

BEFORE THE
TRANSPORTATION SECURITY ADMINISTRATION
UNITED STATES DEPARTMENT OF HOMELAND SECURITY

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.
IN RESPONSE TO A
INTERIM FINAL RULE, REQUEST FOR COMMENTS

**Security Threat Assessment for Individuals Applying
for a Hazardous Materials Endorsement for a Commercial Driver's License**

Docket No. TSA-2003-14610; Amendment No. 1572-4; RIN 1652-AA17

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TRANSPORTATION SECURITY ADMINISTRATION

I. INTRODUCTION

A. Procedural Statement

These comments are submitted by the Owner-Operator Independent Drivers Association, Inc. ("OOIDA" or "Association") in response to the interim final rule ("IFR") and request for comments published by the Transportation Security Administration ("TSA" or "Agency"), Docket No. TSA-2003-14610; Amendment No. 1572-4; RIN 1652-AA17, published in the Federal Register on November 24, 2004.

The Federal Register notice requests comments on an interim final rule to require states to deny hazardous materials endorsements on the Commercial Drivers Licenses ("CDLs") of individuals who are determined by the Transportation Security Administration to be a potential homeland security threat.

B. Interest of the Owner Operator Independent Drivers Association, Inc.

The Owner Operator Independent Drivers Association, Inc., is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. The more than 119,000 members of OOIDA are small-business men and women in all 50 states and Canada who collectively own and operate more than 172,000 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 mailing address of the Association is:

Owner Operator Independent Drivers Association, Inc.
P.O. Box 1000
1 NW OOIDA Drive
Grain Valley, Missouri 64029

OOIDA is an international trade association representing the interests of independent owner-operators and professional drivers on all issues that affect small business truckers.

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 for commercial drivers. OOIDA is active in all aspects of highway safety and transportation policy, and represents the positions of small business truckers in numerous committees and various forums on the local, state, national, and international levels. TSA's request for comments related to hazardous materials endorsements would directly affect owner-operators, motor carriers and professional drivers, including members of OOIDA.

II. SUMMARY

The Transportation Security Administration ("TSA") has proposed revisions to its threat assessment process for persons obtaining or renewing a hazardous materials endorsement ("HME") on their commercial drivers licenses ("CDLs"). OOIDA believes that the TSA has demonstrated basic respect for driver privacy in the final rule, but there remain some areas for improvement. Privacy is the most important issue for truck drivers concerned about the impending background checks. Their biggest worry is that private information will be misused or that incorrect or ambiguous information will become attached to their professional reputation and work history. Either scenario could put an end to a trucking career. Although the IFR discusses and invites comments on the feasibility of providing the results of a security threat assessment to a driver's motor carrier, no such provision is authorized by the text of the rule.

OOIDA questions whether this idea is contemplated by the appropriate System of Records.

OOIDA also makes several short comments on the procedures contained in the final rule.

III. COMMENTS

A. OOIDA's Privacy Concerns

1. Public Disclosure of an Initial Determination of Threat Assessment Would End a Career.

The most important provision of the IFR to truck drivers is that the TSA will not give to third parties the information used to assess drivers' backgrounds. Truck drivers guard their right to privacy jealously. They are very skeptical whether these background checks will do anything to prevent an individual from obtaining or using a truck containing hazardous materials to commit a terrorist act. If such background checks are going to be performed, however, at a minimum they do not want the exercise to become an excuse for anyone to obtain and use their personal information for any other purpose. For this reason, TSA must not budge on its intent of providing notice of the initial determination of threat assessment only to the applicant.

If a driver's carrier becomes aware of an initial determination of threat assessment, the driver would face certain dismissal before having any opportunity to go through the waiver or appeals process. No carrier would bear the liability of retaining a driver who has been flagged a possible homeland security risk. Nor would they hire such a driver. The cause for a driver's dismissal would in all likelihood become a permanent part of the driver's employment history, making it virtually impossible for the driver to find another driving job.

2. Public Notice of a Determination of an Imminent Threat Would End a Career.

An interim finding that someone is an imminent security threat and immediate loss of a hazmat endorsement would bring a certain end to someone's commercial driving career. Before wielding such extraordinary power, OOIDA believes TSA should do more to minimize the

possibility of making such a determination by mistake and minimize the possibility such a mistake irreparably damages a driver's career. Constitutional guarantees of due process require that an individual be given an accelerated opportunity for a hearing in the waiver or appeals process when the revocation of a right or privilege occurs without a preliminary hearing. Additionally, OOIDA suggests that TSA invite drivers to provide any information related to the subjects that result in the identification of a person as an imminent security threat.

a. Providing An Expedited Hearing After a Finding of Possible Imminent Security Threat.

Given the likelihood that the determination and announcement that a person poses an imminent security threat would destroy that individual's career and permanently tarnish his employment history record, OOIDA believes that Constitutional due process rights guarantee the individual an expedited hearing under the waiver and appeal processes. If there were a mistake in the threat assessment a hearing may be able to identify and correct that mistake and minimize the damage to the driver's career and reputation.

The revocation of a hazmat endorsement and inability to haul hazmat loads would not be the only loss suffered by a person identified to the state and employer as an immediate security threat. The individual would certainly lose their job, get a black mark on their employment history, find it difficult, if not impossible, to find a new job in trucking, lose the ability to make payments on the loan for any trucking equipment they may own, go into greater debt, and have a difficult time supporting their family. Such a black mark on an employment history would also impair the individual from obtaining employment outside of the trucking industry. The appeals process available to drivers who are the subject of a non-public Initial Determination of Threat Assessment (section 1572.141(c) of the IFR), a process that could take longer than 60 days, does

not provide sufficient due process to a driver facing the hardship of the government unilaterally determining and announcing that he is a security threat. OOIDA believes TSA must adopt more expeditious procedures so that drivers who are mistakenly identified as a imminent security threat have the opportunity to act quickly to minimize the impact of this determination.

b. Giving the Driver the Opportunity to Head Off a Possible Finding of Possible Imminent Threat

OOIDA asks the agency to provide more guidance as to what may trigger an investigation of a person as a possible imminent threat and then provide a mechanism for direct communication from a driver to it on any topic the driver believes the TSA needs to gain a full understanding of his background. Such a process would enhance the information the TSA uses to make its threat assessment. It would also give innocent persons a chance to preserve their career that would certainly be destroyed by a mistaken finding that they were an imminent threat.

OOIDA understands the impossibility of anticipating all of the circumstances that may indicate that an individual is a security threat and the need for the TSA to have flexibility in making such a determination. OOIDA is not asking the TSA to tip-off any individual who may be an imminent security threat. But if a driver knows in advance what information in his background may raise the heightened interest of the TSA, both the driver and the TSA would be well served by giving that driver the ability to volunteer any additional information that makes his threat assessment more complete.

B. The System of Records.

OOIDA asks the TSA to explain the relationship between the IFR and the System of Records (“SOR”) referred to in footnote 16 in the IFR. Specifically, OOIDA asks whether the System of Records published September 24, 2004, cited in footnote 16, is the only such SOR that applies to the hazmat threat assessment. Can OOIDA rely upon the September 24 threat

assessment alone to understand what principles the agency applies to the statutory privacy rights of drivers whose information is accessed for hazmat-related threat assessments?

This question arises because an SOR published in the December 10, 2004, Federal Register entitled “Transportation Security Enforcement Record System” seems also to encompass truck drivers undergoing background checks. The December 10 SOR applies to “Owners, operators, and employees in all modes of transportation for which TSA has security-related duties” related to the communication of information to various government agencies at all levels, including the state, “when relevant or necessary to...(g) the issuance, maintenance or renewal of a license, certificate, contract, grant or other benefit.” This description certainly encompasses truck drivers trying to obtain a CDL with a hazmat endorsement from the state. But does it apply to hazmat endorsement related threat assessments?

OOIDA understands that the TSA drafts SORs in broad terms to cover all potential uses of private information, but does such drafting mean that several different SOR’s may apply to the same agency program or activity? Or does the agency intend for one specific SOR to apply to each agency program or activity? OOIDA asks this question because despite the broad language shared by both the September 24 and December 10 SORs notices, there are differences between the two that are of great interest to OOIDA.

To avoid this confusion, OOIDA asks the agency to be more specific in its publication of future SOR notices indicating specifically what program areas each one covers. Not until the present IFR was published on November 24 in footnote 16 did the public have specific notice that the SOR published on September 24 applied to hazmat endorsement related background checks. This was over 30 days after the comment period for that SOR had ended. Certainly the

persons drafting an SOR know and can include a list of current agency programs covered by an SOR. Such notice need not hamper the agency's ability to expand the coverage of an SOR to future programs. But it would give the public better notice of the potential uses of information protected by the privacy act and give them an opportunity to comment.

C. Informing Employers of a Determination of Threat Assessment

OOIDA's interest in the SOR for hazmat background checks concerns the statements in the IFR that the TSA intends to communicate to employers the final determination denying an individual a hazmat endorsement. No provision for such communication is contained in the IFR's regulations. Does the TSA intend to make such a communication without promulgating a specific rule? Or is the TSA using the broad permission granted itself in the applicable SOR to make such a communication? OOIDA reads the September 24 SOR to permit giving such information to third parties "during the course of a security threat assessment, employment investigation, or adjudication of a waiver or appeal request, to the extent necessary to obtain information pertinent to the assessment, investigation, or adjudication." OOIDA does not see how the SOR permits the type of communication to employers discussed by the IFR.

Given the fact that a driver's career may become effectively over once an employer learns of the fact of a TSA investigation or that a negative threat assessment has been, or may be, made, OOIDA requests that the agency publish any future rule detailing the conditions and procedures that must be followed to communicate protected private information to an employer. OOIDA opposes the entire concept of this communication, but wants to exercise its right to comment on and make suggestions about any such proposal so that the agency may implement a policy with the least damage to the driver's privacy rights.

OOIDA opposes the idea that carriers help maintain a web site listing their drivers for the purpose of facilitating the TSA desire to inform employers that their employee is not authorized

to transport hazardous material. This idea raises too many logistical questions. There are over 675,000 registered motor carriers. The average annual driver turnover rate has been reported to be 114%. How will the agency know whether a carrier is keeping up its part of the database? How will it audit carriers for compliance?

It is much more feasible to give carriers the responsibility to monitor the status of their drivers. They already collect information about a driver's CDL when they apply for a job. They will know when the driver's hazmat endorsement will expire. Carriers already have the responsibility under FMCSA rules to review a driver's MVR at least once a year and have access to it year round. The IFR requires states to report the status of an HME on the driver's MVR record. OOIDA suggests that carriers be given a reasonable period of time after this information becomes available on the driver's MVR to inform themselves of a driver's endorsement renewal status. Until this time expires, carriers should be protected from liability for dispatching a driver to a hazmat load after his HME has been revoked.

D. The Foreign Driver Issue

It is bad public policy to allow persons who are not citizens or permanent residents to obtain an HME or to 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 to haul hazardous materials with a U.S. issued HME. It is grossly unfair to U.S. citizen drivers to allow persons whose backgrounds cannot be effectively checked to have the same rights and privileges as U.S. citizen drivers.

1. Mexican and Canadian Drivers

OOIDA endorses the concerns raised by the National Tank Truck Carriers regarding the resolution of the issue of Mexican and Canadian drivers' compliance with these rules before the HME threat assessment requirement be finalized. OOIDA sees no rationale, from a fairness or public policy standpoint, for giving 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 threat assessments 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 weakening of the immigration status requirement.

2. Non-Citizens and Non-Permanent Resident HMEs

In justifying the weakening of the original hazmat threat assessment rule to allow non-citizens and non-permanent residents to obtain an HME, TSA makes no analysis based on homeland security policy concluding that such persons may be granted HMEs without any diminution in security. The only reasons set forth in the IFR 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 reasons bear on the risk that this population may pose to homeland security.

OOIDA believes that an examination of relevant issues to homeland security would lead to a stronger argument against weakening the original rule. The fact that a person has come into

this country recently gives that person a greater likelihood that they will survive an 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 person committed crimes or acts in their country of origin that would disqualify them from holding an HME? This is the kind of advantage a terrorist would try to exploit. The focus of Homeland Security on protecting our country against threats from foreign persons underscores the seriousness of this issue. How can the TSA justify allowing persons whose background they can't examine take the jobs of U.S. citizens and permanent residents whose background they can examine? Under current proposals, TSA ignorance is their competitive advantage.

If by the IFR the TSA is giving the industry the signal that it will consider how its decisions affect various economic interests in interstate commerce, OOIDA would be glad to submit voluminous comments demonstrating how motor carrier's use of lower paid, less experienced recent immigrants drives down truckers' wages and decreases highway safety. High driver turnover rate in the trucking industry is not for lack of individuals willing to drive, but how drivers are poorly compensated and poorly treated by motor carriers. The fact that similar economic issues appear to have trumped any homeland security analysis indicates TSA may share some of OOIDA's doubts that these rules will have much of an effect on Homeland Security.

E. Firearm or Other Weapon Interim Disqualifying Criminal Offense

OOIDA is concerned that the interim disqualification related to firearms or other weapons is defined too broadly and may disqualify persons who are not a security risk or terrorist threat. The two biggest violations related to firearms that would affect truckers are unlawful "possession" and "transporting." The myriad of state and local firearm laws creates the most problems for truckers. What is legal in one state or locality may be unlawful in the next. A driver who carries a firearm for protection may legally possess and/or transport that firearm in one state or locality but not in another. OOIDA does not ask the TSA to condone the violations of state or local firearms laws. But if an individual has all the proper permits and licenses in their home state or locality for a firearm, but is found not in compliance when traveling through another state or locality, this fact does not indicate that the person is a terrorist threat.

Drivers are even more bedeviled by the term "weapon." Different states have different definitions for weapon. This could lead to one person legally engaged in an activity in one state being granted a HME while a person engaged in that same activity, but illegally, in another state being denied an HME. TSA's definition using the catch-all language "but is not limited to" adds to the confusion, especially when drivers travel from state to state and do not know the finer points of the law in each state. For example,

- * One OOIDA member was arrested in Michigan and charged with possession of a deadly weapon for having a hunting knife in his cab.
- * The California Highway Patrol warned one driver, about carrying a tire thumper next to his seat. It had a cord through the grip when it was purchased and the officer said that would be considered a belly club and unlawful to possess. Also, just carrying it within arms reach made it a weapon.
- * One OOIDA member was arrested for carrying a flare gun. He was also told by a police officer that carrying a claw hammer under his seat made it a deadly weapon.

Any number of common, ordinary items may or may not be considered a weapon under different state or local laws. Legal possession of firearms or many ordinary items does not indicate the owner is a terrorist or security threat. OOIDA urges the TSA to narrow the definition of this disqualifying offense to more accurately identify the type of violent or deceptive wrongdoer that TSA considers a terrorist threat.

F. Advance Notice of Renewal to Drivers

OOIDA strongly believes that states should warn drivers of the expiration of the HME at least 120 days in advance. This amount of time is necessary to prevent interruption in a driver's possession of a valid HME under most scenarios contemplated by the IFR. The original rule had a 180/90 day warning period. Despite an acknowledgment in the IFR of the concerns from the trucking industry that this period be sufficiently long, the new rule shortens the warning period. No justification is made for this rule change. It is acknowledged that this rule does not prevent a person from initiating the renewal process earlier than 60 days out, but this statement does not resolve the issue. Drivers who are out on the road for weeks at a time and do not receive their mail frequently need a great deal of notice in order to begin their renewal process in a timely fashion.

OOIDA can think of no reason, either in the burden on a state or in homeland security public policy, that the amount of advance warning cannot be 120 days rather than 60. The TSA may also find benefits from such advanced notice. They are likely to face less urgent and more complete applications for a waiver or appeal from drivers whose endorsement is not soon set to expire. OOIDA urges the TSA to roll back the renewal notice time to 120 days or explain why a 60 day period is necessary.

G. Practical Issues Not Raised by the IFR

OOIDA would like to ask several practical questions of TSA to clarify issues not addressed by the IFR.

- * Can an individual re-apply for an HME at a later time after a final determination of threat assessment? Some disqualifying issues could be cured by time and responsible behavior.
- * Will states need to re-issue the physical license for a driver after a final determination of threat assessment has been made to remove the endorsement? How and on what time frame will states initiate this action?
- * The five year expiration of an HME in the IFR does not necessarily coincide with different lengths of state expiration periods for CDLs. Will states be required to display a different expiration date for the hazmat endorsement on the license?

H. Some Individuals Should Not Possess a CDL

OOIDA suggests, as it did in previous comments, that the TSA may be justified in denying or revoking the full CDL, not just the hazmat endorsement, of any individual it discovers does not meet the basic requirements for a CDL. The TSA proposes that when a background check reveals an outstanding arrest warrant, it will notify the appropriate law enforcement officials. Similarly, OOIDA encourages the TSA to act beyond the central focus of the statutory mandate and act to deny CDLs to certain individuals. In specific circumstances, current law would support such action. Certain information that the TSA proposes to use to deny persons a hazmat endorsement is the same information that supports the denial of a full CDL. This information includes the work-status of non-citizens.

1. Persons who do not have the legal right to work in the United States Should Not Possess a CDL

When the TSA conducts a background check to determine whether a person is a U.S. citizen or legal resident, the TSA will also learn whether or not that person has the appropriate immigration status to work as a truck driver in the United States. If they do not have the legal right to work in the United States as a truck driver, the FMCSA or TSA should instruct the

appropriate state to revoke that individual's CDL. In some parts of the trucking industry, foreign visitors working without proper permission are a significant problem.

It is common for some recruiters and motor carriers to bring persons into the country under H2-B visas as so-called "seasonal" workers and then help them ignore the time constraints of their work permits. When any person has exceeded the time limit of their visa, does not have permission to work in the United States, or does not have permission to work in a job requiring a CDL, they should be denied a CDL or their current CDL should be revoked.

The information necessary to make this determination will be discovered during the TSA's check of an applicant's citizenship or immigration status. At the same time a state is informed that the individual should not be given a hazmat endorsement, the state can be told that an individual's CDL should be revoked.

2. Why Should Persons Identified as Potential Homeland Security Threats Possess a CDL?

If TSA is confident that its background check procedures and disqualifying criteria truly identify persons who are homeland security threats, then OOIDA does not see why such persons should be able to maintain their CDL, not just a hazardous materials endorsement. As OOIDA has previously stated, doing background checks of truck drivers is not going to prevent terrorists from obtaining trucks or hazardous materials. This proposal will, however, close off one method of gaining easy access to hazardous materials or commercial motor vehicles by unstable or potentially dangerous persons. The federal rules for obtaining a CDL are so lax that they act as an open invitation to anyone who wants to get behind the wheel of a truck. There are certainly many ways a terrorist could use a truck to commit a terrorist act without utilizing hazardous

materials. This regulatory scheme will be more effective if it takes the next step and closes the door to CDLs for such persons.

IV. CONCLUSION

Just as TSA remains vigilant protecting our nation's transportation security, OOIDA remains vigilant protecting the privacy interests of its drivers. OOIDA requests that TSA make several improvements to the threat assessment process to both serve the TSA well and further protect the privacy rights of drivers. They include the need to provide persons found to be an imminent security threat an expedited hearing. TSA must also pay particular attention to the implications of granting HMEs to persons from other countries whose backgrounds may not be comprehensively assessed. This is an issue with homeland security implications and one of fairness to U.S. citizens and permanent residents. OOIDA understands that the process of implementing the Congressional mandate has been a challenge to TSA and has taken a great deal of time. TSA must take the time necessary, however, to put in place a rule that is fair and that has a hope of making improvements to homeland security.

Respectfully submitted,

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