Six (6) States discussed their safety experience with intrastate CMV drivers under the age of 21. The data was conflicting: Agencies from the States of Montana, Illinois, Vermont, and Virginia indicated that their statistics show that CMV drivers under age 21 pose no greater crash risk than other age groups; agencies from the States of California and Iowa stated that their statistics show that CMV drivers under age 21 have a higher crash rate than that of older truck drivers.

FMCSA Response

The FMCSA believes that the commenters have presented compelling arguments both in support of, and in opposition to, the TCA petition to initiate a pilot program. However, for reasons set forth below, the agency believes there is insufficient information at this time to make a preliminary determination as to whether the terms and conditions of the pilot program that TCA requested would achieve a level of safety equivalent to, or greater than, that provided by the current prohibition against drivers under the age of 21.

The agency does not believe that all drivers between the ages of 18 and 21 should be viewed as a safety risk while at the controls of a CMV, regardless of the requirements that would be imposed upon them. However, there is little information currently available to support the contention that young CMV drivers selected through a rigorous screening process, and groomed through an intensive training and mentoring program, would have safety performance records comparable to CMV drivers 21 years of age or older. The comments to the docket provide a clear indication to the agency that the potential safety impacts of a pilot program cannot be determined with any degree of certainty at this time. Therefore, we believe that it would be inappropriate to pursue a pilot program until there is additional information and data on which to base a preliminary determination about the potential safety impacts of allowing younger drivers to operate in interstate commerce.

While commenters offered ample evidence that individuals aged 18 to 21, as a group, are more prone to risk-taking behavior, we do not believe that this information, in and of itself, suggests that this universe of drivers are all unfit to operate a CMV in interstate commerce. Highway safety statistics concerning the over-representation of younger drivers in accidents of all types of motor vehicles provides a vivid, but indiscriminate, picture of safety problems with these drivers. This information represents the cumulative safety performance record of all young adults operating all types of motor vehicles on the Nation's highways, most of whom may never have expressed an interest in becoming a professional CMV driver. We do not believe, however, that such information should be considered as the determining factor in deciding whether young adults committed to exploring a career driving commercial motor vehicles could do so safely.

With regard to the terms and conditions spelled out in TCA's proposal, the FMCSA believes that a program comprised of screening, training, and mentoring is likely to bring about a higher level of safety performance for a given group of drivers than they would otherwise have experienced. Yet, because of the limited information and data about young CMV drivers (between the ages of 18 and 21), the agency is unable to conclude that the baseline safety performance of these younger drivers is sufficiently close to that of older drivers of CMVs, such that screening, training, and mentoring would improve their performance and enable them to achieve safety performance levels equivalent to or greater than older drivers. Denial of the TCA petition should not be construed as a rejection of the argument that screening, training, and mentoring could improve the safety performance of younger CMV drivers. But, the TCA petition, as submitted, does not demonstrate that a pilot program for younger CMV drivers is warranted at this time.

FMCSA's Decision

For the reasons given above, the FMCSA is denying the petition of the Truckload Carriers Association to establish a pilot program for CMV drivers between the ages of 18 and 21. We believe that proper screening, training, and mentoring are likely to improve the safety performance of any given group of drivers. However, based on the information provided by the petitioner and commenters, the agency is unable to determine that the safety measures in this proposed pilot project are designed to achieve a level of safety equivalent to, or greater than, the level obtained by complying with the safety regulations.

Authority: 49 U.S.C. 31136 and 31315; and 49 CFR 1.73.

Issued on: June 4, 2003.

Annette M. Sandberg,

Acting Administrator.

[FR Doc. 03–14445 Filed 6–6–03; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Federal Railroad Administration

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. RSPA–2003–14982, Notice No. 03–7]

Hazardous Materials: Transportation of Explosives by Rail

AGENCY: Research and Special Programs Administration and Federal Railroad Administration, Department of Transportation; and Transportation Security Administration, Department of Homeland Security.

ACTION: Notice.

SUMMARY: The Research and Special Programs Administration, the Federal Railroad Administration, and the Transportation Security Administration are publishing this document to describe the application of Federal laws to the transportation of explosives by rail. In particular, this document explains that, in light of the extensive regulation of the rail transportation of hazardous materials, including explosives, by the Department of Transportation, the protections inherent in railroad operations against improper use of those materials by railroad employees, and the security safeguards taken by the railroads, the transportation of explosives via rail by certain persons described under the Safe Explosives Act does not pose a sufficient security risk warranting further regulation at this time. Based on the determinations made by the Transportation Security Administration and the Department of Transportation that are detailed in this document, certain federal criminal provisions described below do not apply to persons while they are engaged in the commercial transportation of explosives by rail.

DATES: Effective Date: June 4, 2003.

ADDRESSES: You may review the public docket containing this document in person at the Department of Transportation Dockets Management System office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Management System office is on the plaza level of the NASSIF Building at the Department of Transportation, Room PL 401, 400 Seventh Street, SW., Washington, DC 20590–0001. Also, you

may review public dockets on the Internet at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Nancy Machado, Office of Chief Counsel, Research and Special Programs Administration, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone (202) 366–4440; facsimile (202) 366–7041; e-mail *Nancy.Machado@rspa.dot.gov*. David Kasminoff, Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC, 20590–0001; telephone: (202) 493–6043; *David.Kasminoff@fra.dot.gov*. Christine Beyer, Office of Chief Counsel, Transportation Security Administration, 400 Seventh Street, SW., Washington, DC 20590–0001; telephone (571) 227–2657; e-mail *Christine.Beyer@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Availability of Document

You can get an electronic copy using the Internet by—

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (*http://dms.dot.gov/search*);

(2) Accessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html*;

(3) Visiting the RSPA web page at *http:// hazmat.dot.gov;* or

(4) Visiting the TSA Laws and Policy web page at *http://www.tsa.dot.gov/public/index.jsp.*

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this document.

Abbreviations and Terms Used in This Document

ATF—Bureau of Alcohol, Tobacco, Firearms, and Explosives
ATSA—Aviation and Transportation Security Act
CHRC—Criminal History Records Check
DHS—Department of Homeland Security
DOJ—Department of Justice
DOT—Department of Transportation
FAA—Federal Aviation Administration
Federal hazmat law—Federal Hazardous Materials Transportation Law (48 U.S.C. 5101 *et seq.*)
FMCSA—Federal Motor Carrier Safety Administration
FRA—Federal Railroad Administration
GAO—General Accounting Office
Hazmat—Hazardous materials
HMR—Hazardous Material Regulations (49 CFR Parts 171–180)
RSPA—Research and Special Programs Administration
SEA—The Safe Explosives Act
TSA—Transportation Security Administration
USCG—U.S. Coast Guard

I. Background

The Research and Special Programs Administration (RSPA) and the Federal Railroad Administration (FRA), agencies within the Department of Transportation (DOT), and the Transportation Security Administration (TSA), an agency within the Department of Homeland Security (DHS), have determined that in light of the extensive regulation of the rail transportation of hazardous materials, including explosives, by DOT, the protections inherent in railroad operations against improper use of those materials by railroad employees, and the security safeguards taken by the railroads, the transportation of explosives by rail by persons described under section 842(i) does not present a sufficient security risk warranting further regulation at this time. In view of the foregoing conclusion, no additional security regulations addressing this aspect of the transportation of explosives are immediately necessary. Accordingly, under 18 U.S.C. 845(a)(1), discussed in greater detail below, persons engaged in the commercial transportation of explosives by rail are excepted from the application of 18 U.S.C. 842(i).

As a threshold matter, it is important to discuss the role that Federal agencies play in the transportation of explosives by rail. In accordance with Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*), RSPA regulates the safe and secure transportation of hazardous materials (hazmat), including explosives, in all modes of transportation. The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) include packaging, identification, handling, and security requirements. Modal administrations within DOT—the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), and FRA—enforce these regulations in their respective areas of authority. FRA pursues its enforcement responsibilities with a particular emphasis on the transportation or shipment of hazardous materials by rail, including the manufacture, fabrication, marking, maintenance, reconditioning, repair, or testing of containers that are represented, marked, certified, or sold for use in the bulk transportation of hazardous materials by railroad. In addition, FRA issues and enforces a variety of rail safety regulations that address track and roadbed conditions; signal systems; locomotive, freight car and passenger equipment safety; emergency preparedness; hours of service of railroad employees; operating practices and procedures; qualification standards for certain employees; and alcohol and drug testing of railroad employees in safety-sensitive service.

TSA was created following the terrorist attacks of September 11, 2001, as an agency within DOT. TSA was transferred to the DHS on March 1, 2003, and has statutory authority to set standards for security and make determinations regarding the adequacy of security in all modes of transportation. DOT agencies consult with TSA on transportation security matters. The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is an agency within the Department of Justice (DOJ), and has statutory authority to address, among other things, the manufacture, purchase, possession and use of explosives.

Representatives of RSPA, FRA, TSA, and DOJ consulted extensively with each other to ensure that this document accurately reflects the security considerations relevant to those persons responsible for transportation of explosives in commerce by rail.

II. Safe Explosives Act

Congress enacted the Safe Explosives Act (SEA) on November 25, 2002.[1] Sections 1121–1123 of the SEA amended section 842(i) of Title 18 of the U.S. Code by adding several categories to the list of persons who may not lawfully ''ship or transport any explosive in or affecting interstate or foreign commerce'' or ''receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce.'' Prior to the amendment, 18 U.S.C. 842(i) prohibited the transportation of explosives by any person under indictment for or convicted of a felony, a fugitive from justice, an unlawful user or addict of any controlled substance, and any person who had been adjudicated as a mental defective or committed to a mental institution. The amendment added three new categories to the list of prohibited persons: aliens (with certain limited exceptions), persons dishonorably discharged from the armed forces, and former U.S. citizens who have renounced their citizenship. Individuals who violate 18 U.S.C. 842(i) are subject to criminal

[1] Pub. L. 107–296, November 25, 2002, 116 Stat. 2280

prosecution.[2] These incidents are investigated by ATF and referred, as appropriate, to the United States Attorneys.

However, 18 U.S.C. 845(a)(1) provides an exception to section 842(i) for ''any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety.'' DOJ has interpreted this provision to exempt persons from application of § 842(i) when (1) DOT has actually regulated a relevant aspect of the transportation of explosives, and (2) those regulations cover the particular aspect of the safe transportation of explosives that prompted Congress to enact the criminal statute from which exemption is sought. For purposes of § 845(a)(1), if it is determined that persons engaged in certain aspects of the transportation of explosives do not pose a security threat and do not warrant regulation, then those persons are not subject to prosecution under 18 U.S.C. 842(i) while they are engaged in the transportation of explosives in commerce.

As discussed in greater detail throughout this document, this notice addresses all of the categories of individuals who are prohibited from transporting explosives in commerce via railroad under § 842(i), as amended by the SEA, and thus 18 U.S.C. 845(a)(1) excepts those categories of individuals from prosecution under § 842(i) for activities occurring during and incident to the transportation of explosives by rail in commerce.

III. Hazardous Material Regulations

Hazardous materials are substances that may pose a threat to public safety or the environment during transportation because of their physical, chemical, or nuclear properties. Hazardous materials are essential to the economy of the United States and the well being of its people. Hazardous materials fuel cars and trucks, and heat and cool homes and offices. Hazardous materials are used for farming and medical applications and in manufacturing, mining, and other industrial processes. These materials are transported in quantities ranging from several ounces to many thousands of gallons. DOT estimates that one and one-half billion tons of hazmat are transported each year. The majority of hazardous materials move by truck (56%), while rail shipments account for only six percent of the tonnage. The vast majority of hazardous materials shipments arrive safely at their destinations. Most incidents that do occur involve small releases of material and present no serious threat to life or property.

The hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying a safety hazard and reducing the probability and quantity of a hazardous material release. Under the HMR, which are based on the internationally recognized United Nations system for classification, identification, and ranking of hazardous materials, hazardous materials are categorized by hazard analysis and experience into hazard classes and packing groups. The regulations require each shipper to classify a material in accordance with these hazard classes and packing groups; the process of classifying a hazardous material is itself a form of hazard analysis. Further, the regulations require the shipper to communicate the material's hazards through use of the hazard class, packing group, and proper shipping name on the shipping paper and the use of labels on packages and placards on transport vehicles. Thus the shipping paper, labels, and placards communicate the most significant findings of the shipper's hazard analysis. A hazardous material is assigned to one of three packing groups based upon its degree of hazard, from a high hazard, Packing Group I, to a low hazard, Packing Group III, material. The quality, damage resistance, and performance standards of the packaging in each packing group are appropriate for the hazards of the material transported.

Under the HMR, all hazardous materials are divided into nine general classes according to their physical, chemical, and nuclear properties as follows:

Class 1—Explosives
Class 2—Compressed, flammable, nonflammable, and poison gases
Class 3—Flammable liquids
Class 4—Flammable solids
Class 5—Oxidizers and organic peroxides
Class 6—Toxic and infectious materials
Class 7—Radioactive materials
Class 8—Corrosive materials
Class 9—Miscellaneous dangerous substances and articles

Within Classes 1, 2, 4, 5, and 6, there are more specifically defined divisions, and within Class 1 there are Compatibility Group subdivisions as well. The hazard classes and divisions are not mutually exclusive. Certain hazardous materials have multiple dangerous properties, each of which must be addressed according to its relative potential to do harm. In these cases, the UN system and the HMR allow identification and communication of both the primary and subsidiary threats.

DOT's hazardous materials transportation safety program has historically focused on reducing risks related to the unintentional release of hazardous materials. The HMR are designed to achieve two goals: (1) To ensure that hazardous materials are packaged and handled safely during transportation, thus minimizing the possibility of their release should an incident occur, and (2) to effectively communicate to carriers, transportation workers, and emergency responders the hazards of the materials being transported. The HMR specify how to classify and package a hazardous material. Further, the HMR prescribe a system of hazard communication using placards, labels, package markings, and shipping papers. In addition, the HMR prescribe training requirements for persons who prepare hazardous materials for shipment or transport hazardous materials. The HMR include design, performance, and inspection standards for packaging, which also include operational requirements applicable to each mode of transportation.

With particular regard to explosives, subpart C of 49 CFR part 173 sets forth substantial and comprehensive requirements concerning the definition, classification, and packaging of explosives. Other rules cover the required marking labeling, and placarding of explosives shipments. *See* §§ 172.320, 411, and 522–525. The HMR also contain specific operational requirements for handling explosives, including requirements that specifically address rail operations (subpart E of 49 CFR part 174) and the disposition of explosive shipments at their rail destinations. See 49 CFR 174.16(b)(1).

In the wake of the terrorist attacks of September 11, 2001, and subsequent threats related to biological and other hazardous materials, DOT undertook a broad review of government and industry hazardous materials transportation safety and security programs. As part of this review, DOT established the Hazardous Materials Direct Action Group (Hazmat DAG). The Hazmat DAG met with representatives of the hazardous materials industry, emergency response community, and state governments to discuss transportation security issues and continuing terrorist threats. In addition,

[2] The penalty for violation of 18 U.S.C. 842(i) is up to ten years imprisonment and a fine of up to $250,000.

DOT created a DOT Intermodal Hazardous Materials Transportation Security Task Force, which considered attack or sabotage vulnerabilities, existing security measures, and potential ways to reduce vulnerabilities. The Task Force included representatives from FRA, FMCSA, FAA, U.S. Coast Guard (USCG), and Office of the Secretary.

Based in part on discussions in the Hazmat DAG and on the results of the Task Force review, on February 14, 2002, RSPA published an advisory notice to inform shippers and carriers of voluntary measures that can enhance the security of hazardous materials shipments during transportation (67 FR 6963). The notice addressed personnel, facility, and en route security issues and included contact points for obtaining additional, more detailed information. Among other recommendations, the security advisory notice advised employers to be aware of the possibility that someone they employ may pose a potential security risk. RSPA recommended that employers consider establishing a process to verify the information provided by applicants on application forms or resumes, including checking with former and current employers and personal references provided by job applicants.

On March 25, 2003, RSPA published a final rule under Docket No. RSPA–02–12064 (HM–232), herein referred to as HM–232 (68 FR 14510). The final rule requires persons who offer certain hazardous materials for transportation in commerce and persons who transport certain hazardous materials in commerce to develop and implement security plans.

In developing the HM–232 final rule, RSPA assessed the security risks associated with the transportation of different classes and quantities of hazardous materials. RSPA concluded that the most significant security risks involve the transportation of certain radioactive materials; certain explosives; materials that are poisonous by inhalation, certain infectious and toxic substances; and bulk shipments of materials such as flammable and compressed gases, flammable liquids, flammable solids, and corrosives. Based on this security risk assessment, the HM–232 final rule requires persons who offer for transportation or transport the following hazardous materials to develop and implement security plans: (1) A highway route-controlled quantity of a Class 7 (radioactive) material; (2) more than 25 kg (55 lbs) of a Division 1.1, 1.2, or 1.3 (explosive) material; (3) more than 1 L (1.06 qt) per package of a material poisonous by inhalation in Hazard Zone A; (4) a shipment in a bulk packaging with a capacity equal to or greater than 13,248 L (3,500 gal) for liquids or gases or greater than 13.24 cubic meters (468 cubic feet) for solids; (5) infectious substances listed as select agents by the Centers for Disease Control and Prevention (CDC) in 42 CFR Part 73; and (6) a shipment that requires placarding. Select agents are infectious substances identified by CDC as materials with the potential to have serious consequences for human health and safety if used illegitimately. In effect, then, the HM–232 final rule applies the security plan requirement to a shipper or carrier of a hazardous material in an amount that requires placarding and to select agents. Using the placarding thresholds to trigger enhanced security requirements covers the materials that present the most significant security threats in transportation and provides a relatively straightforward way to distinguish materials that may present a significant security threat from materials that do not. It also provides consistency for the regulated community, thereby minimizing confusion and facilitating compliance.

The HM–232 final rule also includes new security awareness training requirements for all hazardous materials employees. This training must include an awareness of the security risks associated with hazmat transportation, measures designed to enhance transportation security, and a component covering how to recognize and respond to possible security threats. With regard to personnel security, the final rule requires that each security plan include measures to confirm information provided by job applicants for positions that involve access to, and handling of, hazmat.

On May 5, 2003, RSPA published an interim final rule (IFR) to further enhance the hazardous materials transportation security (68 FR 23832). The IFR described the current system of regulations applicable to the transportation of hazardous materials in commerce, and reviewed DOT activities to enhance the security of hazardous materials shipments. In addition, the rule summarized the requirements of the USA PATRIOT Act and regulations adopted by TSA and the FMCSA to implement the background check provisions of the Act, and described actions taken by FAA, TSA, and the U.S. Coast Guard to address security issues associated with the transportation of hazardous materials by air and vessel. The IFR also incorporated into the HMR a requirement that shippers and transporters of hazardous materials comply with applicable Federal security regulations and revised the procedures for applying for an exemption from the HMR to require applicants to certify compliance with applicable Federal transportation security laws and regulations. Finally, DOT, in consultation with TSA, determined that, based on the analyses and regulatory programs described in the IFR, the provisions of 18 U.S.C. 842(i) do not apply to the commercial transportation of explosives by motor carrier, aircraft, or vessel.

IV. Transportation Security Administration

In the wake of the terrorist attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), which established the TSA.[3] TSA was created as an agency within DOT, operating under the direction of the Under Secretary of Transportation for Security. TSA became an agency of the DHS in March 2003, by operation of the Homeland Security Act of 2002. (Pub. L. 107–296.) At this point the Under Secretary became the Administrator. The Secretary of DHS has delegated back to the Administrator of TSA all of his authority in ATSA that was vested with the Secretary by operation of law under the Homeland Security Act. TSA continues to possess the statutory authority that ATSA established, which grants the Administrator authority for security in all modes of transportation.[4]

As part of its security mission, TSA is responsible for assessing intelligence and other information in order to identify individuals who pose a threat to transportation security and to coordinate countermeasures with other Federal agencies to address such threats.[5] In addition, TSA is charged with serving as the primary liaison for transportation security to the intelligence and law enforcement communities.[6]

TSA has exercised this authority extensively in the aviation and commercial trucking industries. For instance, TSA regulations require a fingerprint-based criminal history records check (CHRC) on individuals with access to secured areas of airports and aircraft. *See* 49 CFR parts 1542 and 1544. In addition, TSA recently issued an interim final rule that requires commercial drivers to successfully complete a fingerprint-based CHRC in

[3] Pub. L. 107–71, November 19, 2001, 115 Stat. 597.

[4] 49 U.S.C. 114(d).

[5] 49 U.S.C. 114(f)(1)–(5), (h)(1)–(4).

[6] 49 U.S.C. 114(f)(1) and (5).

order to renew or obtain authority to transport hazardous materials. See 49 CFR part 1572. If an individual has a criminal conviction for certain disqualifying offenses within prescribed time periods, he or she is not granted access to the secured area or granted authority to transport hazmat in commerce.

TSA is authorized to complete background checks on individuals in all modes of transportation and to issue identification media that capture the results of the background check. TSA is currently evaluating the need for and nature of background checks on transportation workers, in addition to those in the aviation and trucking industries, who are in a position to cause or control serious security-related events. TSA is taking a risk-based approach to security regulations so that the government and private sector can prioritize resources based on threat information, vulnerability assessments, and criticality determinations. TSA is engaged in such an analysis concerning background checks for transportation workers in the maritime and rail industries. TSA continues to evaluate the need for additional regulations concerning this population and potential threats, and may issue additional security requirements concerning railroad employees engaged in the transportation of hazmat. A comprehensive, risk-based approach will facilitate the development of standards that are narrowly tailored to suit the industry and the threat. TSA evaluated the measures currently required under DOT hazmat and rail regulations, the nature of rail operations, and the security enhancements completed by the railroads, and has determined that, for the present, they adequately address the security concerns of which it is aware.

V. Transportation by Rail

FRA administers the Federal railroad safety laws (49 U.S.C. chapters 201–213), which encompass all areas of railroad safety (*see* 49 U.S.C. 20103), including security. The terrorist attacks of September 11 and subsequent indications of possible terrorist threats specifically directed at the railroad industry indicate the need to assess the security of hazmat shipments, including individuals in a position to have access to sensitive information regarding, or the ability to control the movement of, explosives and other hazmat. FRA has worked closely with TSA, the railroad industry, and RSPA on rail security issues since September 2001.

The nation's railroads have taken several voluntary steps to enhance security since September 11, 2001. The Association of American Railroads (AAR) established a security task force immediately after the attacks. The task force created action teams to assess vulnerabilities in several critical areas: physical assets, information technology, chemicals and hazardous materials, defense shipments, train operations, and passenger security. AAR worked with chemical industry associations and security consultants to assess terrorism risks in these areas. This risk analysis provided the basis for the industry's security management plan, which was presented to DOT and TSA.

The security management plan, which is currently being implemented, includes a uniform system for communicating threat levels throughout the industry, progressively rigorous countermeasures to be taken depending upon the threat level, and a round-the-clock operations center linking railroad control centers with law enforcement agencies. Among the activities the industry is taking to implement the plan are increasing the awareness of employees about potential security threats, limiting publication of information about sensitive shipments, periodically testing security systems, using railroad police and private security guards to monitor critical infrastructure locations, restricting access to railroad facilities, using video surveillance of hazardous materials shipments in certain areas, conducting security evaluations of specific facilities, and the temporary rerouting or suspension of certain hazmat shipments in the event of a credible terrorist threat. These security enhancements undertaken by the major railroads have helped to reduce the risk that explosives or other hazardous materials can be used for terrorist purposes while in railroad possession.

On May 23, 2003, the General Accounting Office (GAO) issued a report titled ''Rail Safety and Security—Some Actions Already Taken to Enhance Rail Security, but Risk-Based Plan Needed'' (GAO–03–435). GAO found that, since September 11, 2001, the rail and chemical industries have taken steps to improve the security of rail shipments of hazardous materials. The report describes the rail industry's development and implementation of its security plan and actions taken thus far by DOT and TSA to address rail security issues. The report does not address the security issues related to railroad employees that are the subject of this notice, nor does it include any reason to question the determinations in this notice concerning the current need for further regulation to address the risk posed by the transportation of explosives by rail by persons described under section 842(i).

GAO recommends that DOT and DHS work together to develop a risk-based plan specifically to address rail security, including timeframes for actions. As noted elsewhere in this notice, DOT and TSA are in the process of evaluating the need for additional Federal regulations to address rail transportation security. We agree that a comprehensive, risk-based approach will facilitate the development of standards that are narrowly tailored to suit the industry and the threat. Recently adopted regulations, such as the HM–232 and USA PATRIOT Act final rules, as well as initiatives currently in progress, incorporate a risk management approach to security regulation.

1. Process for Handling Hazardous Materials Via Rail

A discussion of the process by which explosives and other hazmat are transported by rail is necessary to analyze security risks and appropriate countermeasures. More than 75 percent of hazardous materials moving by railroad moves in bulk, most commonly in a tank car or covered hopper car. Hazardous materials moving by rail are loaded into a tank car, hopper car, boxcar, trailer, or intermodal container by the shipper (or the shipper's agent). The product is then delivered to the railroad for movement to its destination. Railroad employees do not load hazardous materials into rail cars or containers or unload them at their destination.

To arrange for the transportation of a hazardous materials package, a shipper will contact a railroad freight agent. At this time, the shipping description information—the contents and format of which is prescribed by the HMR—is passed along to the carrier, along with emergency response information, origin pickup point, destination, and the car reporting mark and number. The freight agent, or a shipping clerk, enters this information into the carrier's records, and orders are generated for pickup by either a switch or a road crew, depending on the origin location and its proximity to a terminal. The shipping information may be transmitted orally, but the regulations require a document from the shipper, sent either in hard copy or electronically. The shipper must certify that the materials to be shipped have been classified, packaged, and labeled appropriately and are in proper condition for transportation according to the applicable DOT standards.

The shipper must label non-bulk packages to properly disclose their

contents, and must placard hazmat shipments in accordance with the regulations. Shippers often apply security seals to both bulk and non-bulk containers. Security seals impede access to dangerous commodities and also provide evidence of tampering, if it occurs.

Once the hazardous materials shipment has been accepted for transportation by the railroad, the paperwork that describes the product must accompany the shipment. The HMR require the train crew to have a copy of this paperwork in the complete train consist, which must accurately list the placement of each hazmat shipment in the train. Once the product is delivered to its destination, the paperwork is transferred to the receiving party.

2. Unique Characteristics of Transporting Hazardous Materials Via Rail

There are many factors unique to the rail industry that minimize the degree to which an individual may affect the movement of hazardous materials, including explosives. Railroad employees have a very limited opportunity to gain access to or divert hazardous materials shipments they are transporting. Railroad operating employees do not load or unload hazmat from rail cars, and are not expected to enter the cars or handle their contents in any way. Furthermore, train crews that move these shipments are not issued the tools necessary to remove or break the seals of the hazardous material containers. Gaining access to the hazmat in closed containers, if possible at all, would likely attract the attention of other employees. The HMR prescribe requirements for the packaging of all placarded hazmat, including the type of package, the degree to which all closures must be secured prior to transport, and maintenance and testing requirements to ensure that valves and other closures are in good working condition.

Unlike a truck or aircraft, a train operates on a closed system. It is confined to the tracks it is on, and any deviation from its assigned route is either altogether impossible or difficult to accomplish without being detected quickly by railroad employees or officials. Train crews are expected to move their train along a pre-designated route and communicate with the railroad if any delays occur along the route. A train containing hazardous materials is monitored by a train dispatcher who oversees the movement, and in heavily trafficked areas, controls the movement by a system of signals or mechanical and electronic control devices. Further, on large portions of major railroads, each car moving in a train is monitored by trackside sensors that report its location back to a centralized facility or broadcast its location over the railroad radio network every time it contacts one of a variety of equipment scanners.

Although railroads transport a large volume of hazardous materials, the number of annual explosives shipments via rail is very low. According to the AAR, there are approximately 27 million carloads of freight shipped by rail annually. Of these, 1.7 million are hazmat shipments and approximately 1,200 shipments contain explosives. Of the railroads TSA has surveyed, nearly all stated that explosives shipments are not a coveted product. There simply is not enough of it in the rail transportation network to produce good profit margins.

It is also important to note that, of the 660 small railroads operating in the United States, fewer than 10 are known to ship explosive material by rail at any given time. The incidence of explosives shipments on small railroads is nearly nonexistent.

The major railroads (or Class I railroads) handle 94 percent of the nation's rail freight traffic and employ approximately 90 percent of employees in the rail industry. Each of the Class I railroads employs a police force to guard rail yards and equipment to prevent unauthorized access to facilities, equipment, product, and paperwork. There are approximately 1,300 rail police in service today. The railroads conduct fingerprint-based CHRC on these individuals to ensure that persons with criminal or otherwise problematic backgrounds are not hired as part of the police force. Under 49 U.S.C. 28101, these employees are fully authorized to enforce laws of all states in which the railroad operates. *See also* 49 CFR part 207.

Furthermore, railroad police agents can be linked through extensive radio networks to virtually all railroad employees within their territorial jurisdiction, including train crews, train dispatchers, and railroad workers who maintain the tracks, signals and rolling stock. The railroad police can communicate directly with most railroad employees and can monitor the radio communications between many of the employees. Therefore, railroad employees operate in a setting where the employer is not dependent on state or local law enforcement to detect criminal activity; rather, it employs its own law enforcement officers, with specialized knowledge of railroad operations, to ensure the security of those operations.

The Class I railroads require employees to complete an extensive application prior to employment, which includes criminal, employment, educational, and credit history; citizenship status; and military service and type of discharge. The application also provides that candidates will be disqualified or terminated if any of the information provided on the application is false.

As part of the application process, the Class I railroads conduct background checks on all new hires, although this does not include a fingerprint-based CHRC. The Class I railroads ask applicants to disclose any past criminal history. In addition, the major railroads complete a public records search for statewide criminal and outstanding debt information. Using records linked to the applicant's social security number, the major railroads also check the applicant's employment, credit, and address history. This is a significant evaluation, because it typically confirms a candidate's identity. Experienced investigators place great weight on these records to catch individuals who have adopted false identification, who often move beneath the criminal history radar screen. A number of terrorists involved in previous terrorist attacks would have successfully completed a fingerprint-based CHRC, but may have raised concerns as a result of the social security check.

The employment application also requires information concerning previous military service and citizenship status. If a candidate has served in the armed forces, the railroad requests a copy of the individual's discharge papers. An individual with a dishonorable discharge is not disqualified automatically, but the dishonorable discharge may become grounds for disqualification. The railroad considers the totality of the circumstances, such as the facts that gave rise to the discharge, any rehabilitation that is evident, and the results of the other background checks. Similarly, the railroads do not prohibit hiring aliens, but will not hire an alien unless the proper immigration forms and approvals have been obtained. Any person who has renounced his or her U.S. citizenship would be required to state that he/she is not a U.S. citizen on the application. In a general survey of the Class I railroads, the percentage of non-Canadian aliens working in the railroad industry is extremely small. Citizens of Canada, who typically work

for the Canadian railroads, are discussed in greater detail below.

The railroad employees responsible for actually transporting hazardous materials, *i.e.*, the train crew members, are subject to a variety of requirements that address their fitness for duty, general health, and knowledge of appropriate operating practices. Locomotive engineers are certified pursuant to a comprehensive regulatory regime (49 CFR part 240) that includes safety testing, visual and hearing acuity tests, and alcohol and drug testing (49 CFR part 219). A locomotive engineer's certification may be revoked for failure to follow critical operating rules or for violation of rules concerning alcohol and drug use. *See* 49 CFR 240.117 and 307. In addition, engineers undergo knowledge and operational testing and training periodically that may reveal any severe mental disorder that might jeopardize the person's ability to perform safely. Railroad operating employees almost always work in close proximity to other crew members, so their actions are constantly observed. Abnormal behavior would likely be noticed and reported by fellow employees to management or an employee assistance program. Serious injury can result very quickly while working on or near railroad equipment; consequently, rail employees are typically not tolerant of abnormal or irresponsible behavior in the workplace.

Aside from the locomotive engineer, the other train crew members are conductors and brakemen. FRA's regulations require that, like engineers, these employees are trained and tested on the railroad's operating rules. *See* 49 CFR part 217. These employees are also subject to the alcohol and drug testing regulations, and may be removed from service for violating operating rules or alcohol and drug prohibitions.

We recognize that the background checks conducted by the railroad industry are not as comprehensive as fingerprint-based background checks. However, because of the conditions under which explosives are transported by rail and the difficulty that a potential criminal or terrorist would have in gaining access to or controlling an explosives shipment and the other Federal and industry measures currently in effect, we do not believe that additional regulations concerning railroad employees are warranted at this time. TSA continues to assess the need for more detailed background check requirements in the rail industry and may determine that such standards are necessary in the future.

Because Canadian railroads transport hazardous materials into the United States, locomotive engineers working for these railroads are often citizens of Canada rather than the United States. TSA recently published a rule that requires Canadian train crews entering this country to be vetted by Transport Canada, the agency in the Canadian government that oversees transportation. (68 FR 6083; Feb. 6, 2003.) A Canadian citizen entering the U.S. via rail with explosives shipments on board is not granted access unless Transport Canada certifies that the individual has completed a background investigation. TSA is in the process of amending this rule to extend its application to Canadians who transport explosives within the United States as well. TSA has met with representatives of Canada on several occasions to discuss these procedures, and will conduct similar discussions with Mexico.

FRA has been granted broad authority over railroad safety, including security, which includes authority to address particular safety or security problems through extraordinary remedies. Under 49 U.S.C. 20104, FRA may issue an Emergency Order imposing requirements to abate an emergency situation involving a hazard of death or personal injury. These orders are issued without notice or prior hearing, and can be directed to corporations or individuals. Using such an order, FRA can impose whatever conditions are necessary to address the emergency, up to and including requiring the cessation of operations on a particular line or removing persons from safety-sensitive service. In addition, FRA has statutory authority to disqualify individuals from safety-sensitive service when it is shown that an individual is not fit for service due to his or her violation of one or more safety laws. 49 U.S.C. 20111(c).

VI. Determination Under 18 U.S.C. 845(a)(1)

As noted above, 18 U.S.C. 845(a)(1) provides an exception to the prohibited persons provisions in 18 U.S.C. 842(i) for ''any aspect of the transportation of explosive materials via railroad, water, highway, or air, which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety.'' Under this exception, if DOT regulations address the transportation security issues associated with persons engaged in a particular aspect of the safe transportation of explosive materials, then those persons are not subject to prosecution under 18 U.S.C. 842(i) while they are engaged in the transportation of explosives in commerce. In addition, if it is determined by TSA and DOT jointly that certain aspects of the transportation of explosives do not pose a sufficient security risk and therefore do not warrant regulation, the exception contained in 18 U.S.C. 845(a)(1) also applies, and persons engaged in such transportation would not be subject to criminal prosecution under section 842(i).

DOT is authorized by Federal hazmat law to designate material, including an explosive, as hazardous when transported in commerce in a particular amount and form that may pose an unreasonable risk to health, safety, or security. DOT regulations applicable to the transportation of explosives by all modes include the classification, packaging, hazard communication, and operational requirements described elsewhere in this document. Further, the HMR include specific requirements for security plans and training adopted in the HM–232 final rule.

As discussed in detail above, DOT and TSA assessed the security risks associated with the transportation in commerce of explosives as defined in 18 U.S.C. 841(c)–(f). Based on this assessment, we concluded that the most significant security risks are associated with the transportation of explosives shipments in quantities that require placarding under the HMR. Thus, the HM–232 final rule requires persons who offer or transport shipments of explosives in all modes of transportation that must be placarded under the HMR to develop and implement security plans. There are additional requirements for placarded shipments in transportation, which minimize the risks associated with their transportation. Shipping papers, packaging, car placement, the integrity of seals and closures, hazmat employee training, and maintenance are all areas that must be handled in accordance with prescribed standards.

Non-placarded shipments of explosives are not subject to these requirements. In rulemakings published on May 5, 2003, DOT and TSA determined that non-placarded shipments do not present a sufficient security risk in transportation, at this time, to warrant application of the TSA background check requirements to persons who transport those shipments in commerce or to persons who possess those shipments incidental to transportation in commerce, including persons subject to 18 U.S.C. 842(i). *See* 68 FR 23832 and 68 FR 23852. DOT and TSA continue to assess the security risks posed by the transportation of non-placarded shipments of explosives in commerce and will take appropriate

regulatory action, after public notice and comment, to address those risks.

Nevertheless, non-placarded shipments of explosives continue to be subject to general HMR requirements governing packaging and hazard communication. These risk-based safety requirements also enhance overall transportation security. For example, for high hazard shipments, such as Class 1 materials, the stringent packaging required by the HMR to enhance the safety of the shipment in transportation makes it difficult for someone to tamper with the shipment for a criminal or terrorist purpose. Similarly, shipping documents help shippers, carriers, and consignees account for specific shipments and identify discrepancies or missing packages. In addition, under the HM–232 final rule, hazardous materials employers must ensure that all hazardous materials employees receive security awareness training. Such training must include an awareness of the security risks associated with hazardous materials transportation and a component covering how to recognize and respond to possible security threats.

A joint decision by DOT and TSA as to whether a particular hazardous material, including an explosive, presents a sufficient security risk when transported in commerce to warrant background check or other security requirements is determinative. As noted above, DOT and TSA previously determined that the transportation of non-placarded shipments by persons described under section 842(i) does not present a sufficient security risk to warrant further regulation at this time. That determination also applies to the transportation in commerce of non-placarded explosives via rail.

For the transportation of explosives by rail in amounts that require placarding, RSPA and FRA regulations, the protections inherent in railroad operations against improper use of explosives by railroad employees, and security safeguards imposed by the railroads themselves adequately address, at the current time, security risks associated with rail employees who are involved in such transportation. DOT regulations ensure that explosives shipments are properly loaded, labeled, and documented, and that the shipments are very difficult to tamper with. In addition, the HM–232 final rule requires persons who transport certain hazardous materials to develop and implement security plans. Thus, railroads that carry hazardous materials, including explosives, in amounts that require placarding must have a security plan that conforms to HM–232 requirements. The plan must include an assessment of possible transportation security risks for covered shipments and appropriate measures to address the risks. Specific measures put into place under the plan must address personnel security. To the extent that a railroad identifies security vulnerabilities related to its personnel, its security plan must address those vulnerabilities. Further, major railroads have their own authorized law enforcement officers, and the nature of railroad operations makes it difficult for an employee to have any realistic opportunity to gain access to, improperly use, or redirect the movement of the shipments. Major railroads screen potential employees in a way that is designed to reveal those who are under indictment or have been convicted of serious felonies, are fugitives from justice, are in the country illegally, have renounced their citizenship, or have been dishonorably discharged from the armed forces. Serious felonies involve those offenses that generally pose a substantial threat to public safety and security.

Periodic operational testing and the nature of railroad work create an environment in which mental disorders that give rise to safety or security concerns are likely to be noticed and addressed. FRA's alcohol and drug regulations effectively prevent substance abusers from serving in security-sensitive positions. Recent security enhancements undertaken by the major railroads have also helped to reduce the risk that explosives or other hazardous materials can be used for terrorist purposes while in railroad possession. Small railroads rarely handle any explosives shipments, and many of the safeguards against misuse of those materials that exist on larger railroads are also present on small ones.

For all of these reasons, DOT and TSA have determined that the transportation of explosives via rail by persons described under section 842(i) does not pose a sufficient security risk warranting further regulation at this time. In light of this determination, the provisions of 18 U.S.C. 842(i) do not apply to persons while they are engaged in the transportation of explosives in commerce via rail.

It is important to note that this determination may be reassessed as DOT and TSA continue to identify and address security risks associated with the transportation of explosives. For example, in a rulemaking to be developed under Docket HM–232A, RSPA is evaluating the need to require further security enhancements on materials or categories of materials that present the most serious security risks in transportation. Likewise, TSA is considering transportation worker identification rules that would likely include certain railroad workers and entail background checks. Because of the potential impact of such enhanced security requirements on the economic viability of the hazardous materials transportation industry, any additional security requirements will be developed through normal notice and comment procedures, unless security threats justify expedited or emergency rulemaking.

Issued in Washington, DC, and Arlington, Virginia, on June 4, 2003.

Samuel G. Bonasso,

Acting Administrator, Research and Special Programs Administration.

Allan Rutter,

Administrator, Federal Railroad Administration.

James M. Loy,

Administrator, Transportation Security Administration.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2003–15353]

Notice of Receipt of Petition for Decision That Nonconforming 2002 BMW Z8 Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 2002 BMW Z8 passenger cars are eligible for importation.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2002 BMW Z8 passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is July 9, 2003.