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The safety and security association of the commercial explosives industry.

June 6, 2003

Dockets Management Facility
Room PL 401
US Department of Transportation
400 Seventh St., SW
Washington, DC 20590

RE: Docket No. FMCSA-2001-11117¹-20

Dear Sir or Madam:

On behalf of the Institute of Makers of Explosives (IME), I am submitting comments to the Federal Motor Carrier Safety Administration's (FMCSA) interim final rule (IFR) that implements §1012 of the USA Patriot Act by prohibiting States from issuing, renewing, transferring or upgrading a commercial driver's license (CDL) with a hazardous materials endorsement unless the CDL applicant has submitted to a background check conducted by the Transportation Security Administration (TSA) and determined by TSA not to pose a security risk warranting denial of the endorsement. This IFR is also attempts to resolve jurisdictional issues between agencies of the Department of Justice (DOJ) and the Department of Transportation (DOT) concerning the handling of explosives during transportation.

Interest of the IME

The IME is the safety and security association of the commercial explosives industry. Our mission is to promote safety and the protection of employees, users, the public and the environment; and to encourage the adoption of uniform rules and regulations in the manufacture, transportation, storage, handling, use and disposal of explosive materials used in blasting and other essential operations. Commercial explosives are transported and used in every state. Additionally, our products are distributed worldwide, while some explosives, like TNT, must be imported because they are no longer manufactured in the United States. The ability to transport and distribute these products safely and securely is critical to this industry.

¹ 68 FR 23844 (May 5, 2003).

Background

As enacted in 2001, the USA Patriot Act gave DOT authority to determine standards and procedures for security clearances of operators of commercial motor vehicles transporting hazardous materials. DOT, subsequently, delegated this authority to TSA while reserving related responsibilities to the Federal Motor Carrier Safety Administration (FMCSA).² Meanwhile, TSA has transferred to the Department of Homeland Security (DHS).

Since 1970, a provision of Federal Explosives Law (FEL) has enumerated several disqualifications applicable to a number of persons, including persons who transport explosives, a subset of hazardous materials.³ Yet, these disqualifications were not imposed on transporters of these materials because the FEL excepts from its provisions the transportation of explosives which are regulated by DOT.⁴ Late last year, Congress enacted the Safe Explosives Act (SEA), which, among other things, expanded the existing list of FEL disqualifications, but did not alter the transportation exception.⁵ While the legislative history of the SEA is totally silent on the transportation exception, the FEL's implementing agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), determined, without notice and comment, that the FEL disqualifications as amended by the SEA were "self-implementing," that the transportation exception has never been effected for persons who may possess explosives in the course of transporting explosives in commerce, and that the only reason that the transportation community was not more aware of its compliance obligation is that ATF has not exercised its authority to enforce these requirements.

ATF's revised interpretation of FEL led to a self-imposed embargo on the transportation of commercial explosives by all North American railroads, vessel operators serving US ports, and some motor carriers. ATF stated that it had not determined whether or not DOT rules applicable to persons transporting explosives by air are adequate to effect the FEL transportation exception.⁶ TSA's transfer to DHS complicated this jurisdictional issue inasmuch as the FEL transportation exception applies only to transportation regulated by DOT.

In response to the disruption from frustrated commercial explosives shipments otherwise in full compliance with law caused by ATF's revised interpretation of the FEL transportation exception, DOT/TSA have exercised their statutory authorities and implemented a number of interim final rules to invoke the transportation exception for commercial movements.⁷

² 68 FR 10988 (March 7, 2003).

³ 18 U.S.C. 842(l)(1) - (4).

⁴ 18 U.S.C. 845(a)(1). Provisions related to plastic explosives are not subject to the exception.

⁵ PL 107-296, Title XI, Subtitle C.

⁶ Recent Regulations Issued by the Transportation Security Administration on Commercial Transportation of Explosives, February 11, 2003.

<http://www.atf.treas.gov/explarsen/safexpact/expltransregs.htm>

⁷ 68 FR 6083 (February 6, 2003), 68 FR 23852 (May 5, 2003), 68 FR 23844 (May 5, 2003), and 68 FR 23832 (May 5, 2003).

IME is grateful to DOT/TSA for their united efforts to address this jurisdictional issue as swiftly and comprehensively as possible. These comments address the portion of the rules implemented by FMCSA.

Areas of Support

IME fully supports FMCSA's determination that this IFR together with the hazardous materials regulations (HMR) of the Research and Special Programs Administration (RSPA), and FMCSA's drug and alcohol testing and CDL regulations which incorporate by reference TSA's standards for obtaining a hazardous materials endorsement occupy the field of regulation necessary to assess and control the security risk presented by "persons engaged in the commercial transportation of hazardous materials by motor vehicle."⁸ This determination meets the conditions imposed by DOJ to effect the transportation exception and shields persons engaged in the commercial transportation of hazardous materials by motor vehicle from prosecution under the FEL.

IME fully supports FMCSA's determination to adopt RSPA's placarding standards as the trigger for federal background checks of drivers engaged in hazardous materials transportation. As noted, "the HMR do not require placarding for the transportation of all hazardous materials because [RSPA] has determined that some such materials do not pose serious risks in smaller quantities."⁹

IME fully supports FMCSA's determination, both from a statutory and a risk assessment perspective, to apply the federal background check requirement to all placarded loads, not just placarded Class 1 shipments. A number of risk assessments of hazardous materials in transportation show that explosives do not pose the greatest threat in commercial transportation.¹⁰

IME fully supports FMCSA's determination to use the CDL and the hazardous material endorsement as the credential to verify that a commercial motor vehicle operator has a security clearance. The text of the USA Patriot Act was less than clear about what credential was at risk if a driver was determined to present a security risk while engaged in the commercial transportation of hazardous materials by motor vehicle. The only rational interpretation of the USA Patriot provision is that provided by FMCSA.

IME fully supports FMCSA's determination that the consequence for a driver who cannot meet the security requirements of the IFR is a revocation of the hazardous materials transportation endorsement only.

IME fully supports FMCSA's determination that its rules, together with RSPAs and TSAs companion rules, address the security risk of "persons," not just drivers, engaged in the

⁸ 68 FR 23846 (May 5, 2003).

⁹ 68 FR 23845 (May 5, 2003).

¹⁰ Comparative Risks of Hazardous Materials and Non-Hazardous Materials Truck Shipment Accidents/Incidents, March 2001, <http://www.fmcsa.dot.gov/Pdfs/HMRiskFinalReport.pdf>

commercial transportation of hazardous materials by motor vehicle.¹¹ Clearly, "persons" other than drivers handle hazardous materials in the course of transportation. To the extent such persons "possess" commercial explosives during this time, these persons do not default to ATF's personnel security checks, nor are they subject to prosecution under the FEL.

IME fully supports FMCSA's determination to require renewal of a CDL requiring a hazmat endorsement every five years. We believe this is an adequate interval to reassess the qualification of hazmat drivers.

Issues Needing Clarification

FMCSA defines "alien" to mean "any person not a citizen of the United States." The USA Patriot Act uses another definition of "alien" that, along with citizens of the United States, also excludes persons who are nationals of the United States.¹² In the preamble to the IRF, FMCSA acknowledges this fact stating that "'alien' has the same meaning given the term in Sec. 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)), i.e., any individual not a citizen or national of the United States." (Emphasis added.) FMCSA's rules should be amended to be consistent with this definition.

Issues of Concern

FMCSA states that there is no preemptive effect on State law as a result of this IFR.¹³ FMCSA, TSA, and RSPA's USA Patriot Act IFRs all have different statements about the preemptive effect of these rules. Such statements can only lead to misunderstanding and uncertainty as, over time, non-federal security requirements are challenged. Some States have already enacted legislation they consider necessary to carry out the mandates of the USA Patriot Act for hazmat driver background checks. The prospect of duplicative, conflicting, or non-reciprocal non-federal background checks in light of DOT/TSA USA Patriot Act authority prompted IME to join with a number of other hazmat industry associations last year to voice concern about this issue.¹⁴ Independent state action also prompted industry to support legislative clarification that the preemptive authority of FHMTL extends to non-federal security issues arising under FHMTL or requirements of DHS.¹⁵ As a result of this legislative clarification, RSPA's companion rule to this IFR "preempts State, local, and Indian tribe requirements" that violate any of the preemptive authorities of FHMTL concerning background clearance of transportation workers, including drivers subject to TSA's requirements.¹⁶ However, the preemptive authority of the FHMTL limited to the extent that the non-federal requirement is "authorized by another law of the United States."¹⁷ FMCSA's IFR should acknowledge DOT's authority under the FHMTL to

¹¹ 68 FR 23846 (May 5, 2003).

¹² 8 U.S.C. 1101(a)(3), "The term 'alien' means any person not a citizen or national of the United States."

¹³ 68 FR 23847 (May 5, 2003).

¹⁴ Letter to Norman Y. Mineta, Secretary, DOT, from Cynthia Hilton & Paul Rankin, Interested Parties for HMTA Reauthorization, February 15, 2002.

¹⁵ PL 107-296, Section 1711.

¹⁶ 68 FR 23841 (May 5, 2003).

¹⁷ 49 U.S.C. 5125(a).

prosecute applications for preemption of non-conforming, non-federal transportation worker background clearance requirements.

We, better than some, appreciate the speed with which TSA/DOT have moved to "regulate" security standards of transportation workers. Regrettably, this haste has put FMCSA in a position of releasing a rule without closure on how the application process, fingerprint collection, and the periodic renewal of CDLs with hazmat endorsement is going to work given the variations among state licensing programs. If legislative changes are needed at the state level within the 180-day window set by this IFR, this may not be possible. Some state legislatures do not even meet annually. We do believe that FMCSA is on the right track with its outreach to state motor vehicle. In the short-term, perhaps the solution is to continue to rely on a name-based security check protocol until FMCSA can be assured that a fingerprint-based clearance system is in place. Additionally, FMCSA should clarify the status of a driver's CDL hazmat endorsement when, if for no fault of the driver, TSA is unable to complete its processing in a timely manner.

Outstanding Issues

ATF has said that when DOT issues background requirements for other classes of transportation workers that ATF, with DOJ, will examine the standards to see if they are sufficient to effect the transportation exception of FEL.¹⁸ We understand that ATF, and DOJ, participated heavily in the crafting of this and other USA Patriot Act rulemakings, and that these agencies agree that these rules are sufficient to effect the FEL transportation exception for assessing security risks of persons engaged in the transportation in commerce of explosives. While we welcome ATF/DOJ's willingness to relinquish FEL authority over transportation in commerce, we question ATF/DOJ's interpretation of its authority in a manner allowing it to withhold the effect of the transportation exception once DOT/TSA act pending a determination of regulatory sufficiency. FEL provides that the transportation exception be effected when any aspect of the transportation of explosive materials is regulated by DOT and its agencies.¹⁹ The only legislative history on the provision states that FEL "is not meant to affect aspects of the transportation of explosive materials regulated by [DOT]."²⁰ (Emphasis added.) FEL does not say that the exception is effective only after approval of the ATF or DOJ. The notion that DOJ/ATF are the arbiters of the sufficiency of DOT/TSA rules for purposes of the FEL transportation exception has implications for this and future rulemakings. This rule, the other companion USA Patriot Act rules, and any future rule affecting explosives in transportation potentially invite DOJ/ATF oversight. It also raises the possibility that DOJ/ATF could revoke the FEL transportation exception if they perceive that circumstances have changed and that DOT/TSA have not moved quickly enough to address new threats. When DOT, the government's regulatory authority over transportation in commerce, determines that it has exercised its authority and occupies a field of commercial transportation regulation, its determination should be final.

¹⁸ 68 FR 13775 (March 20, 2003).

¹⁹ 18 U.S.C. 845(a)(1).

²⁰ H. Rep. 91-1549, page 70.

Conclusion

The transport of hazardous materials, including explosives, is a multi-billion dollar industry that employs millions of Americans. Explosives are a small and essential component of this vital enterprise. This commerce has been accomplished with a remarkable degree of safety and security, in large part, because hazardous materials in transportation in commerce are highly regulated by TSA/DOT under a uniform regulatory framework authorized and demanded by FHMTL.

We support federal background checks of persons engaged in the transportation of hazardous materials. We believe that DOT/TSA, not ATF, are the appropriate federal entities with the expertise to effectively secure the commercial transportation of hazardous materials, including explosives, against terrorist threats. ATF's authority, when it is permitted to be exercised in transportation, can only narrowly reach to explosives – a commodity less than 0.1 percent of all commerce. An explosives-only security clearance scheme for transportation workers cannot be justified. FMCSA/TSA's rules to implement the hazmat driver provisions of the USA Patriot Act have properly assessed the risk presented by explosives, and other hazardous materials, when transported in commerce, and struck an appropriate balance that manages risk in a flexible and cost-effective manner.

Thank you for your attention to these issues.

Sincerely,



Cynthia Hilton
Executive Vice President