

ATA supports the use of background checks to ensure the security of our transportation system, and the trucking industry continues to be a strong proponent and partner of ensuring our national security as well as our economic wellbeing. It is important to note that CHRCs are performed on truck drivers not only by government agencies to fulfill statutory mandates and regulations, but also by motor carriers as terms of employment to ensure the safety and security of an operation and reduce the potential for cargo theft or other potential illicit activities. Employer based CHRCs are most often done through third party vendors.

With this framework in mind, ATA offers these comments to the DOJ, focusing on the following particular issues:

- **Security Threat Assessments (STA) Based on Risk:** Regulations and programs that require security threat assessments should focus on employees that handle high risk materials or are in security sensitive positions rather than requiring all employees to undergo a CHRC.
- **Name-based vs. Fingerprint-based:** Name/biographical-based CHRCs provide a high degree of certainty in searching national criminal databases and should be considered as the first alternative rather than always requiring fingerprint-based checks. Such a process would vastly improve the utilization of both private and public sector resources when entities must examine a large population of employees. Officials should collect fingerprints if a CHRC results in a potential false positive to further investigate an individual's CHRC, or for more highly sensitive security threat assessments. Again, such policies must be based on risk analysis rather than undertaking "blanket-cover" fingerprint checks.
- **Consolidation and/or Coordination:** DOJ, in conjunction with the Department of Homeland Security (DHS), the Department of Transportation (DOT), and other relevant agencies, should develop a consolidated, single window system for background checks that satisfy the various mandates being imposed on industry. At a minimum, federal government agencies should coordinate their STA policies and requirements to accept other agencies' STAs for their own background check compliance purposes.
- **State Based Criminal Histories and Federal Preemption:** For national security purposes, the federal government should require states to transmit data and information in their state criminal databases through the Interstate Identification Index (III), the Integrated Automated Fingerprint Identification System (IAFIS), and to ensure full participation in the National Crime Information Center (NCIC) 2000 database. In addition, federal agencies performing CHRCs on government and private sector employees should qualify such checks as being fully compliant with other federal, state, and local CHRC requirements preempting state and local authorities from issuing an assortment of differing CHRC criteria and standards.

- **Provide Industry Access to Federal Databases for CHRC:** ATA supports DOJ increasing the scope of industries granted access to federal databases for conducting CHRCs. Just as the banking and childcare-related industries are granted access, the trucking industry should receive the same access and associated benefits.

Multiplicity of Background Checks

Today, because of the lack of a national, uniform, coordinated transportation wide screening system and/or policy, a commercial truck driver in the United States could be subject to duplicative background checks against the same national databases under the following regimes:

- *Air Transportation Security Act (ATSA)*(P.L. 107-71); The Transportation Security Administration (TSA) has issued an air cargo rule, including a name-based background check for compliance with CHRC requirements;
- *Maritime Transportation Security Act (MTSA)* (P.L. 107-295); The Coast Guard, as the implementing agency, is using the Transportation Worker Identification Credential (TWIC) program, under development by TSA, for compliance with CHRC requirements;
- *USA PATRIOT ACT* (P.L. 107-56) and *Safe Explosives Act* (P.L. 107-296); TSA has issued rules requiring all commercial drivers with Hazardous Materials Endorsements (HME), which also covers explosives, to undergo a CHRC;
- *Free and Secure Trade (FAST) Program*: U.S. Customs and Border Protection developed this voluntary supply chain security program that requires drivers to undergo a CHRC through U.S. and Canadian databases;
- *Department of Defense cargo*; The Defense Industry Security Clearance Office (DISCO) issues secret clearances to trucking company drivers and other employees transporting or handling DOD cargo; and,
- *State CHRC requirements*; some states have or are considering legislation requiring transportation workers to undergo a CHRC for access to certain facilities. Florida legislation requires a CHRC for workers at port facilities including truck drivers.

The ubiquitous nature of trucking operations throughout our nation's transportation system has created a structure where a driver will pay \$39 dollars for an air cargo check, \$94 for a hazardous material background check, \$50 for a FAST card, and \$85 for a Florida Uniform Port Access Credential (FUPAC)¹, totaling \$268. Of course, this total cost does not take into account lost wages and the inconvenience of time spent to enroll in each of these programs. This present state of affairs for undergoing security threat assessments is

¹ Florida Statute S.311.125

neither cost effective nor time efficient; burdens both employer and employee resources; burdens government resources for undergoing multiple CHRCs; and, undermines the objectives of protecting both our national and economic security.

Instead, ATA advocates that the federal government coordinate and consolidate the policies, systems and processes for security threat assessments required of transportation workers, especially truck drivers. Government should provide either:

- a. A single transportation wide identity credential that satisfies the mandates of the various legislative mandates (TWIC could potentially meet this goal); or
- b. Develop a coordinated policy so that the CHRC for one program satisfies the requirements of other similar programs in other transportation operations and modes.

In addition, in order to further improve efficiency and effectiveness of such CHRCs on a nationwide basis, any effort should also include federal preemption of any state and/or local security threat assessment requirements for commercial truck drivers.

Risk Assessment and Name-based vs. Fingerprints-based checks

Another critical aspect of conducting a CHRC is deciding who should undergo such a check based on the level of risk posed by the type of operation (e.g. requiring access to secure facilities) or by the type of cargo. ATA believes that federal government agencies must apply risk-based assessment tools to identify which segments of the transportation population require a background check, if at all. Once the determination has been made as to who is required to undergo a CHRC, then a further determination must be made as to who requires a name-based check versus those that require a fingerprint-based background check.

ATA's experience with the implementation of the background check program to ensure truck drivers in possession of a HME do not pose a security risk provides a clear illustration for the need to employ risk-based assessments in evaluating who should be required to undergo a CHRC. ATA believes that drivers licensed to transport hazardous materials should only undergo a fingerprint-based background check if they transport highly sensitive hazardous materials that represent a security risk, as classified by DOT, in consultation with DHS and the U.S. Department of Health and Human Services. HME licensed drivers that will not transport such materials should only undergo a name-based background check, which has already occurred as described below.

In 2004, TSA implemented Phase One of the HME background check process by checking the names and biographical data of 2.7 million HME holders against terrorist-watch lists/databases. In correspondence to ATA regarding this program, TSA states that the agency checked the III using names and biographical data, with the agreement and consent from the National Crime Prevention and Privacy Compact Council (Compact Council). According to TSA, the Compact Council agreed to the name-based CHRCs until TSA developed a fingerprint-based collection system to check the HME driver population.

TSA stated that the name-based background checks resulted in approximately 100 hits, though it is not clear to ATA how many of those required further investigation.

According to TSA, these name-based checks “assessed the risks associated with the transportation of hazardous materials via commercial vehicle... and that the risks are effectively addressed”.² Considering this statement, ATA suggested to TSA that name-based checks should be sufficient to check the HME-licensed population of drivers. ATA further suggested that TSA delay the fingerprint-based checks on hazmat drivers until the roll out of the TWIC card to prevent the same drivers from submitting to a duplicative background check, resulting in additional fees. TSA stated that it was the Compact Council’s decision to require a fingerprint based check of all HME holders and could not wait until the TWIC was finalized. Thus, TSA implemented the second phase of the USA PATRIOT Act in 2005, requiring new HME applicants, beginning January 31, and those renewing or transferring from one state to another, beginning May 31, to undergo fingerprint-based background checks.

Unfortunately, in its implementation of Phase Two, TSA did not design a national, uniform system for the HME background check process, but instead gave the states the option to use a system developed by a TSA contractor, or the states could develop their own process. The result is that 33 states (including the District of Columbia) have opted to use a TSA contractor while 17 states have set up their own individual systems and fees, including higher fees for performing CHRCs on state criminal databases.

Through our experience with the HME background check process, the various other programs and rules requiring a CHRC, and our knowledge of the transportation industry’s security issues, we make the following comments to the specific issues presented in the notice:

1. The effectiveness and efficiency of utilizing commercially available databases as a supplement to IAFIS criminal history information checks.

ATA does not believe there is a need to access commercially available databases for criminal history record checks for the purpose of meeting statutory mandates or other security threat assessment programs developed by government agencies. The FBI criminal databases should be the central repository of all criminal background checks, including all the criminal history information located in state databases.

2. Any security concerns created by the existence of these commercially available databases concerning their ability to provide sensitive information that is not readily available about law enforcement or intelligence officials, including their identity, residence, and financial status.

ATA does not claim any specific expertise in this area of policy. However, the recently reported security breaches into commercially available databases point to serious concerns as to their ability to safeguard the information in their systems.

² 69 Fed Reg at 17971

3. The effectiveness of utilizing State databases.

Our experience with the federal HME background check program has shown that state databases do not fully report criminal records information through the III to IAFIS, and potentially also NCIC 2000. This, in effect, renders these databases incomplete and jeopardizes the accuracy of security threat determinations. Some states have determined a need to close this deficiency by requiring an additional CHRC through their state criminal history database. This fragmented approach to conducting a security threat assessment for compliance with a federal requirement is highly inefficient, increases the costs of the background check, lengthens the processing time, and applies uneven standards from state to state. It is imperative that the federal government require the states to share complete criminal history records information to provide a national, single source system for conducting and processing security threat assessments. Incorporating such state based information would greatly improve the accuracy and validity of both name-based and fingerprint-based background checks when checking national crime databases.

4. Any feasibility studies by the Department of Justice of the resources and structure of the Federal Bureau of Investigation to establish a system to provide criminal history information.

ATA encourages DOJ to consider a feasibility study for expanding the National Instant Criminal Background Check System (NICS) developed for implementation of the Brady Act (P.L. 103-159) to sectors of the economy that require an expedited CHRC. The NICS system includes database information from the NCIC, III, and NICS Index. Establishing a similar expedient system for transportation workers would significantly improve the current wait times that truck drivers now face in undergoing CHRCs. With wait times from 30 days up to 120 days to get results back for the present HME system, many motor carriers have lost qualified drivers who seek employment elsewhere during this delay period, exacerbating our industry's driver shortage problem.

5a. Privacy rights and other employee protections, including employee consent.

ATA believes an employer should have access to criminal history information with the employee's prior consent.

5b. Privacy rights and other employee protections, including access to records used if employment was denied.

A clear system should be developed for employees to appeal the result of their background checks if employment was denied, including access to their records to dispute and correct any erroneous information.

5c. The disposition of the fingerprint submissions after the records are searched.

ATA advocates that fingerprints be submitted once and stored on file for future access to improve process efficiency and eliminate any future additional costs. Under the current HME program, TSA does not require either the states or the TSA collection agents to transmit the fingerprints collected for a security threat assessment for storage. Once the FBI receives and processes the fingerprints the collectors purge the prints from their systems. Failure to pass all fingerprints through a common clearinghouse for storage in a common database will require their re-collection upon each HME renewal, resulting in drivers incurring additional costs.

5d. Privacy rights and other employee protections, including an appeal mechanism.

Government should provide an appeals and waiver mechanism for employees to dispute a decision which prohibits them from qualifying for a position based on background check results.

6. The scope and means of processing background checks for private employers utilizing data maintained by the FBI that the Attorney General should be allowed to authorize in cases where the authority for such checks is not available at the State level.

ATA supports allowing private employers access to DOJ federal criminal databases. For several years, the trucking industry has sought access to federal criminal databases to alleviate the problems of cargo theft and security that our industry faces on a daily basis. The trucking industry seeks access similar to that afforded to a number of industries, including the banking industry and child-care organizations, to perform pre-employment background checks on potential employees.

7. Any restrictions that should be placed on the ability of an employer to charge an employee or prospective employee for the cost associated with the background check.

The decision as to who pays for the costs associated with the required background checks is best left between the employer and the employee. Currently, the trucking industry is experiencing a severe driver shortage. In this environment drivers can easily switch employers with some frequency. To attract and retain new drivers, companies frequently cover the associated costs of the necessary security threat assessments. More seasoned drivers often take their valid security credentials with them from one company to another or opt to pay for their own background checks in an effort to secure faster employment.

ATA sees no necessity in placing restrictions or regulations on employers' personnel practices as they relate to security background checks. Rather than focusing on whose responsibility it is to cover the costs of mandated security background checks, government should be actively seeking solutions that will eliminate the redundant

background check requirements which are imposing unnecessarily higher costs to both employers and employees.

8. Which requirements should apply to the handling of incomplete records?

Again, ATA strongly supports requirements that would lead to the states providing complete criminal records to the national database to ensure that government is accurately making security threat determinations based on complete information generated through a single source.

9. The circumstances under which the criminal history information should be disseminated to the employer.

The purpose of conducting driver background checks is to ensure that they do not pose a security risk to the transportation system when transporting security sensitive cargo. To make this determination, it is imperative that employers receive the results of a CHRC, with the prior consent of the employee. Without such information, the employer must rely upon the employee to reveal the results of a CHRC. As such, trucking companies may unknowingly continue to dispatch drivers who are deemed security risks. This is a significant security loophole that should be closed.

10. The type of restrictions that should be prescribed for the handling of criminal history information by an employer.

As stated above, an employer has a legitimate reason and an obligation to review an employee's CHRC results. The employer also has an obligation to keep the results confidential, as they would any personnel records, and to use the information solely for the purpose of determining an employee's security risk and suitability for employment.

11. The range of Federal and State fees that might apply to such background check requests.

The attached fees chart (see Attachment I) reflects the cost of conducting a security threat assessment under a variety of transportation security programs. This partial list of programs underscores both the disparity of costs and types of fees charged under different programs. ATA emphasizes the need for developing a coordinated/consolidated approach for compliance with various background check programs in order to minimize the impact of such fees upon employers and employees. Such systems should be developed on a nation-wide basis to ensure uniformity of treatment and to spread the costs throughout a larger population of employees required to undergo a CHRC.

12. Any requirements that should be imposed concerning the time for responding to such background check requests.

The entire CHRC process, if properly implemented, should be expedited to take anywhere from 30 seconds to no longer than two hours for a name-based CHRC process. For a fingerprint-based process, a reasonable period should be 24 hours but no longer than 10 days from application to notification of the results. In the trucking industry, lengthier timeframes can put drivers out of work while they await the results of their background checks and cause serious disruptions to a trucking company's operations. Currently under the HME process, some states take up to 120 days to return a security threat status to drivers. This unfavorable timeframe could be significantly reduced with the implementation of a consolidated, national information system to process background checks such as that described under the NICS for the Brady Act.

13a. Any infrastructure that may need to be developed to support the processing of such checks, including the means by which information is collected and submitted in support of the checks.

As discussed in item #5c, ATA supports the retention and storage of fingerprints collected in a common database where they can be retrieved for compliance with transportation security programs, including the various regimes listed earlier in this document. This enhancement would require a clearinghouse service for the trucking industry similar to those currently established in other transportation modes, such as for airport workers. Storing individual applicant prints will result in significant efficiencies and cost savings for both industry and government.

13b. Any infrastructure that may need to be developed to support the processing of such checks, including the system capacity needed to process such checks at the Federal and State level.

Before focusing on developing further infrastructure, DOJ needs to review what present infrastructures exist at the federal, state, and local levels that could be leveraged to support the processing of CHRCs. Facilities such as airports, maritime facilities, police stations, postal offices, federal office buildings, could function well for the purpose of collecting and processing background checks. Considering the potential population of transportation workers required to undergo CHRCs under the various security regimes, DOJ and other agencies, in consultation with industry stakeholders, must develop systems and locations that are convenient and accessible for submitting biographical and/or biometric information.

14. The role that states should play.

As discussed above, it is vitally important that states establish a reporting mechanism to share criminal records history information to IAFIS and the NCIC. States must also move to amend any legislation that prohibits them from sharing their records with the federal government.

It is also important to note that states are being required to establish new minimum security standards under the Real Id Act (P.L. 109-13) for the issuance of drivers' licenses. States are required to certify if a non-U.S. citizen seeking a license has the proper legal immigration status, in addition to having to check other specific documentation for identification purposes. Implementation of the Real Id Act is likely to result in states having to develop information systems to verify such status and information. These requirements might afford an opportunity for DOJ and DHS to work with the states in establishing a NICS like system to provide CHRCs to people seeking a STA to be in compliance with statutory and regulatory security requirements.

Conclusion

ATA appreciates the opportunity to provide comments on ways to improve procedures for conducting criminal history background checks for non-criminal purposes. To summarize, ATA provides the following recommendations for your consideration:

- Consolidate and coordinate security threat assessment requirements. The Department of Justice and the Department of Homeland Security must begin deliberate efforts to address the overlapping federal, state, and local requirements that do not provide additional security value.
- Determine required security threat assessment based on risk. In the case of the trucking industry, only drivers who transport highly hazardous materials or require access to security sensitive areas of a facility should require a fingerprint-based background check. Name-based background checks should sufficiently serve as a requirement for drivers who transport hazardous materials that do not pose a security risk.
- Grant the trucking industry access to federal criminal databases to conduct CHRCs. The access should be equivalent to what the banking and childcare industries are afforded. This would allow the trucking industry to improve our industry's ability to comply with statutory and regulatory mandates and further protect the transportation system from individuals who may pose a security threat.
- Require that the federal government standards for conducting and processing background checks preempt all other state and local requirements. Multiple standards from state to state impose unnecessary, costly, and burdensome requirements on industry.

ATA and the trucking industry remain strongly committed to securing our nation's transportation system from acts of terrorism, and to ensure our country's economic wellbeing. We continue to offer our expertise and industry perspective to work in partnership with DOJ and DHS to develop a national background check policy that industry can support and provides meaningful security benefits.

Should you have any comments or questions, please contact Martin Rojas (703) 838-7950 or Jeanne Dumas (703) 838-1703 in ATA's Safety, Security and Operations Department.

