA disqualifies 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 November 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 November 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. Once these individuals have paid their debt to society they should not be unfairly restricted from obtaining employment.

**Indictment:**

Despite the objections of the Teamsters Union, the Rule (November 2004 Interim Final Rule) includes provisions that 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 warrant, 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 November 2004 Interim Final Rule lacks 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.

Since it is still early in the process and we have had limited feedback from our members regarding this process, 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.

**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.”

**Notification Timeline:**

The Teamsters Union remains concerned that the time limits stipulated in the November 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 to Foreign Drivers:**

The Teamsters Union remains concerned as to how foreign drivers will be treated under this Rule. The language included in the SAFETY-LU directs that a commercial motor vehicle operator registered to operate in Mexico or Canada shall not operate a commercial motor vehicle hauling hazmat in the United States until the operator has undergone a background records check *similar* to the background records check required for US drivers. This must occur within 6 months of the effective date however, the Director of the TSA may extend this an additional 6 months. Therefore it is possible that foreign drivers can be hauling hazmat in the United States until August of 2006 before they will be subject to background records check requirements.

The Teamsters Union asserted previously (Docket No. TSA-2003-14610) that the TSA should 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. The Teamsters Union contends that this is the absolute minimum that should be acceptable regarding foreign drivers and that the SAFETEA-LU requirements do not meet this level of security. It would be utterly unconscion-

able 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.

**Duplication of Effort:**

The Teamsters Union continue to question why the TSA has not 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 had 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, system 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:**

The Teamsters Union continues to 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.

**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.

Mr. LUNGREN. Thank you, Mr. Madar, for your testimony.

And I thank all the witnesses on this panel for your testimony. It is very, very helpful.

I am going to start the questions. I will try and limit myself to 5 minutes. And we will go for probably a couple of rounds.

Mr. Madar, you mentioned that one of the areas, one of the bones of contention in all of this is the list of crimes for which one is rejected for this credential. Can you give me an idea of some of the crimes? Or is that in your written testimony that you think are not necessary to this act?

Mr. MADAR. Thank you, Chairman.

There are some crimes detailed in my written testimony. But to answer your question here, one crime in particular that is listed by TSA is the crime of fraud, which includes everything from bad checks to identity theft. And it is our recommendation that, if TSA is attempting to address identity theft concerns, then they should specify that crime and not use a broad category.

Mr. LUNGREN. What about crimes of domestic violence? Do you get into that?

Mr. MADAR. We did not specify whether that would be included in our list, but that would be one that we might consider, also, possibly robbery. There are a number of crimes—and I am not a lawyer, so I can not go into great detail—but there are a number of crimes—

Mr. LUNGREN. Could you submit for the record the position of the Teamsters on what crimes you believe ought to be eliminated from consideration right now?

Any others on the panel have a position on crimes that are now included as those as disqualifiers that ought not to be there anymore?

Ms. LEWIS-PICKETT. Mr. Chairman, I would just like to follow up on Mr. Madar's response to that, particularly the crime of financial fraud.

Within the DMV, that is probably one of the biggest challenges we have, with crimes within the DMV, is under-the-counter signature fraud of signed documents. So while we are thinking of possibly eliminating something like that, I think we should look at the far-reaching impact that that crime really could have.

Mr. LUNGREN. Any others have any comments on the crimes that are now included as disqualifiers?

Okay, Mr. Laizure, do you have any idea whether it is owner-operators or the large trucking companies that handle most of the security-sensitive materials?

Mr. LAIZURE. At this time, it is mostly the big boys. The small business people will go through contracts and stuff like that and do the—the security sensitive, as related to national security now, not in relation to a list that is going to have to be developed for things that are—you know, rather than DOT list that is for accident response and stuff like that, there is going to have to be another list made up that says, "This is something that can be weaponized or readily used."

And once that is decided, then, you know, there is going to be a lot of stuff that does not require that people can get into. And that is one of the problems I run into every day, is because of my small size, I have to go through some other people to get at the base contract.

Mr. LUNGREN. Mr. Russell, you have indicated that the way it works now is a burden for your folks, that it unnecessarily includes people that really do not need to be included.

And yet, Mr. Madar says that it really would not make any difference to his membership, who presumably works for many of your companies, because they would probably all need to have it, in order to maintain their jobs. How do you respond to that? You seem to have two different positions on this.

Mr. RUSSELL. It is two different positions because the industry is segmented. The LTL business, where there are many small packages in each trailer, may, in fact, have hazardous material in one box, or two cartons, or three crates.

In the truck-load industry, which is the largest single segment of the trucking industry—

Mr. LUNGREN. Right.

Mr. RUSSELL. —you just have one industrial company's goods in each trailer. And therefore, it is a more discreet decision that the



driver can make, because most large carriers—a very small percentage of our business is, in fact, hazardous in the weaponable sense.

Similarly, what we have found is that—I think I do not fully agree with Mr. Laizure, because there are specialized, dedicated fleets that handle the really dangerous stuff, the weaponizable stuff, armaments, military stuff. Most of the large carriers do not.

We do handle a lot of nail polish. And we do handle a lot of Coca-Cola syrup or a lot of things that fall into the category of now defined as hazardous but not weaponable, some of the products you talked about when you began the meeting. But I think that essentially most of the major movements are done by small, specialized fleets.

And I think, with regard to Mr. Madar's comment, he is right, because, for the LTL carriers, they carry whatever is going in that box, not whatever is going in the trailer.

Mr. LUNGREN. Ms. Sanchez, you are recognized for—

Mr. RUSSELL. I hope I am clear on that.

Mr. LUNGREN. Thank you.

Ms. SANCHEZ. Thank you, Mr. Chairman.

Again, thank you to the panelists.

Mr. Madar, I recognize that the current hazardous material endorsement program has negatively impacted truckers. What, in your opinion, what is the one change that we could make that, if we made immediately, that would alleviate some of this impact?

Mr. MADAR. Congresswoman Sanchez, it is very difficult to stipulate the one item that would make the biggest change for us. But if I had to pick one, I think it would be to revise the list of disqualifying offenses.

Ms. SANCHEZ. Do you have truckers who have been working, trucking for a long time, and, all of a sudden, they come up against this background check, and they have something in there—I do not know, a domestic violence incident or something like that—that all of a sudden just disqualifies them after having been a trucker for 10 years? Is that what is going on with your membership?

Mr. MADAR. Well, it is still early in the process. And we have only had limited feedback. We have had some reports from our members that that is exactly what is going on, that they have crimes in their past that they have paid for, and paid their dues for, and now would technically disqualify them.

Ms. SANCHEZ. So are you saying that your member, even though they may have committed a crime, served some time, gotten it off their record, and have been trucking for a while may lose their license because of the new background check requirement?

Mr. MADAR. Yes.

Ms. SANCHEZ. That is what you are seeing in your membership? How many of your members have gone through this type of background check? What percentage of them?

Mr. MADAR. I do not have that information.

Ms. SANCHEZ. Okay. Thank you.

Ms. Lewis-Pickett, the ability of states to process the required information for these background checks is different. Is that an administrative problem for the departments? What can we do at the federal level to help you assist in that?

Ms. LEWIS-PICKETT. Yes, that is a major problem that we are hearing from all states, primarily because the process is not integrated in the driver licenses programs that they administer.

The membership, really, is recommending a solution of integrating this process into the commercial driver license information system, which is the network that is used to transfer information, driver records, information about commercial drivers. This process really is outside of that business practice right now.

Ms. SANCHEZ. So you have this network where all the departments are talking to each other, when they are checking, cross-checking, somebody that has come from some other place and has a commercial license?

Ms. LEWIS-PICKETT. That is correct.

Ms. SANCHEZ. Why is it, then, that the state of Virginia is spending so much time on the phone, in fact, verifying what might already be on the system?

Ms. LEWIS-PICKETT. But the process is not integrated into the system. All of this is outside of the system. And what we are saying—

Ms. SANCHEZ. So all the background checks are outside of the system?

Ms. LEWIS-PICKETT. Absolutely.

Ms. SANCHEZ. Why is that?

Ms. LEWIS-PICKETT. TSA made the decision not to use the network.

Ms. SANCHEZ. Thank you.

Ms. LEWIS-PICKETT. You are welcome.

Ms. SANCHEZ. Mr. Laizure?

Mr. LAIZURE. Yes, ma'am.

Ms. SANCHEZ. You mentioned in your testimony that you have completed several background checks and have been fingerprinted six different times.

Mr. LAIZURE. Yes, ma'am.

Ms. SANCHEZ. Why so many times? How much did these processes cost you? I mean, what kind of bill are we looking at for you, to have to go through all these checks?

Mr. LAIZURE. All of the checks, except for TSA's, which when I renew my CDL I will have to redo, are usually \$5 to \$10. They take me less than 30 minutes to go do at the county jail or the sheriff's office.

Ms. SANCHEZ. So it is the same—you are going to get a set of fingerprints each time at the same county jail?

Mr. LAIZURE. Yes, ma'am.

Ms. SANCHEZ. And then sending it off with whatever it is that you are applying for?

Mr. LAIZURE. When you get your paperwork to go for your DOD clearance, they send you a packet and they send you two cards. You take them up to the county jail, because that is where they do the fingerprint. They fingerprint you. You put them all in a packet. And you send them off.

A year later, DOE wants it. Same form, two more cards, go get it down. TSA wants it and says, "You got to drive 170 miles, you know, and it is going to cost you \$100. And all the other times that

you have done it do not count.” And that is all so you can haul nail polish and that kind of thing.

Ms. SANCHEZ. Thank you so much.

Mr. LUNGREN. Mr. Linder is recognized for 5 minutes.

Mr. LINDER. Mr. Russell, what is the threat assessment that they make? Several of you have mentioned the threat assessment. Does that have to do with the material you carry?

Mr. RUSSELL. Yes, my understanding is the definition of threat assessment on materials that are weaponable, that create weapons of mass destruction, as opposed to other HAZMAT materials that have other negative consequences, but not that.

Mr. LINDER. So you said that about 2 percent of your load is HAZMAT. Does that include the fingernail polish and those things?

Mr. RUSSELL. Yes, we do no threat assessment. In other words, we do not do any weaponable material.

Mr. LINDER. To go back to your point, Mr. Laizure, do you have a reason why TSA does not trust your local sheriff department to fingerprint you and the DOD does?

Mr. LAIZURE. I have no idea. It is wasting tax money, time. It has been done. And this is something that maybe we will have to ask TSA about.

But how much of the process that you have gone through, to go for DOD or DOE or something like that, are they going to repeat? I mean, they are recreating the wheel again.

Mr. LINDER. We are getting used to that here.

[Laughter.]

Mr. LAIZURE. I have got 18 of them. I do not need any more.

Mr. LINDER. When you get fingerprinted for a DOD approval, I presume those fingerprints go on the national fingerprint list and they are there forever?

Mr. LAIZURE. I do not know where they go. DOD sends them to one place. DOE sends them to another. They get digitized, I am sure.

The only background I have on that is when I went for my conceal permit. The sheriff could go in and punch it up and go, “Yep, your prints are in there. Do not worry about it.” If the sheriff can find them, why can’t TSA?

Mr. LINDER. Not a bad question.

Mr. Russell, you said that some of these drivers are not going to go back and get approved for hazardous waste?

Mr. RUSSELL. It may be just a moment description of this. Our average driver is 46 years old. I believe the average Teamster is in the mid-50s, maybe a bit older. Wal-Mart’s average driver is in the early-50s. These people are not 25, 28 years old.

Most of them, in our case, have had HAZMAT certification for years, 3 years, 5 years, 10 years. Most of them do not want to be fingerprinted—

Mr. LINDER. Why?

Mr. RUSSELL. —because of alimony checks that bounced or they did not pay their last rent 5 years ago or 20 years ago. And we do criminal background checks, so it is not an issue of what crime they may have committed. It is an issue of they just do not want big brother watching them.

And the reality is, they can still make a living as an over-the-road truck driver. There is a driver shortage. And they just do not need to go through the process that will cost them, and this chance is \$100 if you get the prints and then \$400 or \$600 by not working those days. And that is the reality.

Mr. LINDER. Mr. Laizure, you said that you can carry weapons but you cannot carry a pistol for yourself.

Mr. LAIZURE. Yes, sir.

Mr. LINDER. Many states now have concealed carry. Does that specifically exempt you?

Mr. LAIZURE. Carry a handgun in Massachusetts and see how far you get.

Mr. LINDER. But many states allow them.

Mr. LAIZURE. I have got to go to all—I have got to go to all 48 states, Canada and Alaska, okay? The minute I hit one of those that does not, you know, honor my permit from the state of Washington, first of all—and that is if it is driving around in my pickup truck or whatever. The minute I get in a commercial vehicle, I am going to jail, even in my home state.

There is nothing I can do. I have no authority. And I have no tools to keep somebody from running me off the road. And we have just put placards on the side—I can teach you in 10 minutes how to look at a truck and tell within about five things of what is in the back.

Mr. LINDER. I will pass. Thank you.

[Laughter.]

Thank you very much.

Mr. LUNGREN. You have been left speechless?

Ms. Jackson-Lee is recognized for 5 minutes.

Ms. JACKSON-LEE. Thank you very much, Mr. Chairman and ranking member.

I thank the witnesses. And thank you for your indulgence. Airplanes sometimes are not as fast as trucks. And so I was not able to be here at the very beginning, but I appreciate very much the witnesses.

And I wanted to probe—I wanted to just call the roll. And anyone that wants to correct me and add another agency, they can. Department of Transportation, Homeland Security—Texas, Transportation Security Administration, DOD, and DOE that seem to be players in this particular complex set of circumstances.

Let me acknowledge that this is an important responsibility, but it seems that we have sort of a morass of overlapping confusion.

Let me ask Mr. Brown, who sees it from a different perspective, that, if the administration were to change current rules about hazardous material and create a new category for security-sensitive hazardous material, how, in your opinion, would that impact truckers? And it is my understanding that, regardless of any changes, that truckers will still have to get an endorsement for the new proposed category.

And if you could yield for a moment, because I want to include Mr. Madar in the inquiry. And, Mr. Madar, I just want—when I yield to you, I am going to ask Mr. Brown first—I want you to be thinking about, “Do we have enough truckers?” And this whole question of offenses, what offenses do you think can be eliminated

and have no bearing on whether or not the person is the appropriate person to carry hazardous material?

I also understand that it is hard to be fingerprinted because in many places you cannot find the offices to be fingerprinted. We certainly should provide some relief for that. If you could comment on that.

And, then, of course, there is a complex system of review, where it seems that TSA is monitoring itself and it might be, as I understand it, better to have an administrative law judge. If you could comment on that and why that would be the better approach, I would appreciate it.

I yield to you, Mr. Brown.

Mr. BROWN. Thank you very much.

The impact on the driver of these changes—we have already seen a very large impact, because presently all hazardous materials are caught up in this dragnet. As we look at the selection of materials that could be included on this security-sensitive hazardous materials list, we range from the very select high-order explosives and those kinds of things, which most of us will easily agree should be on the list, to the very broad list used currently by DOT.

I guess it is fitting that I am sitting in the middle of the table, because I am suggesting really a middle ground from those two extremes by looking at a list that a committee of experts representing the United Nations, including experts from the United States, have already agreed upon as a list appropriate to the security for the world.

And I think that our coalition of members and our coalition of associations submit that that is an appropriate starting point. There is no doubt—

Ms. JACKSON-LEE. So you would narrow the list by experts looking and refining it more, putting aside radioactive material and nuclear material? You would refine the list by having experts look at it more closely and getting more refined a list, separate from this long list, and also putting aside radioactive and nuclear material?

Mr. BROWN. Which are clearly included. The U.N. list is inclusive of those materials, but excludes the fingernail polish and other things, and tries to focus on truly security-sensitive materials that could be used for weapons of mass destruction.

Ms. JACKSON-LEE. Thank you.

Mr. Madar?

Mr. MADAR. Thank you, Congresswoman. You had a number of questions, and I will see if I remember all of them.

[Laughter.]

Ms. JACKSON-LEE. Thank you very much. Thank you.

Mr. MADAR. With regard to the list of crimes that the Teamsters would recommend be removed from the list, Chairman Lungren has asked that we submit for the record a complete list, so I will do so at a future date.

Ms. JACKSON-LEE. All right.

Mr. MADAR. With regard to whether there are enough drivers, are you asking specifically whether there are enough drivers on the road now?

Ms. JACKSON-LEE. If we were to fix the problems that you see, will we have enough truckers now? And you want to comment on

the issue dealing with the fingerprinting and the ALJ. So if we were able to fix what you are concerned about, would we have enough truckers to be able to assist in this really extensive effort of carrying hazardous materials?

Mr. MADAR. Well, currently there is some discussion in the transportation sector that there is a shortage of drivers to begin with. So this HAZMAT background check process, with the predicted elimination of a certain percentage of those drivers who are currently in the pool, would most likely have a negative impact on the availability of HAZMAT-endorsed drivers.

And I am not sure if eliminating or fixing all of these problems will be possible, but it will certainly go a long way towards alleviating that concern.

With regard to the administrative law judge, the Teamsters have the opinion or are of the opinion that the administrative law judge would serve as an impartial person or entity that drivers could petition and appeal to.

Currently, if TSA denies your security—or indicates that you are a security threat, you are required, if you choose to, to appeal to TSA. So you are appealing to the entity that has already indicated that you are a security threat. And the same goes for the request for a waiver. So it is our opinion that you need an impartial third party to review those.

And with regard to the fingerprint locations, we have received a number of complaints from our drivers that the TSA locations, there are not enough of them, they are too spread out throughout the states. Very often, as Mr. Russell and others on the panel have indicated, the drivers would need to take at least a day off to drive to that location, provide their fingerprints, do their background check, and then drive home.

And that involves not only paying the fee for the background check, but also the loss of work. So we have suggested that the locations be expanded.

The other problem that we have also seen is that TSA has not adequately advertised the fact that drivers are entitled—drivers who reside in a TSA agent state are entitled to use any TSA agent collection location. Most drivers do not understand that. They believe that they have to go to the locations that are listed in their state only.

Mr. LUNGREN. The gentlelady's time is expired.

Ms. JACKSON-LEE. Thank you. I thank you.

Mr. LUNGREN. We are going to do a second round and then go to our second panel.

Mr. Brown, you indicated that we ought to use the U.N. list of high-consequence dangerous goods rather than the more limited list proposed by others. Do you have any idea what percentage of hazardous materials that are hauled today would be considered high-consequence dangerous goods under the U.N. list?

Mr. BROWN. I am sorry, Mr. Chairman, I would not—I do not think that I could address that answer. We would be happy to look into that, present that to the committee. It is available.

Mr. LUNGREN. Thank you. Would you do that in writing?

Advocates of keeping a security-sensitive list short—Mr. Russell has indicated that there is specialized carriers for those security-

sensitive loads and that those folks have made a conscious decision to get into that market and deal with the potential increased liability.

Mr. Brown, is that the case in your industry, in the industries you represent?

Mr. BROWN. Mr. Chairman, our industry transports materials on a very, very broad scope. There certainly are those specialized carriers that deal in specialized commodities.

But our list is a much broader one and addresses not only those specialized carriers but also more usual—

Mr. LUNGREN. Okay, well, let me ask the question this way. If, in fact, we were to maintain here in the Congress and the executive branch that we ought to have background checks, whether with or without fingerprints, for the most sensitive types of cargo, is it your estimate that that would make more people go to specialized carriers? And would that be a good or bad thing, I mean?

Mr. BROWN. Our concern with a very narrow list of materials is—I suppose it is exemplified by what happened in 2003, when the Bureau of Alcohol, Tobacco and Firearms tried to regulate the transportation of explosives. And in that process, the railroads, for example, decided that they would not be able to immediately respond to the ATF needs and obtain security or background check on all of their personnel.

The result of that was essentially an embargo of explosives, including fireworks. Our concern is that, with too narrow a selection of materials, we will find carriers simply opting out of the transportation of these materials.

And we will be pushing into other areas where the safety actually becomes a very great concern. Because now, if we are unable to ship small quantities of materials via common carrier, you will see a tendency to use larger shipments of materials all at one time. This creates both a greater security and greater safety concern.

I think there was testimony within the last couple of weeks from Mr. Hamberger from the railroad association, the American Railroad Association, testifying that hazardous materials represented some 90 percent or greater of the risks presented to his industry and yet represented only a very miniscule part of the revenue.

It was his view. And we are concerned that it may be shared by others in the transportation industry that it would be better for them to simply opt out of transporting those goods at all. And with what happened in 2003 in the ATF issue, we are concerned that that could happen again, if that list is too narrow, Mr. Chairman.

Mr. LUNGREN. Thank you.

Mr. Russell, you stated in your written testimony that HAZMAT represents only 1.5 to 2 percent of total freight and that, until recently, you required all your drivers to have HAZMAT endorsements.

You go on later in your prepared testimony to propose that only those who handle security-sensitive HAZMAT be required to undergo the security threat assessment. You state that nationwide this is only four-tenths of a percent of the average daily HAZMAT shipments. By my rough calculation, that means 3,200 out of 5.2 million daily shipments.

If this was to occur, would you still ship these security-sensitive hazardous materials?

Mr. RUSSELL. I believe that companies like our company would probably not ship those materials—

Mr. LUNGREN. So you would leave those to specialists?

Mr. RUSSELL. Right. And there would be specialized carriers to move it. And the laws of capitalism will work. And if you need more specialized carriers, they would form and be able to handle it.

Mr. LUNGREN. Okay.

And my last question, Ms. Lewis-Pickett, are the only concerns your organization has with the two-tiered system the actual implementation of it, with regard to the states? And my question is this: Isn't it possible that a two-tiered system would be less work for the states, since there would not be the need to collect as many fingerprints and review everybody to the same extent?

Ms. LEWIS-PICKETT. The concern, I believe, is timing. It is the burden of cost, administrative resources. But it is also timing.

And the recommendation to integrate it into these CDLIS modernization process I think allows time to think through what the changes will be. I think the fear is to too quickly make changes that then continues to burden the process, trying to not only train people on what the new processes are, a whole new application processes.

I just think it needs to be thought through. The DMVs are not against something like this but do not want to see it happen in a haphazard format.

Mr. LUNGREN. Thank you.

Ms. Sanchez?

Ms. SANCHEZ. Thank you, Mr. Chairman.

I understand that the TSA has developed a HAZMAT truck security pilot program which is intended to provide information about the specific location of hazardous materials during transport and to provide coordinated support and response to terrorist threats.

Do any of the witnesses know why this program has taken such a long time to be developed by TSA and to implement it? Does the HAZMAT truck security pilot program present problems for truckers and trucking associations?

Yes?

Mr. RUSSELL. I believe I understand it. And I believe what it does is it makes an effort to try to communicate ahead with communities when sensitive material is coming through.

Ms. SANCHEZ. Right.

Mr. RUSSELL. I think, if that is what it is, if that interpretation is right, I think it will create a lot of information, which would probably be so much that local communities could not cope with it.

As it is right now, weaponable material movers require specific authorizations from states, in terms of going through those states. And I think that is probably sufficient.

I mean, there is a lot of technological developments in this entire area, which, you know, down the road may be opportunities that could be used but at this point there is nothing that really jumps out that would provide that.

Ms. SANCHEZ. Thank you.



Anybody else on that?

Mr. BROWN. If I may—

Ms. SANCHEZ. Yes?

Mr. BROWN. Again, I have to presume that we are talking about the law which may, in fact, require tracking of vehicles—

Ms. SANCHEZ. Right, as they go through certain areas.

Mr. BROWN. —during the movement. And the issue presented for our industry is that we frequently use rental vehicles that are not so equipped. To take a very minute example, I suppose, is the Fourth of July, in most of the states, would be over under this law, because rental vehicles are absolutely essential to that effort and they are not properly equipped to meet that requirement.

And so, while it may be a small issue, I think the citizens would like their Fourth of July shows to continue. It is a small—I guess what it is, is it reflects that we have a number of very small problems here that are generated by these things that are very difficult for us to manage because of the diverse number of laws that now apply to it, with ATF, DOT, TSA, DMV, the acronyms go on and on.

And so, to the extent that we can harmonize any of those things, whether it is the U.N. list being in harmony with the rest of the world, DMV being in harmony with TSA, and DOT, and ATF, we would greatly appreciate your leadership in that avenue.

Ms. SANCHEZ. So, you know, the root of the question, I think, is, are we putting forward solutions that may be searching out a problem? I mean, do we have to notify all communities as things move through? What does that do to your truckers, as far as their paperwork and their ability to communicate this, time frames, lines? Timing is so important in trucking.

Mr. RUSSELL. The issues are, of the 3.5 million tractors on the road today, about 400,000 have satellite tracking. Most of the larger companies have satellite tracking.

But the satellite tracking pings every 15 minutes or every half hour. It is not a continuous ping that would be prohibitively costly.

So that any effort to literally prevent a tractor from going Point A to Point B and then diverting to Point C, the technology does not exist where you could actually make that happen. Where, if somebody jumped into Mr. Laizure's cab and ran that truck and trailer into a big city, it would be impossible to track it under the current system.

And very few trucks to begin with, only, you know, roughly 12 percent, have satellite tracking to begin with.

Ms. SANCHEZ. Thank you.

Thank you, Mr. Chairman.

Mr. LUNGREN. I suspect it would be difficult to get into Mr. Laizure's cab, though.

[Laughter.]

I suspect he would not make it easy for him.

Mr. RUSSELL. And he looks like the strongest guy at this panel, too.

[Laughter.]

Mr. LUNGREN. And he has been checked out 18 times to Sunday and six sets of fingerprints. So he is either a repeat felon or he is just one clean guy.

Ms. Jackson-Lee is recognized for 5 minutes.

Ms. JACKSON-LEE. Thank you very much. If any of you want to comment on that, Chairman, you owe me some additional time.

[Laughter.]

This looks to me as if—Chairman, to the ranking member—that we need some kind of fix in order to be adequately addressing the question of hazardous materials, which we owe a responsibility to the American people. And then, of course, to have the personnel, trained, experienced personnel, that we will be able to utilize and also to not have government being overbearing and ineffective.

I just came back from my hometown, but we spent some time with members of Homeland Security on emergency preparedness, still dealing with Hurricane Katrina and Rita. And one of the key issues was bureaucracy and effective bureaucracy. And I know the second panel will help us try to solve that.

But let me raise these questions with you, Ms. Lewis-Pickett. Thank you for being here. Could you give us some additional information about the impact of this program on the states? You represent the motor vehicle association.

And it is my understanding that the infrastructure may not currently exist for the states to successfully implement this program. That is a key concern for us. And you might want to suggest how we can be more effective, government and states working together.

I am also concerned about it being an unfunded mandate, but you might share your thoughts on that.

And then, what is the relationship between the Commercial Drivers License Information System and the TSA program? Again, are we linked up?

And would you yield for a moment? And I am going to give a broad question. I hope others will jump in on this last question. How do you believe the HAZMAT endorsement program should relate, if at all, to the broader Transportation Worker Identification Card, which has not yet moved into your arena, but it is working with a number of other workers, longshoremen and others?

Is the program that TSA is now developing—I mean, what impact will that broader TWIC program have on what we are trying to do here?

Ms. Lewis-Pickett?

Ms. LEWIS-PICKETT. Yes, again, several questions. I hope I can keep up.

Ms. JACKSON-LEE. Only two for me.

Ms. LEWIS-PICKETT. Only two for me.

[Laughter.]

As far as the burden, what we are hearing from the membership is the manual process that in place right now is definitely burdensome to them. The DMVs are really, really spread thin right now. And when we look at the federal-state partnership, I think the DMVs have stepped up in a number of areas to try to put programs in place, to administer programs that are mandated by Congress.

This is one where the federal agencies really decided not to use what was the best mechanism at the state level, and that is the network that manages the commercial drivers license program at the state level. And that is CDLIS, the Commercial Driver License Information System.

The problem now is that we have almost lost that window of opportunity and that we need to probably continue this manual process until such time that we begin to make modernization aspects of this program, which is going to begin in the year 2006.

CDLIS modernization takes time. And what that is, it is the coding of the codes that we use state to state to transfer driver information. Our members reminded us of the extreme burden on adding just an S to school bus drivers.

It is not as simple as it seems, when we talk about changing the credentialing process. All of our systems have to change so that we are able to communicate on driver records from state to state to state.

So our proposal is that you take time and to really think through what needs to happen, to provide the HAZMAT credentialing, and then make a concerted effort to work with the states, work with all of the stakeholders that are represented here at the table, so that we do not have a hodgepodge system and that it is something that the states can easily handle.

Ms. JACKSON-LEE. The other question was, what is the relationship between the Commercial Drivers License Information System and the TSA program, in your view?

Ms. LEWIS-PICKETT. There is not one.

Ms. JACKSON-LEE. No relationship?

Ms. LEWIS-PICKETT. No. They are certainly considering using CDLIS in the future, but it is not being used today.

Ms. JACKSON-LEE. And does this pose a financial burden that the states are willing to accept?

Ms. LEWIS-PICKETT. Whether they like it or not, it does create a financial burden, and they have accepted it in order to make the program work today.

Ms. JACKSON-LEE. The question about the TWIC, anybody want this?

Mr. Russell?

Mr. RUSSELL. TWIC, we believe, is a year or a year-and-a-half away from now. We actually had meetings in Boston with the TSA 10 days ago.

Trucks are the only thing that truly touch the ports, therefore containers coming off ships from wherever they may be coming from, airports, rail yards, cities. Trucks touch it all.

TWIC, as long as TWIC is risk-based, makes sense. And that basically we support TWIC, provided it is risk-based and does not create another entire level of duplication. But I think that certainly a HAZMAT certification as part of TWIC would be a logical approach.

Ms. JACKSON-LEE. Another else?

Ms. LEWIS-PICKETT. We certainly would have concerns of, how do you link the driver history information with the TWIC card? TWIC is more so that the risks—the identity risk area, as far as the HAZMAT, that is really tied to the driver and that driver's driving history. So I think there is two different focuses there.

Ms. JACKSON-LEE. That is what it would be linked to, the driver's history?

Mr. MADAR. I also have to echo the comments of Mr. Russell. The Teamsters, I think, right now are only on the fringe of the TWIC

card. But if or when the TWIC card actually comes to pass, our main concern is that there is not a duplication of effort, that the drivers who are required to have the TWIC card, that they do not have to go through the HAZMAT endorsement process as well as the TWIC card.

It would just be another level of cost and bureaucracy, which these drivers do not need to go through.

Ms. JACKSON-LEE. Mr. Chairman, I just want to—if you yield me 30 seconds to make this statement on the record.

I think that we all have a responsibility to secure the homeland. What I do not think I heard completely anyone raise is the fact that the background of some of these individuals may suggest that there has been some failing in their background or that it is a criminal issue that they have served their time, they are gainfully employed, they are supporting family members.

And I am not sure if the TWIC card is going to now weed out large numbers of individuals who have, you know, served their time to society and now are trying to contribute to society, who work in these different areas.

And I hope our committee would be concerned about people who rehabilitate their lives, and that would come up on their record, and whether or not that would eliminate them in this broader sense from doing the job that they have been doing.

And I thank the chairman.

Mr. LUNGREN. I thank you for your comments.

And I thank the panel for their statements. As was suggested, there may be some other written questions submitted to you. We would ask that you try and respond to those in a timely fashion. And several of you have indicated you will respond in written form to some of the questions that I proposed.

Thank you very much for appearing before us. You have been very helpful.

It is now my pleasure to call for the second panel, representing the Department of Homeland Security and the Department of Transportation.

The chair calls the second panel and would recognize Mr. Justin Oberman, the assistant director for transportation threat assessment and credentialing at the Transportation Security Administration, to testify.

And I think we have mentioned that your prepared remarks will be made part of the record and ask you to try and limit your comments to 5 minutes. And then we will go into questions after we have heard from both members of the panel.

Thank you, Mr. Oberman.

#### **STATEMENT OF JUSTIN OBERMAN**

Mr. OBERMAN. It is good to be with you again. Ranking Member Sanchez, Congresswoman Jackson-Lee, it is a pleasure to be here.

And we are pleased to testify today about our HAZMAT credentialing program, about which we are very proud, and try to put it in the context of all of our efforts under way to secure the transportation system, including the surface modes of transportation, as well as hazardous materials in general.

And I think that the HAZMAT program actually provides an excellent example of how we are using risk-based decision making, which is a priority for the Secretary, as well as for the TSA administrator, how we are using that approach in this program.

And I think there are a few examples of that. First, one of our main principles at TSA is to make investment decisions based on where the risk lies, as well as, of course, what our statutory requirements are from the Congress.

And as you know, the statutory requirements to conduct this program actually precedes the creation of TSA. It was in the USA Patriot Act from October of 2001. And so, of course, most of the requirements that we have set forth are based directly on the statute.

Second, we obviously are concerned about terrorists' ability to use hazardous materials for purposes completely different than what they are intended, namely to perpetuate terrorist attacks. And so we have made an investment in the program for that reason.

Third, you know, one of our key principles is to try to use our intelligence to focus on the terrorists themselves, as well as their means of conveyance of dangerous goods in this case, and so forth.

And so that is why, in this program, regardless of what state you are in, what kind of company you work for, or what materials you ship, as long as they are considered to be hazardous, that we are screening people very, very thoroughly, trying to identify people who present no suspected terrorist threats or have otherwise engaged in behavior that might indicate a propensity for them to be involved in some kind of terrorist, even unwittingly. And so that is a very important point.

I think it is also important to point out that we have worked very, very closely with the Department of Transportation, the Department of Justice, the trucking industry, the states, the labor unions and others in developing and standing up this program.

And while we are very concerned about the points that were raised earlier today, they are all points about which we are familiar. And we are working to address each of them in turn.

So I want to remind the committee of that and also thank the stakeholders for their very critical involvement in what we are doing.

In terms of making improvements and changes to the program over time, I think I would say a few things. First, Ranking Member Sanchez, to address the concerns you mentioned in your opening statement about the reports that are owed under the highway bill, those reports are in departmental coordination at the moment.

I think I can address most of our key conclusions reached today, but we will have those to your shortly. And one of the things that we do address in those reports is the issue of comparability. That was a concern expressed here today regarding the requirements of other government agencies, vis-a-vis TSA's requirements. I think we can discuss those to your satisfaction.

The other two points I would like to make before closing are as follows. Number one, our intention, as we stand up screening and credentialing programs across TSA to include HAZMAT credentialing, as well as the TWIC program and others, is to make

these programs interoperable and not to reinvent the wheel every time we roll out a new program.

For example, when developing our regulations for HAZMAT truck drivers, we used to a great extent the statutory guidance that is in the Maritime Transportation Security Act, which is going to govern the TWIC card. And we did that because there is more detail there than there was in the Patriot Act, for example.

That is going to enable us, when we promulgate our regulation to the TWIC program, to not have a different list of crimes with different standards, so that truck drivers today that are authorized to carry HAZMAT to a gas station, for example, or to a seaport will continue to be able to take that material to a seaport using a TWIC card and not have to be re-vetted, and pay another fee, and be subject to different standards.

The final thing I would say is that we are looking forward to an ongoing relationship with the Department of Transportation to include reviewing all of the industry proposals that were articulated today, as well as in other forums, to try to make the program even more risk-based and focused on the most dangerous terrorist threats.

I look forward to any questions you might have and to an ongoing working relationship in this area. Thank you.

[The statement of Mr. Oberman follows:]

#### PREPARED STATEMENT OF JUSTIN OBERMAN

Good afternoon, Mr. Chairman, Congresswoman Sanchez, and Members of the Subcommittee. I am pleased to have this opportunity to testify on the subject of securing hazardous materials transported by commercial motor vehicles.

Even before passage of the Aviation and Transportation Security Act, P.L. 107-71, which created the Transportation Security Administration (TSA), Congress recognized the need to bolster the security of hazardous materials (hazmat) transportation. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, P.L. 107-56, which became law on October 26, 2001, required a background records check for all U.S. drivers who transport hazardous materials in commerce.

Today, I would like to give you an overview of the Hazardous Materials (Hazmat) Threat Assessment Program, developed to implement Section 1012 of the USA PATRIOT Act.<sup>1</sup> I will also discuss how we are refocusing TSA's priorities to reflect our understanding of the nature of potential threats to the transportation system, and how that effort will inform our future actions as we continue to protect the security of transportation on our Nation's highways.

#### **Adapting to a Changing Threat Environment**

As TSA has recently testified before this Subcommittee, our fundamental challenge is to protect passengers, freight, and our transportation network in a constantly changing threat environment. We know that terrorists will not only look for weaknesses in our transportation system and its security measures, but they will also adapt to perceived security measures. Therefore, in all of its endeavors TSA is pursuing a strategy based on the following four operating principles:

**First, we will use risk and value analysis to make investment and operational decisions.** That means that we will assess risks based not only on threat and vulnerability, but on the potential consequences of a particular threat to people, transportation assets, and the economy. Further, we will assess and undertake risk management and risk mitigation measures based on their effect on total transportation network risk.

**Second, we will avoid giving terrorists or potential terrorists an advantage based on our predictability.** TSA will deploy resources and establish proto-

<sup>1</sup>The statute provides that a "State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary has first determined. . . that the individual does not pose a security risk warranting denial of the license." See 49 U.S.C. §5103a.

cols flexibly based on risk, so that terrorists cannot use the predictability of security measures to their advantage in planning or carrying out a threat.

**Third, we will continue to intervene early based on intelligence, and focus our security measures on the terrorist, as well as the means for carrying out the threat.** We recognize that enhancing and expanding techniques to identify suspicious persons at the transit, train, or bus station, in the airport, or on our highways is necessary. However, the strongest defense posture is to detect a terrorist well before an attempt to launch an attack has begun. A coordinated inter-agency intelligence collection and analysis effort must be our first line of defense. Our hazmat driver screening program is an important example of this approach.

**And, finally, we will build and take advantage of security networks.** As you may know, we are placing a renewed emphasis on building information sharing networks in every transportation sector—rail, transit, maritime, and trucking, as well as aviation. Not only will we work more closely with stakeholders in these industries, we will put a renewed emphasis on sharing intelligence, capacity and technology with other law enforcement, intelligence gathering and security agencies at every level of government. We will build a more robust, distributed network of security systems to protect America.

As we apply these operational principles, TSA remains dedicated to important customer service principles, as well. As we move forward,

- TSA will identify opportunities and engage the private sector in its work to develop and implement security systems and products.
- We will protect the privacy of Americans by minimizing the amount of personal data we acquire, store and share, and we will vigorously protect any data that is collected, stored or transmitted.
- And we will remember, in all that we do, that our goal in stopping terrorism is to protect the freedoms of the American people. Therefore, we will work to make travel easier for the law-abiding public, while protecting the security of the transportation network and the people who depend upon it.

#### **The Hazardous Materials (Hazmat) Threat Assessment Program**

In May 2003, TSA, the Federal Motor Carrier Safety Administration (FMCSA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA)<sup>2</sup> published an interim final rule implementing the hazmat driver threat assessment program.<sup>3</sup> The rule complements existing Department of Transportation (DOT) regulations that define the hazardous materials for which a hazardous materials endorsement (HME) is required to be issued by individual States or Territories. Under the threat assessment rule, any person who is required by the DOT rule to possess an HME as a condition of transporting hazardous materials must first undergo a threat assessment.

As a first step toward meeting this requirement, TSA conducted a terrorist-focused name check on approximately 2.7 million drivers then holding HMEs for their commercial drivers licenses (CDL). This name-based check resulted in the referral of 74 individuals to law enforcement agencies, some as a result of links to on-going Federal Bureau of Investigation (FBI) cases and some to terrorism. In January 2005, TSA began conducting a fingerprint-based FBI criminal history records check, an intelligence-related check, and verification of immigration status for applicants seeking to obtain a new HME on their State-issued commercial drivers license. Finally, in May 2005, TSA extended these checks to all hazmat drivers, including those seeking to renew or transfer an HME.

#### *Program Basics*

TSA conducts a threat assessment to determine whether an individual may be issued an HME under the statute and implementing regulations. Regulations prohibit issuance of HMEs to individuals who: have been convicted of certain felonies, under particular circumstances; are fugitives; are not U.S. citizens, lawful permanent residents, or lawful non-immigrants, refugees, or asylees with valid evidence of unrestricted employment authorization; have been adjudicated as mentally incompetent or involuntarily committed to a mental institution; or who are determined to pose a threat of terrorism or a threat to national transportation security.

Commercial drivers seeking a new HME, or renewing or transferring an existing HME, must submit biographical and biometric (fingerprint) information to TSA for the purpose of conducting a threat assessment. This information is processed by a

<sup>2</sup> PHMSA was formerly part of the Research and Special Programs Administration (RSPA).

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

TSA contractor in Agent States or, in Non-Agent States, through the State department of motor vehicles (DMV) or its contractors.<sup>4</sup>

In order to effectively process a large volume of threat assessments in a timely manner and ensure that applicants who are initially denied an HME have recourse, TSA has devised a process that provides for both appeals and waivers. These cases are managed by an Appeals and Waivers Manager.

The initial adjudication process includes an assessment of each HME applicant's criminal history, citizenship status, and mental health history; each applicant is also vetted against relevant terrorism databases. Applicants with potential disqualifying issues are assessed by multiple trained adjudicators. Legal assistance is available to the adjudicators to ensure that the decisions comport with statutory and regulatory requirements. The process is designed to reduce the risk of error of improperly adjudicating applicants, while minimizing the adjudication time. The initial adjudication concludes with either: a Final Determination of No Security Threat, if the applicant is found eligible to hold the HME; or an Initial Determination of Threat Assessment, if the information indicates that the applicant has a potentially disqualifying issue. A Final Determination of No Security Threat constitutes a Federal determination that an applicant may be issued an HME by the State, although some States may conduct additional checks under their own laws.

TSA established a goal of completing the adjudication process within an average of 30 days of receiving an application, and has successfully met this goal. Since the beginning of the program, TSA processed cases, on average, within 13 days; in the most recent month for which data is available, TSA has taken an average of only 9 days to process a case.<sup>5</sup> To ensure that drivers with existing HMEs can continue to work during the adjudication process, the regulation requires States to notify drivers of the threat assessment requirement at least 60 days in advance of the expiration of their HME. When necessary, States may extend the expiration date of an existing HME for up to 90 days.

*Appeals.* An applicant who receives an Initial Determination of Threat Assessment may appeal that determination within 30 days of receipt. If no appeal is initiated within 30 days, TSA issues a Final Determination of Threat Assessment to the applicant and the State licensing agency, and the State may not issue or renew the HME.

An applicant who appeals his Initial Determination of Threat Assessment may review any unclassified records on which the initial determination was based, and may provide further information regarding the condition that resulted in the initial determination. This may include, for example, corrected or additional information on his or her criminal history or citizenship status. TSA notifies the applicant and the State of its determination. If the appeal is successful, the applicant will receive a Determination of No Security Threat, and may be issued an HME. If the appeal is not successful, a Final Determination of Threat Assessment is made, and the State may not issue an HME to that applicant.

*Waivers.* An applicant may request a waiver if a disqualifying factor is undisputed, but that factor has been mitigated in some respect (*i.e.*, by rehabilitation after conviction of a disqualifying criminal offense). The Appeals and Waivers Manager creates a summary of the case, including information provided by the applicant, addressing the severity of the offense, recidivism, and rehabilitation. The case is then vetted by a TSA waiver committee comprised, at a minimum, of the Appeals and Waivers Manager, counsel, and representatives of the hazmat program office. The waiver committee makes a recommendation to the Assistant Secretary's designee, who renders the final decision. TSA does not grant waivers for individuals who have been convicted of treason, sedition, espionage, or crimes of terrorism. Since implementation, TSA has received over 100 waiver requests. Of the 40 waiver requests that have been completed, 19 were granted and 21 were denied.

#### *Current Program Status*

TSA is proud of the progress we have made in implementing the hazmat threat assessment program. In the nine months since the Department began fingerprint-

<sup>4</sup>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.

<sup>5</sup>Since January 31, 2005, there have been over 136,000 applications (supported by fees and fingerprints, and thus ripe for adjudication) of which more than 124,000 have been cleared to hold an HME; approximately 11,000 are in the initial adjudication process; and approximately 800 in the post-adjudication process. Approximately 700 applicants have been deemed disqualified to hold an HME.



based checks, we have processed over 120,000 applications. Today, 33 States and the District of Columbia participate as Agent States through which TSA collects and transmits fingerprint and driver application information. There are 156 enrollment sites in these jurisdictions. In addition, there are 864 enrollment sites in 17 Non-TSA Agent States.

TSA has established a comprehensive program, but we continually seek opportunities for improvement. For example, to improve customer service, TSA engages daily with State DMVs, industry associations, and other stakeholders to expand the number of sites that collect fingerprint and commercial driver information. Within the next month, TSA plans to roll out a secure web portal for use by all States that provides electronic notification of threat assessment results and driver processing status. This will improve customer service at the State licensing level, as well as provide even more timely access to TSA communications.

In order to address concerns about differences among State processes and reduce opportunities for error and delay, TSA has automated the submission of biographical information to TSA from the 17 Non-Agent States. Originally, TSA anticipated that it would 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 applications from the Non-Agent States. Because the AAMVA system will not be able to accommodate us in the near future, TSA has implemented two alternatives that make the process more efficient for applicants in Non-Agent States. First, we created a secure web-based application intake portal that enables States and their drivers (if the State so allows) to submit biographical information directly to TSA. Second, we enabled the electronic submission of biographical information directly from the State driver licensing systems, leveraging the prior work done with AAMVA and the States.

Like you, we have heard concerns about higher processing fees being charged in some States that are not served by TSA agents than in those served by TSA agents.<sup>6</sup> As you know, TSA has statutory authority to recover infrastructure and other start-up costs necessary to perform background checks and provide credentialing-related services through fees that are reasonably related to the costs of providing those services. Where fees are collected through Agent States, the entire amount of the fee, which covers FBI records checks (\$22), fingerprint and application collection (\$38), and program office and adjudication processing costs (\$34), is fixed by TSA at \$94.<sup>7</sup> This cost is comparable to the \$97 charged for processing a first-time passport application. In both TSA-Agent and Non-Agent States, the portion of the fee for the FBI records check and the adjudication processing is set by TSA. However, in Non-Agent States, the fingerprint and information collection fee is set by the individual State. Although the resulting fees differ somewhat, the average fee in Non-Agent states is approximately \$91.

### **Further Program Improvements**

#### *Reducing Redundancy*

As we pursue improvements in the hazmat threat assessment program, we are looking at ways to leverage data collection innovations that will reduce duplication of effort among this program and other DHS vetting and credentialing programs. The Department is carefully assessing the interoperability of a variety of programs to ensure that they are complementary, while working toward the ultimate convergence of our credentialing programs.

Similarly, we are evaluating standards for comparability with other Federal agencies, such as the National Nuclear Security Administration, a component of the Department of Energy, and agencies within the Department of Defense (DoD). Our goal is to develop a protocol that permits drivers who have security clearances based on comparable disqualifying and vetting criteria to forego an additional TSA security threat assessment for an HME. TSA has convened a Comparability Work Group to assess background check requirements, with the intent of establishing a baseline "standard" for determining comparability. Among other pertinent factors that will be considered when determining comparability are any disqualifying factors which originate in legislation.

<sup>6</sup>Typically, States require an HME to be renewed once every four or five years; accordingly the fee is only charged once for that period.

<sup>7</sup>As dictated by statute and OMB guidance, the agency's fee levels are based solely on the agency's costs of performing the security services required by the hazmat driver threat assessment rule. In order to comply with the Chief Financial Officers Act of 1990, 31 U.S.C. 3512, TSA and DHS will review all program costs no less than every two years to ensure that actual program costs are in line with fees charged. If, based on the actual cost history of the program, the fees charged are either too high or too low, the fee levels will be adjusted accordingly through rulemaking. At present, TSA's hazmat fees do not exceed agency costs.

TSA also recognizes that broader efforts are underway to develop standardized screening for programs across the Federal government and the private sector. As these procedures are developed and implemented government-wide, TSA will consult with other Federal agencies to ensure compatibility with respect to other security screening programs whenever possible.

*Vetting Canadian and Mexican Hazmat Drivers*

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires that Canadian and Mexican drivers who seek to transport hazardous materials in the United States be subjected to a background check similar to that required for U.S. drivers.<sup>8</sup> TSA has met with Canadian and Mexican officials to discuss options for developing and implementing a comparable vetting platform to ensure their hazmat drivers undergo security threat assessments.

Among the options we are considering is U.S. recognition of the hazmat endorsements of drivers enrolled in the U.S. Customs and Border Protection's (CBP) Free and Secure Trade (FAST) program. FAST is a cooperative effort between CBP and Canada and Mexico, an integral part of which is a fingerprint and name-based background check of participating commercial drivers. CBP conducts both criminal history record checks and intelligence vetting against relevant terrorist watch lists on all applicants, an interview, and periodic re-vetting of the FAST applicants against relevant intelligence databases. While participation in the FAST commercial driver program is currently voluntary, we have determined that the vetting process used in the program is similar to the Hazardous Material Threat Assessment Program.

*Employer Notification of HME Denials*

We are also working toward fulfilling the requirement of SAFETEA-LU that we seek comment from the industry and develop a process for notifying employers of HME applicants of the results of the threat assessment in an appropriate manner when the applicant is disqualified. We have a notification process in place, and sought input from the industry on improving methods for notification in November 2004. We are in the process of seeking comment again to finalize a notification process that gets employers the information they need and at the same time protects the privacy rights of applicant employees.

*Proposals for Graduated Hazmat Endorsements*

Due to concerns about the potential or perceived impact of current background check requirements and fees on the number of drivers applying for hazmat endorsements, we understand that proposals have been made to create a graduated system of hazmat endorsements. As we understand the proposal, a statutory change may be sought to require that only drivers seeking a hazmat endorsement for a smaller category of "security sensitive" hazardous materials be subject to the full complement of security, criminal fingerprint, and immigration status checks.

As noted earlier in this statement, we support a risk-based approach to hazardous materials security and agree that security regulations should be appropriately tailored to address transportation security risks. When promulgating the hazmat rule under the USA PATRIOT Act, TSA and DOT determined that all placarded materials warrant a security threat assessment of those seeking authorization to transport. A person who is given an HME today is authorized to carry the full range of hazardous materials that require a placard. These include toxic chemicals, and radioactive or poisonous commodities, as well as materials that may be perceived as relatively benign, such as nail polish, paint, and soft drink concentrate. However, in large quantities, even these "benign" commodities could be used to cause significant harm. Therefore, under both DOT and DHS rules, trucks carrying large quantities in bulk packages of these so-called "benign" commodities require placarding and a driver who has undergone a security threat assessment.

Nevertheless, we are amenable to undertaking a risk-based analysis to determine whether the existing requirements of the USA PATRIOT Act are overbroad. Any modifications to the list should be developed through the collective efforts of all stakeholders, including the Department of Homeland Security, the Department of

<sup>8</sup> Even before enactment of this requirement, TSA promulgated regulations, 49 CFR 1572.201, prohibiting Canadian drivers from transporting explosives into the U.S. unless they have submitted to a background check by Transport Canada. In addition, TSA checks these drivers' names against watch lists to determine whether they may pose a threat to transportation security, and U.S. Customs and Border Protection (CBP) checks those names at the border to determine whether a driver transporting explosives at the border is cleared to enter the United States or should be denied entry. TSA also has engaged with Canadian officials concerning the broader population that transports all placarded hazardous materials into the U.S. and continues to work toward a background check program that will enhance bilateral security while minimizing disruption to cross-border trade.

Transportation, other interested Federal agencies, States, and industry. The analysis should also consider operational and enforcement implications of any potential changes.

### **Other Highway/Hazmat Security Initiatives**

#### *Hazmat Truck Security Pilot Program*

TSA does not intend to rely solely on the hazmat security threat assessment program to protect the Nation from hazmat-related security threats. The Hazmat Truck Security Pilot Program is intended to provide information about the specific location of hazardous materials during transport, to support coordinated, agile responses to terrorist threats. In the first phase of the pilot, TSA will evaluate a minimum of three technically different, commercially available tracking solutions. Later phases of the pilot program will involve creating and demonstrating a prototype centralized truck tracking center to provide a single point of contact for analyzing alerts or incidents and coordinating responses to potential threats.

#### *Highway Watch*

The American Trucking Associations' (ATA) Highway Watch® program provides yet another layer of security for our Nation's highway transportation system. The program, implemented through a cooperative agreement between ATA and DHS through the Office of Domestic Preparedness (ODP), supports a platform for reporting safety and security threats on highways and provides anti-terrorism and safety instruction to America's highway transportation professionals. This group includes commercial truck and bus drivers, school bus drivers, first responders, public transportation professionals and others. To date more than 172,000 transportation professionals nationwide have received Highway Watch®.

A key component of the program is reporting by drivers of real or potential safety or security concerns to a national call center hotline. Safety reports are forwarded to local first responders who determine the appropriate next step. When a security call is received, a report of the incident is forwarded to the Highway Information Sharing and Analysis Center (ISAC) for assessment and analysis by a team of transportation security professionals. Incidents that may pose a threat to national security are then shared with Federal and State government intelligence officials and other law enforcement agencies. We note that with the enactment of Section 541 of the Department of Homeland Security Appropriations Act, 2006, P.L. 109-90, liability protection is now afforded to participants of Highway Watch® who report a potential incident to the appropriate authorities.

#### *Working with Industry to Improve Hazmat Security*

TSA's Corporate Security Review (CSR) program has identified hazmat carriers as the first and most important sector to be visited for review within the community of some 1.2 million inter—and intrastate trucking companies. TSA is ambitiously moving ahead to conduct personal visits with the largest of these hazmat carriers to validate and improve corporate security programs and to better understand how TSA can assist in that process.

TSA is also teaming with State, local and municipal law enforcement agencies that conduct roadside inspections and safety oversight of trucking operations. Under an Agreement with TSA, DHS's Federal Law Enforcement Training Center (FLETC) is creating a curriculum to deliver security instruction to roadside officers who may come in contact with hazmat truckers. The curriculum will include identifying suspicious drivers, fraudulent documentation, suspicious cargo and reporting findings. The initial focus of the new roadside awareness program will be hazmat trucking operations.

Finally, DHS is engaged in preliminary discussions with industry representatives to identify best practices currently in existence and new measures that might increase protections for hazmat drivers. We know that today a terrorist may need nothing more than a handgun and a stoplight to hijack virtually any truck. A well-trained and vetted driver, a hijack-resistant vehicle and a response-ready enforcement community will create a highly efficient and effective barrier to terrorist use of hazardous materials in transport.

### **The Road Ahead**

The Hazmat Driver Threat Assessment Program is a vital part of our overall program for protecting the security of transportation systems. As we continue to explore, develop, and refine programs to protect the transportation of hazardous materials we will be informed by our guiding principles: risk analysis in development of programs, randomness in implementation of measures, early intervention based upon intelligence, and leveraging the power of multiple security networks.

As we move forward, I want to recognize the valuable cooperation and assistance TSA has received from the Department of Transportation, AAMVA and its State li-

censing partners in the development and implementation of the Hazmat Threat Assessment Program, as well as other industry partners in highway security, including motor carriers, and driver and labor organizations.

Thank you, again, for giving me this opportunity to appear before the Subcommittee. We look forward to working with the Subcommittee as we continue to implement the hazmat background check program and develop the regulations needed to implement the new mandates of the SAFETEA-LU Act. I will be pleased to answer any questions you might have.

Mr. LUNGREN. Thank you very much, Mr. Oberman, for your testimony.

The chair now recognizes Mr. Robert McGuire, the associate administrator, Pipeline and Hazardous Material Safety Administration of the Department of Transportation.

#### **STATEMENT OF ROBERT MCGUIRE**

Mr. MCGUIRE. Good afternoon, Mr. Chairman and the distinguished members of the subcommittee. Thank you for the opportunity to appear before you today to discuss the Department of Transportation's ongoing efforts to improve the secure and safe transportation of hazardous material.

We understand the committee is considering modifying the hazardous materials Commercial Driver License background check requirement. We look forward to working together with the Congress as we explore ways to maintain safety and security while also minimizing the time and cost to the economy.

Like our colleagues at the Department of Homeland Security, we are amenable to undertaking a risk-based analysis to determine whether the existing requirements of the USA Patriot Act should be modified. The Department of Transportation has considerable expertise in assessing both the safety and security risks associated with the transportation of hazardous materials, and we look forward to working very closely with DHS on this issue.

We work with the other modal administrations at DOT to administer a comprehensive, nationwide program designed to protect the nation from the risk to life, health, property, and the environment inherent in the commercial transportation of hazardous materials.

We have learned through our safety program that a transportation system involving hazardous materials cannot be safe if it is not secure. This is why DHS and DOT work in concert to achieve an interrelated regulatory safety and security framework.

We continue to seek ways to enhance the security of hazardous material shipments. For example, in consultation with DHS, we are moving forward to examine ways to enhance the security of rail shipments of toxic inhalation materials.

DOT is also considering whether and to what extent communications and tracking systems could be utilized to improve the safe and secure transportation of certain hazardous materials.

In considering various approaches to narrowing the current list of materials required for a background check, we must analyze the relative risk for diversion and misuse of hazardous material.

Second, we cannot limit our review to individual materials, but rather must consider various combinations.

Third, we believe that any modifications to the list of materials triggering a driver background check should be based on security risk assessment that considers potential scenarios under which a

truck could be diverted for terrorist use and evaluates the degree to which driver background checks would address those factors.

Lastly, we must consider the role fulfilled by our state partners and work with them. It is necessary that any possible modifications to the current regime be done in full partnership with them. Establishing a new endorsement on the CAL would likely require costly revisions to the information technology systems in all 50 states and the District of Columbia.

We recognize that there is always room for improvement and believe that there is more work to be done on this issue. The department looks forward to working with the members of this subcommittee, the Congress, the states, and our stakeholders, as we move forward.

Mr. Chairman, I commend you and the members of this subcommittee for your leadership. I thank you for the opportunity to be here today, and I look forward to answering any questions you may have.

[The statement of Mr. McGuire follows:]

PREPARED STATEMENT OF ROBERT MCGUIRE

Mr. Chairman and distinguished members of the Subcommittee: thank you for the opportunity to appear before you today to discuss the Department of Transportation's ongoing efforts to improve the secure transportation of hazardous materials.

**Introduction**

We understand the Committee is currently considering options for modifying background check requirements for Commercial Driver's Licenses (CDL). In particular, the Committee is considering narrowing the list of materials required for background checks. Like our colleagues at the Department of Homeland Security, we believe an opportunity exists to improve the safety and security of hazardous materials movements, by modifying the current requirements. We believe any such modification should be predicated upon a risk-based analysis rather than a blanket adoption of an environmental and safety list currently used. We believe modifications to the list, which would require modification of the USA PATRIOT Act, should be developed through the collective efforts of all stakeholders, including DHS, DOT, other interested Federal agencies, States, and the industry.

DOT has considerable expertise in assessing both the safety and security risks associated with the transportation of hazardous materials and we look forward to working very closely with DHS on this issue.

**DOT's Hazardous Materials Program**

The Pipeline and Hazardous Materials Safety Administration (PHMSA), along with other modal administrations at DOT, administers a comprehensive, nationwide program designed to protect our Nation from risks to life, health, property, and the environment inherent in the commercial transportation of hazardous materials.

Hazardous materials are essential to our citizens, and to our economy. These materials fuel automobiles; heat and cool our homes and offices; and are used in farming, medical applications, manufacturing, mining, and other industrial processes. More than 3 billion tons of regulated hazardous materials—including explosive, poisonous, corrosive, flammable, and radioactive materials—are transported each year.

We oversee the safe and secure shipment of over 1.2 million daily shipments of hazardous materials moving by plane, train, truck, or vessel in quantities ranging from several ounces to thousands of gallons. These shipments frequently move through densely populated or sensitive areas where an incident could result in loss of life, serious injury, or significant environmental damage. Our communities, particularly the public and workers engaged in hazardous materials commerce, count on the safe and secure transport of these shipments.

The Department's hazardous materials transportation safety program has historically focused on reducing risks related to the unintentional release of hazardous materials. Since 9/11, we have moved aggressively, recognizing and addressing safety and security issues associated with the commercial transportation of hazardous materials.

Hazardous materials safety and security are mutually interdependent activities. This principle was recognized by Congress in the Homeland Security Act of 2002.

Section 1711 of this act amended the Federal hazardous materials transportation law to authorize the Secretary of Transportation to “prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.”

DOT shares responsibility for hazardous materials transportation security with DHS. The two departments consult on security-related hazardous materials transportation requirements and matters to assure these requirements are consistent with the Nation’s overall security policy goals and objectives. We constantly strive to assure our two departments coordinate our efforts so that the regulated industry is not confronted with inconsistent regulations.

#### ***Hazmat CDL and Security Background Checks***

Pursuant to the Commercial Motor Vehicle Safety Act of 1986, commercial motor vehicle drivers transporting placarded hazardous materials under the DOT Hazardous Materials Regulations must have a hazardous materials endorsement. This endorsement to a basic CDL reflects that drivers transporting hazardous materials are trained and possess the necessary knowledge to safely handle the specific materials they transport.

In the aftermath of the 9/11 attacks, Congress enacted the USA PATRIOT Act. The PATRIOT Act prohibits a State from issuing a license to operate a motor vehicle transporting hazardous materials in commerce unless the Secretary of Transportation has first determined the individual does not pose a security risk warranting denial of the license. The responsibility for this determination was subsequently transferred to the Secretary of Homeland Security.

In 2004, DOT and DHS issued regulations implementing the hazardous materials licensing provisions of the PATRIOT Act. DHS’s regulation established procedures for determining whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a CDL and for appealing and issuing waivers to such determinations. DOT issued a companion regulation amending Part 384 of the Federal Motor Carrier Safety Regulations (FMCSRs) to prohibit States from issuing, renewing, transferring, or upgrading a CDL with a hazardous materials endorsement unless the Attorney General has first conducted a background records check of the applicant, and DHS has determined the applicant does not pose a security threat warranting denial of the hazardous materials endorsement. DOT’s companion regulation also extends the list of hazardous materials for which an endorsement is required to include “select agents” as designated by the Centers for Disease Control and Prevention. Thus, DHS and DOT regulations work in concert to achieve an interrelated regulatory safety and security framework.

#### ***Proposals to Modify Background Check Requirements***

As noted earlier, DOT has vast experience in regulating the safe and secure movement of hazardous materials. Through PHMSA and other modal administrations, our regulations establish a prevention-oriented risk management system focused on identifying and reducing both the probability and quantity of a hazardous material release. We collect and analyze data on hazardous materials—incidents, regulatory actions, and enforcement activity—to determine the safety and security risks associated with the transportation of hazardous materials and the best ways to mitigate those risks.

We believe modifications to the list of materials triggering a driver background check must be based upon a qualitative, scientific, risk-based analysis. Please allow me to briefly discuss some of the issues that should be considered as part of this analysis.

First, we must analyze the relative risk for diversion and misuse of the hazardous materials being considered for exclusion from the background requirements. Second, we cannot limit our review to individual materials, but rather must consider all possible safety and security risks which come from instances where various combinations of relatively low risk hazardous materials could result in substantial death, injury, or damage to the environment. Third, we must consider factors affecting vulnerability to shipments in transport, and finally, we must also carefully analyze the degree to which driver background checks would identify and address those potential vulnerabilities.

Not to be overlooked is the role fulfilled by our State partners. It is necessary that any possible modifications to the current regime be done in full partnership with them. Establishing a new endorsement on the CDL would require costly revisions to the information technology systems in all 50 States and the District of Columbia. The States have just completed major revisions to implement the current PATRIOT Act background check regulations and other changes to the CDL requirements mandated by the Motor Carrier Improvement Act of 1999. States are also preparing for implementation of the Real ID Act, requiring yet further substantial changes to

their systems. We believe working closely with our partners, including The American Association of Motor Vehicle Administrators (AAMVA), is critical as we move forward.

***Ongoing DOT Hazardous Materials Security Initiatives***

In 2003, DOT published a final rule—known as HM-232—requiring shippers and carriers of certain highly hazardous materials to develop and implement a security plan. The security plan must include an assessment of possible transportation security risks as well as the appropriate measures being taken to address the assessed risks. At a minimum, the security plan must address security risks associated with personnel security, unauthorized access, and en route security. The final rule also requires security awareness training for all hazardous materials employees and in-depth security training for employees of persons required to develop and implement security plans when transporting placarded hazardous material and other select toxins.

The Department has aggressively pursued enforcement of the security regulations. To date, the Federal Motor Carrier Safety Administration (FMCSA), the Federal Railroad Administration (FRA), and The Pipeline and Hazardous Materials Safety Administration (PHMSA) have conducted thousands of security reviews and have initiated over 500 enforcement actions.

We continue to seek ways to enhance the security of hazardous materials shipments. For example, in consultation with DHS, we are moving forward to examine ways to enhance the security of rail shipments of Toxic Inhalation (TIH) materials. We are also considering other general requirements for enhancing the security of rail shipments of hazardous materials. DOT is actively considering whether, and to what extent, communications and tracking systems should be required for motor carriers transporting certain hazardous materials.

***Conclusion***

The Department of Transportation takes very seriously its responsibility to ensure the safe and secure movement of hazardous materials across our transportation system. Although we believe the regulatory framework currently in place is a good start, we recognize that there is always room for improvement. Together with DHS, we seek to achieve the highest level of safety and security possible, while at the same time, minimizing the burden and associated cost to commerce.

We recognize that there is more work to be done, and look forward to working with the Members of this Subcommittee, the Congress, and our stakeholders as we embark on a serious and open discussion with all interested parties. We will achieve a workable framework that enhances the safe and secure transportation of hazardous materials.

Mr. Chairman, I commend you and the members of this Subcommittee for your leadership. I thank you for the opportunity to be here today and look forward to answering any questions the Subcommittee may have.

Mr. LUNGREN. Thank you very much, Mr. McGuire, for your testimony.

At this time, I would take 5 minutes to start the round of questioning.

Mr. McGuire, can you tell me, when were you notified you were going to be testifying before this panel?

Mr. MCGUIRE. Yesterday morning.

Mr. LUNGREN. Yesterday morning. So you were unable, if you were notified yesterday morning you would be testifying before us, to comply with the 48-hour rule that we would have your testimony 48 hours ahead of time, correct?

Mr. MCGUIRE. That is correct.

Mr. LUNGREN. Is it the position of the Department of Transportation that you will decline to testify if, in fact, you are put on a second panel?

Mr. MCGUIRE. Mr. Chairman, I was not privy to that discussion. I could not speak for the department, in terms of our future actions.

Mr. LUNGREN. Well, I am just asking. Is that a policy of the department of which you are aware?

Mr. MCGUIRE. It is not a policy that I was aware of.

Mr. LUNGREN. Mr. Oberman, I am trying to figure out here where the flexibility is. And, as I understand it—and I was not in Congress at the time the original Patriot Act was passed—the Patriot Act prohibited the states from issuing commercial drivers licenses to an individual to operate a motor vehicle to transport HAZMAT for commercial purposes unless the Secretary of Transportation had determined that the individual does not pose a security risk.

The scope included in the Patriot Act was the relevant check of criminal history, immigration status, and international databases. The Secretary of Transportation in the year 2003 delegated this responsibility to TSA. Then TSA was transferred to DHS, although the Secretary of Transportation retained his authority to regulate the safe transportation of HAZMAT, including driver qualifications, packaging standards, placarding requirements, and classification of standards.

It is my understand that the final rule promulgated by TSA in November of 2004 stipulated that all drivers seeking to receive a hazardous materials endorsement on their state-issued CDL required a submission to a name-based intelligence-related check, immigration status verification, and, although not stipulated in the Patriot Act, a fingerprint-based FBI criminal history check.

If that is true, then it is the decision that has been made by the TSA that the fingerprint check be a requirement of this process. Is that correct?

Mr. OBERMAN. Mr. Chairman, that decision was taken very carefully. And it is based on a separate statute which governs background checks for purposes of employment or licensing.

It is a pre-9/11 bill. It was enacted in 1998. And it has to do with how criminal records at the FBI are governed. And it says that, if you are doing a background check for employment or licensing purposes, which of course this is, that the criminal history check must, in fact, be fingerprint-based and not name-based.

So we were subject to that 1998 statute in executing the 2001 statute for truck drivers. I think, though, that it is important to realize that there are numerous elements of the program that I would consider to be flexible, given that we do have a statutory requirement to 2001 and a 1998 statute that governed that decision.

And those elements would include several things. First, we gave the states the flexibility to partner with us in capturing fingerprints and enrolling drivers. And that was done at the request of the states. Seventeen states stepped up to that; 32 states in the District of Columbia decided to use TSA resources, which we provided. And so—

Mr. LUNGREN. No, I understand. So you are saying you have exercised flexibility within—

Mr. OBERMAN. That is right.

Mr. LUNGREN. —the authority you have. But I guess it is your position that, if we were to make a decision that we are including too many people in this, that you do not have to have every HAZMAT do a full background check with fingerprints because most of them do not haul that which is weaponable or security-sensitive, if we were to make that decision, would that require an af-



firmation action on the part of the Congress to change the statute under which you operate?

Or could, if we made that decision, suggesting you did not have to do that, could you go ahead and do that without a change in statute?

Mr. OBERMAN. I think we need to change the statute, because the statute says that everyone who seeks a HAZMAT endorsement is subject to the background check. In other words, it is based on statutes and regulations that govern DOT.

Mr. LUNGREN. Do you have any problem with the argument that we are too inclusive right now?

Mr. OBERMAN. I do not have a problem overall, but I think that this is an issue in which the details are very, very important. And one of the—

Mr. LUNGREN. But, I mean, Coke syrup?

Mr. OBERMAN. Yes, I think—well, I—

Mr. LUNGREN. Do we need to have that being considered as terrorist-based?

Mr. OBERMAN. Yes, I think that—

Mr. LUNGREN. I liked to drink that stuff when I worked at a soda place.

Mr. OBERMAN. Right.

Mr. LUNGREN. And that probably would have killed me if I drank it too much without putting the water in with it, but that would not be a terrorist act. That would be a stupid act on my part.

Mr. OBERMAN. Right. I think that—and I will let Mr. McGuire address this—I think that the requirements that say whether a material is hazardous or not is based on volume, weight, combustibility, things of that nature.

And so I would not want to answer that out of context, to say that, you know, our position is that Coke syrup in and of itself is a hazardous material. You have to look at in the context of the overall regulatory structure. I would like to defer to DOT on that.

What I would say, though, is it is important to keep in mind that we have not only defined a narrow list of crimes, which are disqualifying—and we were given the statutory discretion to do that—narrower than we have used in other modes, but that we have also provided very significant appeal and waiver processes to let drivers, as was discussed in the earlier panel, who really have rehabilitated themselves to continue to carry hazardous material.

So I just want to point that out. And then—

Mr. LUNGREN. I appreciate that. But before you go to that, look, here is the problem. I will give you an analogy.

And it is something that Chairman Cox used to always say, and I agreed with him on that. And I will continue to this point, which is, when we were talking about trying to eliminate terrorists from getting on airplane, right now we have cast the net so wide—or to use another analogy, we have such a huge haystack, that we are looking for the needle in the haystack, it makes a whole lot of sense for us programmatically to try and reduce the size of the haystack so we can look for that needle.

Here, if we are going for everybody, we are not going to get those that we are looking for. And we have an undue burden on people who are out there. And we are sitting here saying, “Well, you

know, you could have too much Coke syrup." I mean, you know, come on.

Maybe I am missing something, but that is not why we are engaged in the war on terrorism, in my judgment.

So my time is expired.

Ms. Sanchez?

Ms. SANCHEZ. Thank you, Mr. Chairman.

Thank you, gentleman, for being before us.

Mr. Oberman, What is the status of the safety report? You said soon. What does it mean?

Mr. OBERMAN. What it means is that it is in final coordination within the department. And we will get it here as soon as we can.

What I will tell you is that I think we fully understand that Congress's intent, with the requirement that we report on the issue of comparability, as well as the issues surrounding the number of fingerprinting sites that are available.

And what I would say to you is that we do believe that comparability should be included in this program. And we look forward to working with the Department of Defense, the Department of Energy, and others, so that the stories that were described today do not occur.

In other words, if you are granted a security clearance, for example, to carry hazardous materials for the military, that you not, in turn, be re-vetted. I would just point out that there are some—

Ms. SANCHEZ. That is a new policy? That is a new policy out of your department?

Mr. OBERMAN. Well, it is an issue that we are going to address in the report that the Congress asked us to address in that requirement. So, yes, I mean, our intention is to work with the other agencies to establish standards for comparability, so that if you are checked by one federal agency, you do not need to be checked again.

What I would caution just on that point, though, is that there are some implementation requirements that we have to be mindful of. One example, which is, again, not insurmountable but important to note, is that the TSA background check for hazardous materials truck drivers is good for a period of 5 years.

So if somebody was vetted, let's say, 4 1/2 years ago by the Defense Department to carry hazardous materials and are now seeking clearance for a HAZMAT endorsement from a state, we have to make a decision as to whether that 4 1/2 year period would be extended an additional 5 years or only an additional 6 months.

So, notionally, we are in agreement. But we have to make sure that we address through all the details.

And then on the second safety requirement, SAFETEA-LU requirement, regarding the number of sites that are available for fingerprinting, I think this is an issue that will never go away to a certain extent, because it is a big, vast country and these states are very big geographically.

What I would say, though, is that we are working with the trucking industry and with the DMVs to try to add or move sites whenever we can. We are doing that in an ongoing basis. I am not sure we are ever going to be perfect, but I do not think that you ever could be.

And so, as I said, we are remiss in having those reports be late, but they will be up here just as soon as they can. And your urging us today will—

Ms. SANCHEZ. Let me ask the question in another way: What date do you think that report is going to be up here?

Mr. OBERMAN. I would say no later than November 15th. We will do everything we can to get it up here by then. And I have now made a commitment, so I am going to have to maybe start—

Ms. SANCHEZ. Do you know that your department makes commitments all the time and still has not sent us reports that we asked for almost 4 years ago—

Mr. OBERMAN. Understood.

Ms. SANCHEZ. —about 2 1/2 years ago?

Mr. OBERMAN. Understood. I will do everything I can to get these two up to you by no later than November 15th.

Ms. SANCHEZ. 2005?

[Laughter.]

Mr. OBERMAN. 2005.

Ms. SANCHEZ. Okay, I want to hear you say that.

Mr. OBERMAN. 2005.

[Laughter.]

Ms. SANCHEZ. Okay, let's talk a little bit about transportation security incidents. Under the regulation, this term is defined as an incident resulting in a significant loss of life, environment damage, transportation system disruption, or an economic system disruption in a particular area.

The definition is broad. What do you think it means? And are you going to tighten this up or just leave it like that?

Mr. OBERMAN. Well, I think that it is something we would be willing to look at. I am not necessarily anxious to broaden it.

What I would tell you is that—

Ms. SANCHEZ. To broaden it? No, I am not asking you to broaden it.

Mr. OBERMAN. To narrow it, rather. Sorry.

I think that—a couple of things on that topic. Number one, the number of instances in which we see transportation-related incidents in a background check is pretty rare.

And they are of grave concern to us, because our mission across TSA and, of course, across all of credentialing programs is to keep people that might present a potential threat out of secure areas of the transportation system, whether it is the tarmac of an airport or the cab of a truck carrying hazardous materials.

And so, again, I am hesitant to make a blanket statement that we would be willing to narrow that. I think it is very rare that somebody has such an incident that we are made aware of during a background check.

If you have examples or have been made aware of such examples, I would really like to take a look at those, because they are of note every time they happen. It is not that common.

Ms. SANCHEZ. Well, in California, where I live, a transportation system disruption in a particular area happens every single day on our freeways. A lot of times, it may involve a trucker. It does not necessarily mean that they caused it, but they are involved in it.

Mr. OBERMAN. I think when we talk transportation security incidents, that were another "I" word, again, looking at intent, as opposed to an unforeseen circumstance that was out of the control of a driver. So that if they, you know, slipped on a patch of ice or something, I am not sure that that would rise to the level of—

Ms. SANCHEZ. No, we do not have ice in southern California.

Mr. OBERMAN. —a transportation security—understood. But we do in Chicago where I live. Anyway, the point is—

Mr. LUNGREN. I hope we did not lose some mountains since I have been gone. I think you do have some ice.

Ms. SANCHEZ. We call that the north.

Mr. OBERMAN. Anyway, I think that it really gets to the issue of intent and whether somebody is betraying the trust that we have shown in them to act as the security of the system, where the potential for damage is much greater than in an unprotected area.

Ms. SANCHEZ. Well, I might suggest that you take a look at that, because—

Mr. OBERMAN. I would be happy to.

Ms. SANCHEZ. —we have had certain people come forward and tell us their horror stories on this.

Ms. SANCHEZ. Again, since the process is fairly new, I am anticipating we may have even more people.

Thank you, Mr. Chairman. I see my time is up.

Mr. LUNGREN. Yes.

The gentlelady from Texas, Ms. Jackson-Lee, is recognized.

Ms. JACKSON-LEE. Thank you very much, Mr. Chairman.

I would like to continue in the line of questioning of my colleague, the ranking member, at least sort of generally continue on that theme, Mr. Oberman. And thank you for your testimony.

I said in the earlier session, panel, that sometimes we are immersed in bureaucracy, even as we attempted to develop the Homeland Security Department and to bring all the factors together that would help secure the homeland. But what it does is, it puts people with different skills in the midst of responsibilities that they might not necessarily have the skills.

For example, I do not necessarily consider Transportation Security Administration well-grounded in criminal law and as well to be able to define certain crimes as being particularly relevant to the work at hand.

For those of us who believe in second chances for individuals who have unfortunately are short of crimes of violence or sexual predators against children, which we understand they are both very difficult challenges, but believe in second chances and believe in the idea of people having the ability to be rehabilitated and then ultimately providing for their families, juxtaposed against the responsibility for securing the homeland, I am befuddled about the current list of disqualifying offenses, which include a felony of dishonesty, fraud or misrepresentation, as it may relate to national security.

That is a very broad definition. It appears to cover a wide range of crimes. And so I question whether all of them would really cause someone to be a terrorism security risk in the United States.

Is it your intent, TSA's intent, to better define and limit what crimes would fall under this very broad category? And how, then, will you do it? How quickly would you do it?

Would you also answer the question, which seems to be common sense to me, that, if TSA is in the business of denying applicants, would not it be appropriate and meet the standards of due process if we established an administrative law judge so that the appeals could be before an independent arbiter?

Mr. OBERMAN. Thank you, Congresswoman. Let me take each of those in turn.

First, what I would say is that it is important to remember that the statute did require TSA to develop a list of disqualifying crimes. And I think, to our credit, we did that in conjunction with the Department of Justice, which does have, of course, a grounding in criminal law, and consulted with them and other agencies in putting that list together.

And we narrowed the list quite a bit, in comparison to what we are doing in other modes, because we are trying to reduce the size of the haystack and really focus on potential threats.

I think it is also important to note that, in the 9 1/2 months, 10 months that we have had the program up, we have denied HAZMAT endorsements to fewer than 1 percent of those who have applied. And that is, of course, a smaller percentage than those with criminal histories.

But, again, we are taking a risk-based approach and looking at people's records, based on what we think is a propensity to commit damage or at least presents a risk that we are not willing to take, having that driver carry HAZMAT.

With respect to reviewing the list overall, I think that we are happy to do that. We are happy to do that in conjunction with the Congress, as well as other agencies, to see if we can further refine and hone that list.

I think, on the example that you raise, with respect to dishonesty and so forth, again, we are concerned about people that wittingly or unwittingly have a greater likelihood of being involved in a potential terrorist incident and, given that they have got a track record of being dishonest, might be a key link in a plan and not realize that they are being exploited by a potential terrorist threat.

So that is why that is of concern. I will tell you that it is, again, very, very rare that it comes up and that we see it.

And I guess on the final point, regarding administrative law judges, that is something that we have heard from the industry, as well as the labor unions, and so forth. And I think that I would tell you a couple of things.

Number one, that is a big resource burden. In other words, administrative law judges are few and far between. That would increase our fee levels quite a bit, to have a whole process for the administrative law judge—

Ms. JACKSON-LEE. Then let me—Mr. Oberman, so that I can get Mr. McGuire in, why don't you give me the rest of the answer in writing—

Mr. OBERMAN. Okay.

Ms. JACKSON-LEE. —because I think all of those points that you are making right now can be fixed.

Mr. McGuire—I was getting ready to call you Mr. Oberman—please express the great disappointment, not that we do not respect your presence here, but a great disappointment in the absence of—not Mr. Oberman, but the other gentleman that was supposed to be here, Mr. McCown.

Let me express a great disappointment. And maybe the press should raise their hands and say that they are still in the room.

But what I quickly wanted to ask you—and let me also just thank the Department of Transportation, on a good note, for the great work that you did in helping many of us at Hurricane Rita.

But Mr. Laizure mentioned that he has been fingerprinted six times for a variety of different hazardous material endorsements. Comment on that. And comment on the drivers that have complained about the limited number of locations.

You think you are doing a good job, but can you do better?

Mr. MCGUIRE. I am sorry. I am going to have to pass that question to Mr. Oberman, because that is part of the TSA program and not part of what our responsibilities are.

Ms. JACKSON-LEE. Then it would be helpful to find out—and I will get that from Mr. Oberman, then, in writing. I think I will do that.

Let me just ask you, what is the cooperative relationship that you have with TSA? And is that hindered by the lack of cohesion between the DOT and the TSA aspects?

Mr. MCGUIRE. No. Our impression is that the relationship is working quite well. We have been working with TSA together for a number of years on a number of issues. This is only but one of them.

Others would include the rail transportation of toxic-by-inhalation materials, the topic that has been mentioned very briefly today about potential tracking of hazardous material shipments on truck and by rail.

So I think that, in general, I would say that our relationship has been quite good and quite productive.

Ms. JACKSON-LEE. And, Mr. Oberman, if you would give me those questions I had in writing, and that is about the repetitive fingerprinting and the lack of convenient sites, that would be very helpful. And that I think we need to work on very, very—in almost near time.

Mr. OBERMAN. Be happy to.

Ms. JACKSON-LEE. Thank you.

Mr. LUNGREN. Mr. McGuire, you state in your testimony: We must consider factors affecting vulnerability and shipments in transport, and that we must also carefully analyze the degree to which driver background checks would identify and address these potential vulnerabilities.

Speaking generally—and maybe both of you could answer this—what vulnerabilities have you identified for the trucking industry? If you were starting from scratch and developing a security program for the trucking industry, would the background check in its current form be part of it?

Mr. McGuire?

Mr. MCGUIRE. Yes, let me just back up a little bit and say that there are a wide range of hazardous materials that are out there.

Not all of them are placarded. There are many that are not placarded.

Within the range of placarded materials that we have been talking about today, because that is the trigger that requires not only the background check, the CDL endorsement, and the security plans that we require, there is a range within there. And we are amenable to taking a look at that, at that list of materials.

I think that where the vulnerability comes in is that there are a number of materials out there that are not included in some of the very narrow lists that have been suggested, that not only have the potential but actually have been used in terrorist acts. Those include the ammonium nitrate fertilizers that Timothy McVeigh used, the gasoline and other fuels that have been used in foreign countries.

Those kinds of things are things that we believe must be included on the list. So we are amenable to looking at the broader range of materials, but we do not want to go too narrow.

I think that, as we look at that list, some of the concerns that we have are, number one, if the U.N. list, for example, covers 50 to 75 percent of the materials that are covered on our list—which is our rough estimate; we have not really nailed that down, as of yet—is that really going to make a significant difference?

We heard testimony in the earlier panel that many companies just go ahead and have all of their drivers get certified so that they do not have the problem of having lists of drivers, two and three lists of drivers, those for general freight, those for HAZMAT without an endorsement, those for HAZMAT that will require the endorsement.

Similarly, from an enforcement perspective for the states, we find that many of the states are commenting that, for the policemen, or the state policemen who shows up, right now it is very simple to say, “This vehicle is placarded. Therefore, the driver needs a CDL. Therefore, the driver needs a background check. And, also, the company needs a security plan.”

Mr. LUNGREN. Mr. Oberman?

Mr. OBERMAN. Thank you, Mr. Chairman.

I think that we would welcome the opportunity to take a fresh look at how we do background checks, particularly since we are vetting people all across modes of transportation.

I think, though, within that context, it is important to note that there are certain criminal histories that would be of great concern to us, certain immigration violations that would be of great concern to us, and, of course, no other suspected ties to terrorism that would be of concern to us.

All three of those elements are part of the background check today. And we have taken steps to really, again, reduce the size of the haystack. But, of course, we would welcome the opportunity to look at that again. It helps us stay sharp to be in constant evaluation mode.

Mr. LUNGREN. Look, my background is—I have been accused of being hard-nosed or hard-something-or-else in the past as a legislator and an attorney general.

But I do understand that we could have a CYA approach to things in which we basically say, “As long as we include all felony

conviction, as long as we include every possible thing that could be utilized, matches and so forth, we are never going to be accused of not covering that one unique situation where terrorists put together, you know, 27 different things and got somebody whose felony background really had nothing to do with that. But we will never be criticized for allowing that person to have one of these licenses.”

On the other hand, if there is a legitimate question that we are denying people who have really done a good job of driving trucks and somebody we can trust, but has a felony conviction, for which I am not going to excuse that person, but really does not relate to this, I mean, if that is a problem, maybe we better take a look at it. We have an obligation to take a look at it.

Mr. OBERMAN. I think we do have an obligation to take a look at it on an ongoing basis because this is how people earn their livelihoods. We agree with that.

I think I would just mention two things that are important to keep in mind. Number one, since January 31st when we started, we have eliminated—rejected, rather, fewer than 1 percent of those who have applied.

Mr. LUNGREN. It is like 672, I think, is the list I have. But if you project that over those in the universe that could apply, I believe that would lead to 15,000, if they all applied. That is not insignificant.

Mr. OBERMAN. Well, we think there are about a million active HAZMAT drivers in the country. And it is 670 out of about 130,000. So our estimates are far fewer than 15,000.

But, even so, we agree that that is—any number is significant, because, again, it is how people earn their livelihoods. What I would say, though, is that I am part of the appeal and waiver process.

And, in many cases, you are right. People have a felony conviction in their past, they get a job driving a truck, and then, from that point forward, their records are completely clean. Almost every single one of those drivers has been granted a waiver by TSA, because we are trying to hone in on the problem that you described earlier.

So I think it is absolutely critical to continue to look at how we do this. But in the same breath, I think the evidence of how we have administered the program is important to keep in mind, because, you know, we are under 1 percent.

Mr. LUNGREN. I appreciate it.

Ms. Sanchez, do you have anything else?

Okay, well, that concludes the second panel. I thank you for your testimony. I always appreciate people who show up and testify before us. Let the record reflect that there are still members of the press in attendance.

We do appreciate the witnesses from both panels for their valuable testimony and the members for their questions. The members of the committee may have some additional questions for the witnesses, and we will ask you to respond to those in writing.

The hearing record will remain open for 10 days.

And without objection, the committee stands adjourned.

[Whereupon, at 4:00 p.m., the subcommittee was adjourned.]



## APPENDIX

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ECONOMIC SECURITY, INFRASTRUCTURE  
PROTECTION AND CYBERSECURITY  
*Washington, DC, July 17, 2002.*

Dear CHAIRMAN LUNGREN:

Thank you for providing me with the opportunity to testify on behalf of the International Brotherhood of Teamsters at the hearing, "HAZMAT Trucking Security" held on November 1, 2005. In response to your question regarding which of the crimes should be removed from the list of disqualifying crimes used by the Transportation Security Administration to screen hazardous materials endorsement applicants please accept the following response.

The International Brotherhood of Teamsters shares the Transportation Security Administration's concerns regarding the importance of protecting Americans from terrorism threats. The recognizes that terrorists may try to take advantage of our transportation network in order to out dangerous and deadly acts against the United States. It is in everyone's interest to keep people with a propensity to commit terrorism from driving trucks carrying hazardous materials. However, in keeping our country safe, we must ensure that we do not violate the civil rights of employees who may have committed crimes in the past but are now attempting to earn a living for themselves and their families, if they do not indeed pose a threat to national security.

The TSA has developed a list of crimes that would disqualify people from obtaining hazmat endorsements for either a period of several years or for life. This list is overly broad and does not necessarily relate to goal of weeding out people who pose a threat to national security. In addition, it violates due process in that it disqualifies individuals who are only wanted or indicted for certain crimes, but have not convicted.

The IBT believes that any disqualifying crime should be clearly connected with the propensity to engage in terrorist activity. Several of the crimes listed, as horrendous as they are, do not relate to whether or not a person is likely to be a terrorist in the future. Furthermore, conspiracy or attempt to commit many of these crimes is also not an indication of terrorist tendencies. An individual who has been convicted of a crime related to terrorism, espionage, sedition or treason does potentially pose a threat to national security. Therefore, these are the only crimes that should disqualify a driver from receiving a hazmat endorsement. The remaining crimes on the list do not clearly relate to goal of protecting the American people from national security threats and should be removed from the list entirely.

Thank you for giving me the opportunity to discuss this issue with you. I hope that I have made it clear that while the supports the goal of keeping our transportation systems safe and secure, it violates basic freedoms and civil liberties to deny a hazmat endorsement and therefore employment opportunities to such a broad range of people.

Sincerely,

SCOTT A. MADAR, MHS, CIH,  
*Assistant Director, Safety and Health Department*  
CC: HONORABLE LORETTA SANCHEZ,  
*Ranking Member Director, International Brotherhood of  
Teamsters*

