

September 26, 2023



**American
Public Transportation
Association**

EXECUTIVE COMMITTEE

CHAIR

Dorval R. Carter, Jr.

VICE CHAIR

Michele Wong Krause

SECRETARY-TREASURER

Jeffrey Wharton

IMMEDIATE PAST CHAIR

Jeffrey A. Nelson

Jose Bustamante
Francis "Buddy" Coleman
Jim Derwinski
Dawn Distler
Denise Figueroa
Jannet Walker-Ford
Carolyn Gonot
Richard J. Leary
Henry Li
MJ Maynard
Raymond J. Melleady
Allan Pollock
Naomi Renek
Leslie S. Richards
Erin Rogers
Rita A. Scott
Troi Taylor
Doug Tisdale
Matthew O. Tucker
Thomas Waldron
Evalynn "Eve" Williams

PRESIDENT AND CEO

Paul P. Skoutelas

U.S. Department of Transportation
Docket Management Facility
1200 New Jersey Avenue SE
West Building
Ground Floor Room W12-140
Washington, DC 20590-0001

Re: Docket Number TSA-2023-0001

Dear Docket Clerk:

The American Public Transportation Association (APTA) represents the \$79 billion public transportation industry that provides mobility for millions of Americans each year, directly employs 430,000 people, and supports millions of private-sector jobs. We are pleased to offer comments regarding the Transportation Security Administration's (TSA) Notice of Proposed Rulemaking (NPRM) Vetting of Certain Surface Transportation Employees published in the *Federal Register* at 88 FR 33472 on May 23, 2023. In its NPRM, TSA seeks comment on security vetting of certain public transportation employees, as required by the Implementing Recommendations of the 9/11 Commission Act of 2007 (6 U.S.C. § 1143)(9/11 Act).

Safety and security are core values of APTA and its member agencies. APTA appreciates the ongoing dialogue with TSA regarding transportation security and the opportunity to respond to the NPRM on behalf of its member organizations.

APTA's comments are focused on four key areas: 1) substantial costs to transit agencies associated with implementing the proposed vetting procedures; 2) potential conflicts with state law; 3) unrealistic timeframe for program implementation; and 4) consideration of risk-based vetting procedures.

1300 I Street NW
Suite 1200 East
Washington, DC 20005
p: (202) 496-4800
f: (202) 496-4324

APTA.COM

I. Costs Associated with Implementing the Proposed Vetting Requirements

In its NPRM, TSA proposes to require security-sensitive employees of certain public transportation operators to undergo a “Level 2” security threat assessment (STA) that includes an immigration check and terrorism watchlist check to determine whether the applicant may pose a security threat.¹ Security coordinators of certain public transportation operators will be required to undergo a “Level 3” STA, which includes the Level 2 check plus a criminal history records check.²

Under the NPRM, covered employees and contractors will have to “present themselves” with specified identifying documents at a universal enrollment center for vetting.³ TSA would establish these sites and public transportation agencies could work with a contractor to set up an enrollment center at their headquarters or regional office at their expense.⁴ APTA members are concerned that the proposed requirement to enroll in-person will result in substantial additional costs for public transportation agencies, including costs associated with travel to and from the enrollment center, and for the substitution of employees to work scheduled shifts in addition to the fees proposed for vetting.

TSA is also proposing to require “recurring vetting” or “perpetual vetting”, meaning the covered employees and contractors would be vetted anew each time data changed in the consolidated terrorist watch list.⁵ Despite this continuous process, covered employees and contractors would also have to undergo a new security threat assessment every five years, which will require a new enrollment, submission, and inspection of identifying documents. With this proposed requirement, public transportation agencies would incur the fees for the mandated security vetting, and potentially in-person enrollment costs (worker travel and substitution), initially and then every five years thereafter.

Proposed fees vary depending on whether the employee has previously undergone another form of security vetting with TSA, such as enrollment in TSA Pre-Check. Based on tables in the NPRM, proposed fees for the initial in-person enrollment and vetting would range for the Level 2 STAs, from \$52.00 to \$80.00 per covered worker; and for the Level 3 STAs, from \$69.00 to \$105.00. Proposed fees for the five -year renewals would vary depending upon whether they are conducted in-person or online. For in-person renewals, the proposed fee ranges are Level 2 STA – \$52.00 to \$80.00; and Level 3 STA – \$60.00 to \$92.00. For online renewals, the proposed fee ranges are Level 2 STA – \$32.00 to \$50.00; and Level 3 STA – \$40.00 to \$62.00.⁶ The fee structure for

¹ See TSA, Vetting of Certain Surface Transportation Employees NPRM, 88 Fed. Reg. 33472, 33478 (May 23, 2023) (TSA Vetting NPRM).

² *Id.* at 33479.

³ *Id.* at pp. 33479, 33512.

⁴ *Id.*

⁵ *Id.* at pp. 33479-33481, 33512.

⁶ *Id.* at pp. 33486-33487.

covered airline employees is not equivalent—the fee for the criminal history check is less and there is no fee for the required security threat assessment.

Many APTA public transit agency members are facing operating budget shortfalls, also known as the “Fiscal Cliff”. In an APTA survey conducted in May of 2023, one-half of the responding agencies say they are facing a fiscal cliff in the next five years.⁷ For the largest agencies (i.e., agencies with operating budgets greater than \$200 million), the percentage is higher—71 percent. The operating budget shortfalls that the largest agencies expect to encounter range from 10 to 30 percent of their operating budgets.

The vetting of certain public transportation employees and contractors will add to the already existing shortfall. The initial vetting and mandated renewal costs are excessive, particularly for employees that already possess a federally issued security clearance or are enrolled in a trusted traveler program. For larger agencies, the cost alone for vetting employees is estimated to be in the millions of dollars. **That cost does not include the expense of back-fill overtime for substitute workers nor compensation for the time required to go to an enrollment center to complete the vetting process.** APTA is concerned that TSA has underestimated the costs to public transit agencies to implement this program. Moreover, APTA urges TSA to lower the fees associated with this vetting process.

II. Waiver of Vetting Requirements

TSA proposes to require vetting of “any individual who performs a security sensitive function” (as outlined in the preamble) or is a security coordinator.⁸ APTA strongly urges TSA to consider waiving the vetting requirement for covered public transportation employees and contractors that are already enrolled in a trusted traveler program such as Global Entry, TSA PreCheck, NEXUS, Transportation Worker Identification Credentials (TWIC), and SENTRI or who possess a security clearance. Many security coordinators hold a security clearance. Therefore, to avoid duplication and unwarranted cost, TSA should issue a waiver for those covered employees with a secret security clearance or higher. Additionally, a security clearance should be provided to all security coordinators who do not currently possess one so they may access sensitive information regarding the public transportation sector and other critical infrastructure.

III. Implementation Timelines

As TSA notes in the preamble, the proposed rule covers the same categories of employees and contractors in public transportation agencies that are subject to TSA’s regulation on security

⁷ See APTA Policy Brief, [Public Transit Agencies Face Severe Fiscal Cliff](#) (June 2023)

⁸ TSA Vetting NPRM at 33477.

training (also required by the 9/11 Act).⁹ Although the TSA Security Training Rule was finalized in March, 2020, implementation was delayed until May 4, 2021, due to the pandemic (requirements took effect in June and September 2021). The delay in implementing the TSA Training Rule was a direct result of advocacy by industry members who were concerned about the short implementation timelines and the resources available to manage the program. APTA has the same timing and resource concerns with the TSA Vetting NPRM. Moreover, the vetting process could create a delay in an already challenging recruiting and hiring process in an industry experiencing significant worker shortages.

TSA proposes an implementation period of six months for requirements relating to security coordinators, and 12 months for requirements relating to security-sensitive employees.¹⁰ APTA members report that these time limits are neither realistic nor achievable. TSA could use a risk-based approach that identifies effective practices for risk-based categorizations based on responsibilities, functions, and access to determine the type and scope of vetting, as discussed below. APTA members suggest that 36 months for implementation for covered employees is more practical. Vetting contract employees could take even longer.

IV. Conflicts with State Law

In its NPRM, TSA proposes to require security-sensitive employees to undergo an immigration check.¹¹ APTA members note that many of the public transportation agencies covered by the proposed rule are not permitted by state or local law to make inquiries regarding immigration status. Accordingly, APTA urges TSA to clarify that the final rule preempts state or local law prohibiting inquiries into immigration status for both Level 2 and Level 3 STAs.

Several jurisdictions have laws prohibiting employers from requesting a potential employee's criminal history on a job application. Inquiries can be made after a conditional offer of employment, and the applicant may be disqualified only if the conviction has a substantial relationship to the position being sought. Various public transportation agencies have second chance programs that provide job skills and career opportunities to past offenders re-entering the workforce. Disqualifying criminal offenses could conflict with these laws or programs. APTA strongly urges TSA to clarify that it intends for the final rule to preempt state laws regarding criminal history.

The proposed rule states that procedures would be established for employees and contractors to appeal or seek waivers of determinations made by TSA during the vetting process. These procedures would align with the existing disqualifying offenses codified in law for the TWIC and Hazardous Materials Endorsement Threat Assessment Program.¹²

⁹ *Id.* at 33476. *See also*, Security Training for Surface Transportation Employees Final Rule, 85 Fed. Reg. 16456 (March 23, 2020), subsequently amended to delay implementation.

¹⁰ TSA Vetting NPRM at pp. 33480, 33512.

¹¹ *Id.* at pp. 33478, 33489, and 33512.

¹² *Id.* at 33479, 33491, and 33515.

No information has been provided regarding the impacts of notification by TSA to a public transportation agency that a covered employee or contractor has been disqualified for criminal history or a terrorist watch list check. APTA strongly encourages TSA to provide additional guidance or clarification regarding actions required by an agency when TSA makes notification that an employee's name came up on a terrorist watch list check or that they were convicted of a disqualifying criminal offense. In addition, TSA must provide recourse for an employee impacted by a false watchlist hit or invalid criminal history disqualification.

V. Risk-Based Vetting Procedures

Relevant 9/11 Act provisions provide the statutory authority for the Department of Homeland Security to conduct checks against the terrorist watch list without the requirement of a regulation. Pursuant to the TSA Modernization Act of 2018 (P.L. 115-254), the TSA Administrator appointed members to the Surface Transportation Security Advisory Committee (STSAC) to serve as the principal advisory forum on matters pertaining to surface transportation security and emergency preparedness.¹³ Applying a "risk-based process" for determining transportation workers subject to security vetting is one of the unanimously approved recommendations by the STSAC fully accepted by the TSA Administrator.¹⁴

APTA advocates that a "risk-based process" be employed for determining transportation workers subject to security vetting, similar to the STA components for aviation worker populations.¹⁵ In particular, identifying effective practices for risk-based categorizations of responsibilities, functions, and access should be used to determine the type and scope of vetting was included in those recommendations and should be employed with the proposed vetting of covered employees as well.

VI. Conclusion

In summary, APTA appreciates the opportunity to provide comments on the TSA Vetting NPRM. APTA's working group that developed these comments include security professionals from numerous impacted public transit agencies in the United States. Many of these transit agencies plan to submit individual comments on the TSA Vetting NPRM.

Safety and security are core values of APTA, we want to continue to work with TSA to ensure that these new vetting requirements further advance our shared commitment to public transit security.

¹³ DHS, TSA, [Surface Transportation Security Advisory Committee Charter](#) (December 20, 2022).

¹⁴ See STSAC, [Annual Report to the Administrator of the Transportation Security Administration and to the Congress of the United States for 2020](#) (March 2021); see also, STSAC, [Fiscal Year 2021 Recommendations Periodic Update](#) (June 30, 2021).

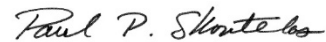
¹⁵ See Appendix, [Privacy Impact Assessment for the Airport Access for Aviation Workers](#), DHS/TSA/PIA-020(c) (April 27, 2020).

Docket Clerk
September 26, 2023
Page 6

To that end, APTA strongly encourages TSA to: 1) lower the proposed fees and other costs of complying with these requirements; 2) clarify that the final rule pre-empts state and local immigration and criminal background check policies; 3) revise the implementation timeline to 36 months; and 4) consider a risk-based approach that identifies risk-based categorizations of responsibilities, functions, and access to determine the employees covered by the vetting procedures.

For additional information, please contact Polly Hanson, APTA's Senior Director of Security, Risk and Emergency Management, at phanson@apta.com.

Sincerely,



Paul P. Skoutelas
President and CEO