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Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License; Final Rule

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Part 1572

[Docket No. TSA–2003–14610; Amendment No. 1572–4]

RIN 1652–AA17

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

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Interim final rule; request for comments.

SUMMARY: TSA is amending standards relating to security threat assessments of commercial truck drivers who are authorized to transport hazardous materials. TSA is adding definitions, and making organizational and substantive changes to the current standards codified at 49 Code of Federal Regulations (CFR) part 1572. First, this rule requires each State to declare whether it wishes to capture and submit fingerprints, applicant information, and fees itself, or alternatively chooses to have TSA complete those tasks. Second, TSA is changing the standards to permit certain aliens who are qualified to hold a commercial drivers license to apply for a security threat assessment. Third, TSA is removing one felony offense, simple drug possession, from the list of disqualifying crimes, and adding unlawful purchase, receipt, transfer, shipping, transporting, import, export, and storage of a firearm or explosives to the list. TSA is reclassifying the criminal offense of arson as an interim rather than permanent disqualifier, and reclassifying the offense of murder as a permanent rather than an interim disqualifier. TSA now prohibits individuals convicted of the most serious crimes, such as treason, from applying for a waiver. TSA is increasing the response time limits for appeals and waivers. TSA is changing the rule concerning transferring a hazardous materials endorsement from one State to another so that drivers do not have to undergo a new background check when obtaining a license in a new State, subject to some restrictions. TSA is enhancing the appeal procedures for an individual who is determined to pose a security threat as a result of the intelligence-related check. The rule moves the start date of the fingerprint-based checks for transfer and renewal applicants to May 31, 2005. The rule no longer requires the States to forward all driver applications to TSA, but the States must retain the applications for one year. States that elect to collect fingerprints and driver information must submit the information and fingerprints electronically, with some initial assistance from TSA. Finally, TSA is reducing the amount of advance notice the States must provide to drivers who hold hazardous materials endorsements regarding the need for a security threat assessment upon renewal. TSA is making these changes in response to comments received from the affected parties and to clarify further the implementation of this program.

DATES: *Effective Date:* This rule is effective November 24, 2004.

Comment Date: Submit comments by December 27, 2004.

ADDRESSES: You may submit comments, identified by the TSA docket number to this rulemaking, using any one of the following methods:

Comments Filed Electronically: You may submit comments through the docket Web site at *http://dms.dot.gov*. Please be aware that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov*.

You also may submit comments through the Federal eRulemaking portal at *http://www.regulations.gov*.

Comments Submitted by Mail, Fax, or In Person: Address or deliver your written, signed comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001; Fax: 202–493–2251.

Comments on Paperwork Collection: Comments may be faxed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS–TSA Desk Officer, at (202) 395–5806. Comments may be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: DHS–TSA Desk Officer.

Declarations Submitted by the States: Address the State Declarations required in § 1572.13(f) to: Program Manager, Credentialing Program Office, 601 S. 12th St., 8th floor, Arlington, VA, 22202.

Reviewing Comments in the Docket: You may review the public docket containing comments in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is located on the plaza level of the NASSIF Building at the Department of Transportation address above. Also, you may review public dockets on the Internet at *http://dms.dot.gov*.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: Kevin Johnson, Credentialing Program Office, Transportation Security Administration HQ, East Building, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–2155; e-mail *Kevin.Johnson@dhs.gov*.

Christine Beyer, Office of Chief Counsel, Transportation Security Administration, HQ, East Tower, 601 South 12th St., Arlington, VA 22202–4220; 571–227–2657; e-mail: *Christine.Beyer@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

This Interim Final Rule is being adopted without prior notice and prior public comment. However, to the maximum extent possible, TSA provides an opportunity for public comment on regulations issued without prior notice. Accordingly, TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the requirements in this document. See **ADDRESSES** above for information on where to submit comments.

With each comment, please include your name and address, identify the docket number at the beginning of your comments, and give the reason for each comment. The most helpful comments reference a specific portion of the rule, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES,** but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in two copies, in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you want TSA to acknowledge receipt of your comments on this rulemaking, include with your comments a self-addressed, stamped postcard on which the docket number

appears. We will stamp the date on the postcard and mail it to you.

Except for comments containing confidential information and Sensitive Security Information (SSI), we will file all comments we receive in the public docket, as well as a report summarizing each substantive public contact with TSA personnel concerning this rulemaking. The docket is available for public inspection before and after the comment closing date.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late to the extent practicable. We may change this rulemaking in light of the comments we receive.

Availability of Rulemaking 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;* or

(3) Visiting the TSA's Law 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 rulemaking.

Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires TSA to comply with small entity requests for information and advice about compliance with statutes and regulations within TSA's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT.** Persons can obtain further information regarding SBREFA on the Small Business Administration's web page at *http://www.sba.gov/advo/laws/law_lib.html.*

Abbreviations and Terms Used in This Document

ATSA—Aviation and Transportation Security Act
ATF—Bureau of Alcohol, Tobacco, Firearms, and Explosives
CDC—Centers for Disease Control and Prevention
CDL—Commercial drivers license
CDLIS—Commercial drivers license information system
CHRC—Criminal history records check
CJIS—Criminal Justice Information Services Division
DHS—Department of Homeland Security
DOJ—Department of Justice
DMV—Department of Motor Vehicles
DOT—Department of Transportation
FBI—Federal Bureau of Investigation
FMCSA—Federal Motor Carrier Safety Administration
HSA—Homeland Security Act
HME—Hazardous materials endorsement
HMR—Hazardous materials regulations
MTSA—Maritime Transportation Security Act
RSPA—Research and Special Programs Administration
SEA—Safe Explosives Act
TSA—Transportation Security Administration
USA PATRIOT Act—Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

I. Background

In response to the September 11 terrorist attacks on the United States, Congress passed the Aviation and Transportation Security Act (ATSA), which established the Transportation Security Administration (TSA).[1] TSA was created as an agency within the Department of Transportation (DOT), operating under the direction of the Under Secretary of Transportation for Security. Effective on March 1, 2003, TSA became an agency of the Department of Homeland Security (DHS), and the head of TSA is now the Assistant Secretary for Homeland Security, Transportation Security Administration (Assistant Secretary).

On May 5, 2003, TSA published an interim final rule (May 5 IFR) that requires a security threat assessment of commercial drivers who are authorized to transport hazardous materials in commerce.[2] The May 5 IFR implemented several statutory mandates discussed below, including fingerprint-based criminal history records checks (CHRC), checks against international databases, and appeal and waiver procedures. The May 5 IFR required CHRC to begin no later than November 3, 2003.

TSA requested and received comments from the States, labor organizations, and representatives of the trucking industry. In addition, TSA held working group sessions with the States to discuss potential fingerprinting systems that would achieve the statutory requirements, but would not adversely impact the States. Based on the comments received and our working sessions with the States, TSA issued a technical amendment in November 2003[3] to extend the date on which submission of fingerprints and applicant information would begin to be required. The reasons for the amendment were that a majority of the States could not implement the program by November and TSA did not have authority to collect fees to cover TSA's implementation costs. The amendment required the States to submit fingerprints and applicant information by April 1, 2004, or request an extension of time and produce a fingerprint collection plan by April 1, 2004. All States were required to have the fingerprint collection program in place as of December 1, 2004.

In response to the November 2003 technical amendment, a majority of the States asked for an additional extension of time because they could not begin collecting applicant information or fingerprints by the extended deadline of April 1, 2004. Therefore, on April 6, 2004, TSA published a final rule removing the April 1 date and establishing January 31, 2005, as the date on which CHRC must begin.[4] The Interim Final Rule we publish today reorganizes, clarifies, and adds operating details to the hazmat program.

In October 2003, legislation was enacted that authorized TSA to collect user fees to cover the cost of each security threat assessment.[5] Pursuant to this legislation, TSA on November 10, 2004 (69 FR 65332), published a notice of proposed rulemaking (NPRM) to establish reasonable fees for the threat assessment process. TSA plans to have the implementation of the hazmat security threat assessment program coincide with our ability to collect fees.

II. USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) was enacted on October 25, 2001.[6] Section 1012 of the USA PATRIOT Act amended 49 U.S.C. Chapter 51 by adding a new section 5103a titled ''Limitation on issuance of hazmat licenses.'' Section 5103a(a)(1) provides:

> A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Transportation has first determined, upon

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

[2] 68 FR 23852 (May 5, 2003).

[3] 68 FR 63033 (November 7, 2003).

[4] 69 FR 17696 (April 6, 2004).

[5] Department of Homeland Security Appropriations Act, 2004, Section 520, Pub. L. 108–90, October 1, 2003, 117 Stat. 1137.

[6] Pub. L. 107–56, October 25, 2001, 115 Stat. 272.

receipt of a notification under subsection (c)(1)(B), that the individual does not pose a security risk warranting denial of the license.[7]

Section 5103a(a)(2) subjects license renewals to the same requirements.

Section 5103a(c) requires the Attorney General, upon the request of a State in connection with issuance of an HME, to carry out a background records check of the individual applying for the endorsement and, upon completing the check, to notify the Secretary (as delegated to the Assistant Secretary) of the results. The Secretary then determines whether the individual poses a security risk warranting denial of the endorsement. The security threat assessment must consist of: (1) A check of the relevant criminal history databases; (2) in the case of an alien, a check of the relevant databases to determine the status of the alien under U.S. immigration laws; and (3) as appropriate, a check of the relevant international databases through Interpol-U.S. National Central Bureau or other appropriate means.

III. Safe Explosives Act

Congress enacted the Safe Explosives Act (SEA) on November 25, 2002.[8] Sections 1121–23 of the SEA amended section 842(i) of title 18, United States 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 lacking mental capacity[9] or committed to a mental institution. The 2002 amendment added three new categories to the list of prohibited persons: aliens, with certain exceptions;[10] 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 prosecution.[11] These incidents are investigated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) of the Department of Justice 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.'' Under this exception, if DOT regulations address the transportation security issues of 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. TSA issued the May 5 IFR and amendments in coordination with agencies within DOT, the Federal Motor Carrier Safety Administration (FMCSA) and Research and Special Programs Administration (RSPA), and triggered this exception. Therefore, the SEA does not apply to commercial drivers with HMEs while they are engaged in the transportation of explosives in commerce.

IV. The Current Rule

To comply with the mandates of the USA PATRIOT Act, and to trigger the exception in 18 U.S.C. 845(a)(1) for the transportation of explosives, TSA issued the May 5 IFR, technical amendments, and Final Rule (referred to collectively through the remainder of this document as the Current Rule). Under the Current Rule, TSA determines that an individual poses a security threat if he or she: (1) Is an alien (unless he or she is a lawful permanent resident) or a U.S. citizen who has renounced his or her U.S. citizenship; (2) is wanted or under indictment for certain felonies; (3) has a conviction in military or civilian court for certain felonies; (4) has been adjudicated as lacking mental capacity or involuntarily committed to a mental institution; or (5) is considered to pose a security threat based on a review of pertinent databases.

The Current Rule also establishes conditions and procedures under which an individual who has been determined to pose a security threat can appeal the determination. The Current Rule provides a waiver process for those individuals who otherwise could not obtain a hazardous materials endorsement (HME) due to a disqualifying felony conviction or lack of mental capacity. Any holder of an HME who has committed a disqualifying offense is required to surrender the endorsement as of September 2, 2003. Finally, the Current Rule prohibits an individual from holding, and a State from issuing or renewing an HME for an individual unless the individual meets the TSA security threat assessment standards.

V. Response to Public Comments

TSA received over 100 comments from individual commercial drivers, small trucking companies, national and international carriers, labor organizations, State Departments of Motor Vehicles (DMVs), industry associations, and associations representing State government. The discussion below groups the comments by the primary issues raised by the public.

A. Shortage of Time and Resources

The overwhelming majority of the comments are from the States and concern the need for additional time and resources. The States notified TSA that State funding, human resources, and technology are in short supply. Many of the States needed additional

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[7] The Secretary of Transportation delegated the authority to carry out the provisions of this section to the Under Secretary of Transportation for Security/Assistant Secretary. 68 FR 10988, March 7, 2003.

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

[9] Since 1970, the Federal explosives law has identified a category of persons prohibited from possessing explosives as ''adjudicated as a mental defective.'' TSA is replacing this term with ''adjudicated as lacking mental capacity.'' However, these terms have the same meaning for the purposes of the Federal explosives law and the TSA hazmat requirements.

[10] The prohibition in the SEA extends to each person—

(5) Who is an alien, other than an alien who—

(A) Is lawfully admitted for permanent residence (as that term is defined in section 101(a)(20) of the Immigration and Nationality Act); or

(B) Is in lawful nonimmigrant status, is a refugee admitted under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157), or is in asylum status under section 208 of the Immigration and Nationality Act (8 U.S.C. 1158), and—

(i) Is a foreign law enforcement officer of a friendly foreign government, as determined by the Secretary in consultation with the Secretary of State, entering the United States on official law enforcement business, and the shipping, transporting, possession, or receipt of explosive materials is in furtherance of this official law enforcement business; or

(ii) Is a person having the power to direct or cause the direction of the management and policies of a corporation, partnership, or association licensed pursuant to section 843(a), and the shipping, transporting, possession, or receipt of explosive materials is in furtherance of such power;

(C) Is a member of a North Atlantic Treaty Organization (NATO) or other friendly foreign military force, as determined by the Attorney General in consultation with the Secretary of Defense, who is present in the United States under military orders for training or other military purpose authorized by the United States and the shipping, transporting, possession, or receipt of explosive materials in furtherance of the authorized military purpose; or

(D) Is lawfully present in the United States with the Director of Intelligence, and the shipment, transportation, receipt, or possession of the explosive materials is in furtherance of such cooperation;* * *''

[11] 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.

State legislative authority to conduct the program and to collect fees to pay for the States' costs in implementing the program. To the fullest extent possible, TSA has issued extensions of time for the start date of the fingerprint-based CHRC to accommodate these requests and to provide TSA time to develop the fee proposed rule, after TSA obtained legislative authority to collect user fees to support the security threat assessment program.

Many of the States raised technical questions concerning the electronic interface that must exist for the States, TSA, and the Federal Bureau of Investigation (FBI) to receive and transmit data. These are daunting issues in light of the fact that each State and the Federal agencies have unique data management systems, with varying levels of sophistication. TSA is building a new Credentialing Screening Gateway System (Screening Gateway) to collect, retain, and transmit all of the information that must be collected from the applicant to conduct a security threat assessment. Once this system is complete, TSA will be prepared to receive all of the data fields required when the applicant provides the required information for an HME. TSA considers the process for collecting applicants' fingerprints for purposes of this regulation—working through State Departments of Motor Vehicles and allowing States either to collect the fingerprints themselves or to ask TSA to do so—as the best process to implement the USA PATRIOT Act's requirements in the near term. DHS is collecting fingerprints for other Departmental programs and expects to implement other programs in the future that will involve fingerprint collection. As all of these programs evolve, DHS will consider whether processes for this program, or for several DHS programs, can be consolidated to improve efficiency while fulfilling security needs. If greater efficiencies are possible, TSA will consider amending this rule, if necessary, to achieve those efficiencies.

TSA is not requiring the States to develop new connectivity with the TSA Screening Gateway. In States that choose to collect fingerprints and applicant information rather than use TSA for that purpose, the State will be responsible for transmitting the information to TSA electronically through the existing Commercial Drivers License Information System (CDLIS), and ensuring that the fingerprints are forwarded to the FBI in a form and manner consistent with FBI and TSA standards. TSA will assist in the electronic transfer of information in States that are in the process of upgrading their systems when the rule becomes effective. In these States, for a short time TSA will accept the information in alternate forms, such as email or facsimiles; and will format or digitize the information into a useable format until the States' computer upgrades are complete. TSA believes that the ability to exchange information electronically will benefit the States, the industry, and TSA in the long run and so TSA encourages the States to opt for this process. If a State knows that it will not be able to transmit the information electronically until after July 2005, however, the State should formally elect to have TSA capture the fingerprints and driver information. TSA can staff the data entry for a short period of time until a State's computer system is upgraded, but TSA does not have the resources to perform that task beyond July 2005.

B. List of Disqualifying Criminal Offenses.

Many individual drivers, trucking companies, and the States submitted comments on the list of disqualifying offenses in the Current Rule. For that reason, TSA reevaluated the list in order to ensure that it is not over- or under-inclusive. As a result, TSA is making several changes to the list of disqualifying crimes.

The list of permanently disqualifying offenses in the Current Rule includes espionage, treason, sedition, a crime involving a transportation security incident, improper transportation of a hazardous material, a terrorist crime, arson, unlawful use of an explosive, and conspiracy to commit any of these crimes. TSA is making four changes to the list of permanently disqualifying offenses: arson is reclassified as an interim rather than a permanent disqualifier, violations of the Racketeer Influenced Corrupt Organizations Act (RICO) are permanently disqualifying if an underlying crime is a permanent disqualifier (such as a terrorist conviction under 18 U.S.C. chapter 113B); TSA is adding unlawful purchase, receipt, transfer, shipping, transporting, import, export or storage of an explosive to former paragraph 1572.103(b)(9); and TSA is reclassifying murder as a permanently disqualifying crime.

TSA is amending the list of interim disqualifying offenses by adding arson and unlawful purchase, receipt, transfer, shipping, transporting, import, export or storage of a firearm, and by reclassifying murder and removing simple drug possession from the list. Possession with intent to distribute remains an interim disqualifying offense.

TSA developed the list of disqualifying felony convictions in consultation with the Department of Justice (DOJ) and DOT, to include those offenses that are reasonably indicative of an individual's predisposition to engage in violent or deceptive behavior that may be predictive of a security threat. Some States suggested that all criminal convictions should be disqualifying. The USA PATRIOT Act requires TSA to ''review relevant criminal databases'' and appropriate international databases to determine whether the applicant poses a security threat. Based on the legislative language and the need to keep commerce moving, TSA believes that disqualification of all drivers with a criminal record is not necessary. Past history and current threat information do not indicate that all persons with a criminal conviction pose a security threat. We believe that the rule lists the criminal offenses that indicate an individual's predisposition to engage in violent or deceptive activity that may reasonably give rise to a security threat.

TSA is removing simple possession of a controlled substance from the list based on comments received and our own analysis. Simple drug possession generally does not involve violence against others or reveal a pattern of deception, as crimes like smuggling or bribery often do. In addition, FMCSA's regulations governing the commercial driver's license program require CDL holders to undergo pre-application, post-accident, and random alcohol and drug testing. 49 CFR part 382. A positive drug or alcohol test will result in restrictions on the driver's CDL or disqualification. TSA believes that these standards act as a strong deterrent against alcohol or drug use while employed as a CDL driver. To the extent that an individual with a simple drug possession conviction presents a threat, the current CDL testing requirements most likely deter dangerous individuals with drug use problems from seeking employment as a hazmat driver. Based on this, and because simple drug possession generally does not fall within the class of crimes involving violence or deception, TSA has determined that there should be no adverse impact resulting from removing conviction for simple possession of a controlled substance from the list of disqualifying offenses. Conviction for possession of drugs with intent to distribute remains a disqualifying crime.

We are reclassifying arson as an interim rather than a permanent disqualifying offense. In reevaluating

the list of most serious crimes—those that disqualify an applicant for life—TSA believes that arson is not always an act of terrorism, as the other permanent disqualifying crimes typically are. Although an arson conviction may be indicative of a very dangerous individual who should not have control of hazardous material shipments, we do not believe that it rises to the same level of threat as espionage and treason do. It remains a disqualifying offense in this IFR, and TSA can carefully consider the underlying facts if a convicted arsonist applies for a waiver to determine whether the facts are indicative of an individual who presents on ongoing, unacceptable risk to security.

We are reclassifying murder as a permanent rather than interim disqualifying offense. Murder is one of the most violent crimes on the list of disqualifiers and indicates a disregard for human life. In reevaluating the standards, TSA has concluded that the crime of murder should be permanently disqualifying.

TSA is adding a RICO offense to the list of permanent disqualifiers if the underlying or predicate racketeering act for the RICO conviction is a permanently disqualifying offense. TSA understands that RICO convictions are often the result of a series or variety of criminal acts that may not be listed in the criminal history records. However, if a defendant is found by the trier of fact, or by his own admission in the course of a guilty plea, to have committed a permanently disqualifying offense as a predicate to a RICO conviction, TSA will consider the RICO conviction as permanently disqualifying. Conversely, where a RICO conviction is based on a series of robberies, the RICO conviction becomes an interim disqualifying offense. TSA does not anticipate that RICO violations will surface often during the security threat assessment process, but wishes to ensure that they are handled consistently and appropriately if they arise.

With respect to a conviction involving improper shipment of a hazardous material under § 1572.103(a)(6), TSA has added the corresponding Federal statutory citation to the rule (49 U.S.C. 5124) to specify the provision of law that is disqualifying. TSA has made this change in response to comments from the Institute of Makers of Explosives (IME) and the National Propane Gas Association (NPGA), in which they expressed concern that a State might charge an individual with a state crime that involves hazardous materials and incorrectly consider it a disqualifying offense under the Current Rule. Section 5124 of title 49, United States Code, provides that a person who knowingly violates section 5104(b) of the law (tampering and marking standards for hazardous materials), or other law in Chapter 51, Transportation of Hazardous Materials, will be fined under title 18 of the Code, or imprisoned, or both. TSA agrees that adding the Federal citation avoids confusion or incorrect application of the law. This amendment clarifies that 49 U.S.C. 5124, or a state law that is comparable, is disqualifying.

TSA has also added the phrase ''or State law that is comparable'' to crimes that include a specific Federal statutory citation to ensure that where a crime is committed pursuant to a State statute equivalent to these Federal statutes, it is clear that a conviction is disqualifying. The language has been added to paragraphs (a)(4), (a)(6), (a)(8), (a)(10) , and (b)(10).

As part of the discussion on disqualifying criminal offenses, it is important to outline the waiver program in the Current Rule and this IFR. TSA's waiver program provides an avenue for drivers with criminal histories to present the circumstances of their crime, evidence of restitution or other sentencing conditions, rehabilitation, and letters of reference. TSA has received approximately 35 waiver requests to date. The rule imposes a lifetime ban on persons convicted of the most serious security-related offenses (such as treason, espionage, and sedition); any driver convicted of one of these felonies is not eligible for a waiver. However, a driver with a conviction for other disqualifying felonies may apply for a waiver of the standard.

C. Immigration Status

With respect to certain aliens, TSA is amending the standards in this rule in response to comments received and TSA's analysis of the industry. The Current Rule permits citizens and lawful permanent residents to apply for a security threat assessment for an HME.

The FMCSA has statutory authority to develop standards for obtaining a CDL. The FMCSA regulations require CDL holders to be domiciled in the licensing State or be issued a nonresident CDL under prescribed procedures.[12] FMCSA's domicile requirement provides that a CDL holder must have a State of Domicile, which is defined as ''the State where a person has his true, fixed, permanent home and principal residence, and where he has the intention of returning whenever he is absent.''[13] FMCSA's regulations also provide for situations in which a CDL operator is domiciled in a foreign jurisdiction that does not test drivers and issue CDLs in accordance with the FMCSA standards, and permits those individuals to obtain a non-resident CDL from a State that does comply with the testing and licensing requirements.[14]

The trucking industry includes many alien drivers, including lawful nonimmigrants, refugees, and asylees. There are areas of the country, particularly the border States, where the concentration of non-citizens is very high. TSA has received correspondence from drivers in the United States under refugee status who understand that they cannot hold an HME under the Current Rule. In addition, their congressional representatives have expressed interest in authorizing these aliens to hold an HME. Employers have also expressed concern that the industry will be adversely impacted if all aliens are prohibited from holding an HME. This concern is particularly acute now because the trucking industry has informed TSA that the current annual employment turnover rate exceeds 80 percent. Employers report that good employees are difficult to find and keep, and often non-citizen employees are highly motivated to begin a trade in the United States once granted lawful status. Background checks are sometimes completed before an alien is granted lawful status or issued evidence of such status, but may not occur in some cases. However, assuming these individuals meet all CDL qualifications and apply for an HME, these applicants would undergo TSA's thorough security threat assessment.

For the reasons listed above, TSA has determined that the security threat assessment standards should be changed to permit nonimmigrant aliens, asylees, and refugees, who are in lawful status and possess valid and unrestricted documentation establishing eligibility for employment to apply for an HME and security threat assessment, if they are qualified to hold a CDL under 49 CFR parts 383 and 384. Any questions concerning the CDL requirements, particularly with respect to domicile, are governed by the FMCSA regulations and State DMV offices. As long as the applicant complies with the FMCSA regulations for obtaining a CDL, is in the country lawfully, is authorized to work in the U.S., successfully completes TSA's security threat assessment, and meets all other

[12] 49 CFR 384.212.

[13] 49 CFR 383.5.

[14] 49 CFR 383.23(b).

applicable standards, the applicant will meet the security threat assessment standards for holding an HME. TSA believes that if these standards are met, a person's status as an alien alone should not disqualify the individual from holding an HME. Aliens in lawful status are permitted to join the U.S. armed services and operate in other modes of transportation, such as flying aircraft in U.S. airspace, as long as they meet all applicable standards. TSA believes hazmat drivers should be treated similarly.

D. Collection of Fingerprints

Commenters asked TSA to permit the submission of fingerprints once and rerun those prints when the driver must renew or transfer an HME. They cite the cost and time needed to collect new fingerprints each time the driver undergoes a new security threat assessment as justification for recycling fingerprints. TSA understands these concerns and continues to develop a process and system to ensure that necessary fingerprint resubmissions are minimized.

E. Preemption

Several commenters asked for clarification or reconsideration of the preemptive effect that this rule has on State or local law. TSA's rule provides minimum standards for a security threat assessment that all 50 States and the District of Columbia must meet. If a State wishes to take additional action to protect its citizens, TSA's rule does not prevent it.

The State is the licensing body for drivers who are State residents and the State has a clear mandate and interest in protecting the residents and drivers within its borders from dangerous drivers. Thus, if a State determines that additional measures should be applied to drivers licensed by the State, and the measures are not inconsistent with TSA's rule, TSA does not wish to preclude the State from establishing them. As long as the State does not nullify or controvert the intent of the standards in this IFR, TSA's rule would not preempt State action. In deference to the State as the licensing body responsible for the welfare of its citizens, TSA believes that complementary State action may be appropriate. For instance, if a State adds a felony or misdemeanor conviction as disqualifying that is not among the list of disqualifying offenses in this rule, TSA's rule does not preempt application of the State law concerning drivers licensed in that State. However, a State is preempted from applying a standard in which the interim disqualifying offenses are no longer treated as disqualifying.

Federal preemption of State driver licensing standards is treated differently from Federal preemption of State laws or regulations governing the transportation of hazardous materials in commerce. The Federal Hazardous Materials Regulations at 49 CFR parts 171–180 are promulgated under the mandate in section 5103(b) of the Federal hazardous materials transportation law [Federal hazardous materials (hazmat) law; 49 U.S.C. 5101 *et seq.*, as amended by section 1711 of the Homeland Security Act of 2002, Public Law 107–296] that the Secretary of Transportation ''prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.'' One of the primary purposes of Federal hazmat law is to ensure a nationally uniform set of regulations applicable to the transportation of hazardous materials in commerce. Thus, the preemption provisions of Federal hazmat law generally preclude non-Federal governments from imposing requirements applicable to hazardous materials transportation if:

(1) Complying with the non-Federal regulation and complying with Federal hazmat law, the hazmat safety regulations (HMR), a hazardous materials transportation security regulation, or directive issued by the Secretary of Homeland Security is not possible (dual compliance test; 49 U.S.C. 5125(a)(1)); or

(2) The non-Federal requirement is an obstacle to carrying out Federal hazmat law, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (obstacle test; 49 U.S.C. 5125(a)(2)).

Further, Federal hazmat law preempts a non-Federal requirement applicable to any one of several specified covered subjects if it is not substantively the same as Federal hazmat law, the HMR, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security (covered subjects test; 49 U.S.C. 5125(b)).

The HMR are not minimum requirements that other jurisdictions may exceed if local conditions warrant; rather, the HMR are national standards and must be uniformly applied across jurisdictional lines. However, another Federal law may authorize non-Federal requirements. 49 U.S.C. 5125(a) and (b). Also, RSPA may waive preemption of a non-Federal requirement if it: (1) Provides the public with at least as much protection as requirements of Federal hazmat law and the HMR, and (2) does not impose an unreasonable burden on commerce. 49 U.S.C. 5125(e).

Most of the questions TSA receives concerning preemption involve the definition of ''conviction'' and whether the State definition or the definition set forth in TSA's rule applies. TSA's definition applies in the context of hazmat drivers, and TSA is amending it in this IFR to clarify the difference between State and Federal expungement standards. The new definition describes what actions constitute an expungement for purposes of the rule and serve to nullify a conviction. By providing the new definition, TSA believes that many of the questions concerning the application of State or Federal ''conviction'' standards are now addressed.

Some commenters have asked whether the TSA rule precludes a State from reviewing State criminal databases, in addition to the CJIS criminal records that TSA will search. Some States have stated that they plan to complete a check of the State records and forward any pertinent information to TSA with the other applicant information for consideration in the security threat assessment. Moreover, some States are required by State law to forward a driver's derogatory criminal history to TSA.

TSA's rule neither requires a State to search nor prevents a State from searching its own criminal records. If a State has the resources to check State criminal history records and forward any pertinent information to TSA during an applicant's security threat assessment, TSA will use the information. The only caveat we must apply is the State record must be transmitted to TSA contemporaneously with the other applicant information that the State submits to TSA. Considering the volume of information that will be exchanged on 2.7 million drivers, TSA and the States must make every effort to keep an applicant's information consolidated. Also, the State must consult with TSA concerning an acceptable format it will use to transmit the State criminal records to make certain TSA staff can easily decipher the record.

F. Privacy Concerns

Several drivers and employers commented on TSA's ability to maintain the confidentiality of a driver's identification information. Some drivers are skeptical that TSA can protect this personal information from use by other government agencies, commercial organizations, or employers. Employers

would like to receive some of the information that will be collected for the security threat assessment. TSA is sensitive to these issues and has established safeguards to ensure that all information will be handled in accordance with the Privacy Act of 1974.[15]

TSA employees and contractors are bound by law and contract to abide by Federal privacy laws to protect personal information from unauthorized disclosure. There are criminal sanctions for individuals who violate these laws. TSA has published its Privacy Act System of Records [16] for this program, detailing the information to be collected, how it will be used, and the routine uses of that information. TSA's System of Records discussed above permits sharing information with employers in its routine uses section. The personal information will be password protected and secured against unauthorized access.

As a matter of efficiency, TSA intends to maintain as much consistency as possible between the current hazmat driver and future maritime programs. The Maritime Transportation Security Act (MTSA)[17] requires a security threat assessment of workers with unescorted access to secure areas of ports, maritime vessels, and facilities. MTSA provides that any information constituting the grounds for denial of a transportation worker identification card must be maintained confidentially by the Secretary; an individual's employer may be informed of whether or not the individual has been cleared.[18] With respect to the hazmat program, any notification TSA makes to an employer will relay whether the driver's endorsement has been revoked so that the employer knows that the driver is not authorized to transport hazmat. Actual criminal history or other dispositive records will not be shared with employers. If TSA determines that an imminent threat exists and additional measures are necessary to secure a facility, TSA may provide additional information to the employer to help prevent a security incident.

It is also important to note that the FBI places restrictions on who may have access to the raw data obtained during a fingerprint-based CHRC. See 28 CFR 50.12. These restrictions would also apply to an employer's use of certain information.

TSA is considering requiring all employers to maintain a list of employees who hold HMEs, so that in the event that TSA wishes to notify an employer that an employee is not authorized to transport hazmat, TSA will have the information necessary to contact the employer. TSA may require each employer to maintain this list on a secure website that TSA can access easily and to update the list periodically. TSA has similar requirements in place in aviation. For instance, each airport must maintain a current list of individuals who have unescorted access to secure areas of an airport, and conduct periodic audits to ensure that the list is accurate. 49 CFR 1542.211. TSA requests comments from the industry concerning methods to establish such a database that would impose the fewest burdens and costs. Also, TSA requests comments on additional measures that would be useful in protecting this information from unauthorized access.

G. Tiered Background Checks

In one comment, an individual driver asked TSA to consider developing a tiered security threat assessment, with more stringent standards in place for the transportation of dangerous goods, such as weapon systems, chemical and biological warfare materials, and bulk fuels. Individuals who haul less dangerous products, such as asbestos, lithium batteries, food coloring, corn syrup, and bleach would undergo a security threat assessment, but with a shorter list of disqualifying offenses. TSA has discussed this principle internally for use across all modes of transportation. Under this approach, individuals with unescorted access to highly sensitive information, equipment, areas, or products would undergo a very intensive background check, and those with access to less sensitive material would complete a check of relevant criminal databases, particularly for outstanding wants and warrants, immigration status, and appropriate terrorist watch lists.

The difficulty with this approach is that it increases the costs, time, and resources necessary to track a particular shipment through the transportation system and make certain that only individuals with the appropriate background check come in contact with the shipment. TSA and DOT faced this problem with explosives shipments. Manufacturers and shippers were not willing to ship explosives in commerce because the SEA was originally going to be implemented in such a way that no felon could transport the explosive. The industry understood that it would not be possible to know at one end of the shipment process who might handle the package before it reaches its destination. In the scenario the commenter proposes, a significant amount of time would have to be spent by the industry to ensure that a box of explosives entering the transportation system in California does not travel through the hands of an individual who had not completed the most stringent security threat assessment before it reaches Vermont.

We note in this regard that the Current Rule, as amended by this IFR, provides for a tiered security threat assessment in that the driver background check requirements apply to drivers who transport ''placarded'' amounts of hazardous materials and select agents. ''Placarded'' amounts and materials are liquid, gaseous, or solid products that DOT has determined to be hazardous in transportation and require special marking and packaging while transported in commerce. (49 CFR part 172). In the May 5 IFR (68 FR 23832) TSA and DOT determined that the most significant security risks associated with the transportation of hazardous materials in commerce 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. This list generally correlates to the types and quantities of hazardous materials for which placarding is required. 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.

As the security programs administered by TSA mature, we intend to develop additional refinements to the process while maintaining a high level of security.

H. HME Transfers

Several drivers and State agencies have requested different standards for HME holders who must transfer the HME to a new State of residence. They cite the difficulty a driver faces if he undergoes security threat assessments for example, in February 2005 in Virginia, and must complete a second security threat assessment if he moves

[15] 5 U.S.C. 552a, as amended.

[16] 69 FR 57349 (September 24, 2004).

[17] Pub. L. 107–295, November 25, 2002, 116 Stat. 2064.

[18] 46 U.S.C. 70105(e).

to another State in the following year. Based on calls TSA has received, some drivers transfer State domicile and driver's licenses frequently. These transfers can become very costly for the driver or his employer, and impose additional work on the State DMVs and TSA. Therefore, TSA is amending the rule to permit the States and a transfer HME applicant to complete one security threat assessment for the period of time required in the driver's original State of issuance. For example, a driver in State A, where the renewal period is every four years, who completes a security threat assessment in 2005 and then moves to State B, will not have to complete a second threat assessment until the State A assessment expires in 2009. FMCSA's regulations require renewing the HME at least once every five years, so drivers across the country have nearly identical renewal periods. 49 CFR 383.141(d). Thus, there is no risk that any driver will go more than five years without a security threat assessment.

TSA invites comment from industry and the States on this new standard. TSA anticipates that the States will have to amend internal recordkeeping practices to track the HME transfer applicants, but we believe based on the comments received from the States that this is preferable to initiating a new security threat assessment each time an HME holder transfers to a new State.

I. Applicability of Waivers to § 1572.107 Disqualifications

An organization submitted comments asking TSA to reconsider the disqualifications from eligibility for a waiver under § 1572.107. TSA does not permit applicants who are disqualified under § 1572.107 to apply for a waiver. First, disqualifications under paragraph 1572.107(a) generally are a result of the intelligence-related check and reveal that the applicant may have or has connections to terrorist activity, leading to the determination that the applicant poses a security threat. Once an applicant is determined to pose a security threat due to intelligence-related information, there can be no rational reason to grant him a waiver of the standards. Further, disqualifications under paragraphs 1572.107(a) or (b) are based on individual determinations that, based on all of the circumstances, the applicant poses a threat. This scenario is unlike situations under § 1572.103, in which applicants are disqualified based on a certain criminal history, but where the circumstances surrounding the crime or rehabilitation following conviction might warrant issuing a waiver. Because individual circumstances are taken into account under a determination based on § 1572.107, there is no reason for a waiver.

Applicants disqualified under § 1572.107 may appeal TSA's initial determination that the applicant may pose a security threat on the grounds that TSA's assessment is inaccurate (e.g., due to mistaken identity). If TSA is not persuaded that the appeal should be granted, there is no opportunity for a waiver. TSA is changing this section of the rule to heighten the level of scrutiny that the applicant's appeal will receive. The rule now requires that the Assistant Secretary, rather than the Director, review and make a final determination of appeals that arise under § 1572.107 of the rule.

J. Hazmat Endorsements for Certain Farmers

Some States have asked whether individuals engaged in farming, who are subject to certain exceptions in the FMCSA and RSPA rules, must undergo a security threat assessment. Farmers are not required to obtain a commercial drivers license if they operate their vehicles within a 150-mile radius of the farm. If they transport materials that must be placarded, they must obtain a farm hazmat endorsement, which is attached to a basic operator Class D license. To obtain this endorsement, the driver must pass the regular CDL hazmat written test and a driving test in a representative vehicle.

These drivers are not required to undergo a security threat assessment for an HME because they are not required to obtain a CDL. The requirements in § 1012 of the USA PATRIOT Act are specific to the hazardous materials endorsement on a commercial drivers license. TSA may determine in the future that this population should undergo some form of a security threat assessment under the provisions of the Aviation and Transportation Security Act.[19] However, TSA is not amending this rule to cover this group, because the rule applies to the States and holders of commercial drivers licenses.

K. Acceptance of Background Checks Conducted by Other Agencies

TSA has received inquiries concerning the acceptance of background checks completed by other public and private entities. They urge TSA to recognize these checks as comparable to the security threat assessment required in this rule to avoid duplication of effort and unnecessary cost. Consistent with Homeland Security Presidential Directive-11 on comprehensive terrorist-related screening procedures and Homeland Security Presidential Directive-12 on common identification standards, TSA is committed to ''standardizing'' the security threat assessment process to the fullest extent possible. TSA will continue to work with all appropriate Federal agencies to ensure comparable background checks and threat assessments to avoid duplication of effort and minimize costs. TSA also recognizes that broader Federal Government efforts are underway to develop standardized screening for multiple programs across the Federal Government and the private sector. As these procedures are developed and implemented government-wide, TSA will consult with other Federal agencies to provide reciprocity with respect to comparable security screening programs.

[19] 49 U.S.C. 114.

VI. Summary of This Interim Final Rule

This document published today (referred to throughout the remainder of this document as the IFR) restructures the Current Rule text for clarity and organization. The chart below provides the section number in the Current Rule and the corresponding new section number used in this IFR.

Old section	New section
1572.5(b)	1572.11
1572.5(c)	1572.13(a)–(d)
1572.5(d)(1)	1572.5(c)
1572.5(d)(2)	1572.5(b)
1572.5(e)	1572.9
1572.5(f)	1572.103
1572.5(g)	1572.15(d)(1)
1572.9	1572.201
1572.11	1572.203

This IFR changes the Current Rule by amending the security threat assessment procedures into three distinct phases: the fingerprint-based check, the intelligence-related check, and the final disposition. As the Current Rule requires and under this IFR, TSA adjudicates the results of the fingerprint- and intelligence-related checks. As provided in this IFR and the Current Rule, after adjudication, TSA issues a Determination of No Security Threat to the State if the records do not disclose disqualifying information. TSA issues an Initial Determination of Threat Assessment to the applicant if the results of the threat assessment reveal a disqualifying standard. The applicant may file an appeal of the Initial Determination with TSA, based on assertions that the underlying records are incorrect or the records refer to a different individual. After completion of

an appeal, TSA issues a Final Disposition based on the results of the security threat assessment and appeal. Under the Current Rule and this IFR, TSA administers a waiver program for individuals who do not meet the standards for mental competency or criminal history, but can show rehabilitation to such an extent that they are capable of holding an HME.

In the IFR, TSA is making the following changes to the Current Rule:

- Revise definitions and terms in the rule text to describe the security threat assessment process
- Reorganize the rule text so that it is easier to follow
- Amend the immigration standards to permit lawful nonimmigrants, refugees, and asylees who possess valid evidence of unrestricted employment authorization who are qualified to hold a CDL to apply for a security threat assessment for an HME
- Remove simple possession of a controlled substance from the list of disqualifying offenses
- Reclassify arson as an interim rather than a permanently disqualifying offense
- Add unlawful purchase, receipt, transfer, shipping, transporting, import, export and storage of a firearm or explosive or explosive device to the list of disqualifying offenses
- Reclassify murder as a permanently rather than an interim disqualifying offense
- Make RICO convictions permanently disqualifying if the predicate crimes are permanently disqualifying
- Add the specific statutory citation for the offense of improper transportation of hazmat
- Lengthen the suspense dates in the appeal and waiver processes
- Reduce the amount of advance notice the States must provide HME drivers about the need for a background check upon renewal
- Amend the standards for drivers who are transferring their HME to a new State so that they do not have to undergo a new security threat assessment until the time period established by the State under which the driver's current security threat assessment expires
- Amend the review process for drivers who are disqualified as a result of the intelligence-related check to provide a final determination by the Assistant Secretary rather than the Director
- Remove the requirement that the States must forward each driver application to TSA
- Require the States to retain the application for one year
- Prohibit applicants with certain conviction from applying for a waiver
- Delay the date on which States are required to begin the security threat assessment process for renewals and transfers
- Require electronic submission of the applicant information in States that elect to do the fingerprint collection
- Require the States to notify TSA as to whether the State elects to collect and submit applicant information and fingerprints, or whether the State wants TSA do the collection

Each of these changes is discussed in detail in the preamble of this IFR.

VII. Rulemaking To Establish Fees

Section 1572.13(f) of the IFR provides that each State must decide whether it wants TSA and its agent to collect applicant information, fingerprints, and fees, and inform TSA of the decision no later than December 27, 2004.

The USA PATRIOT Act did not grant TSA authority to collect fees to cover the costs associated with completing security threat assessments on hazmat drivers. However, on October 1, 2003, legislation was enacted requiring TSA to collect reasonable fees to cover the costs of providing credentialing and background investigations in the transportation field, including implementation of the USA PATRIOT Act requirements.[20] Section 520 of the Homeland Security Appropriations Act of 2004 (2004 Appropriations Act) requires TSA to collect fees to pay for the costs of the following: (1) Conducting or obtaining a criminal history records check (CHRC); (2) reviewing available law enforcement databases, commercial databases, and records of other governmental and international agencies; (3) reviewing and adjudicating requests for waivers and appeals of TSA decisions; and (4) any other costs related to performing the background records check or providing the credential.

Section 520 requires that any fee collected must be available only to pay for the costs incurred in providing services in connection with performing the background check or providing the credential. The fee may remain available until expended. TSA must establish this fee in accordance with the criteria in 31 U.S.C. 9701 (General User Fee Statute), which requires fees to be fair and based on (1) costs to the government, (2) the value of the service or thing to the recipient, (3) public policy or interest served, and (4) other relevant facts. To the extent possible, TSA intends for these fees to be relatively consistent for other TSA background check programs.

In this IFR, TSA is requiring States to choose between two fingerprint collection options. Each State must either: (1) Collect and transmit the fingerprints and applicant information of individuals who apply for or renew an HME; or (2) allow an entity approved by TSA (TSA agent) to collect and transmit the fingerprints and applicant information of such individuals. States are required to notify TSA in writing of their choice within 30 days after the date this IFR is published in the **Federal Register**. If a State does not notify TSA in writing of its choice by that date, TSA will assume that the State has chosen the second option and will work with the State to establish a system for a TSA agent to collect fingerprints and applicant information in the State.

The State will be required to operate under the option it chooses until at least January 31, 2008, unless otherwise approved by TSA. TSA is requiring a specific initial time period of three years so that TSA and the TSA agent can adequately assess the overall cost of implementing the program. The fingerprint portion of the threat assessment will be effectively staggered initially as new applicants apply for the first time and as existing HME holders apply to renew their endorsement. If the States could change position on a yearly basis, the TSA agent would make its initial contract bid based on inaccurate cost projections. With a specific time period, the TSA agent can estimate with more certainty how many applicants must be processed, how much equipment is needed, where the collection centers will be located, and the number of employees needed to carry out the collection tasks.

To comply with the mandates of Section 520 of the 2004 Appropriations Act, the USA PATRIOT Act, and the SEA, TSA is issuing a companion notice of proposed rulemaking (Fee NPRM) to establish user fees for individuals who apply to obtain or renew an HME, and thus are required to undergo a security threat assessment in accordance with 49 CFR part 1572. In the Fee NPRM, TSA proposes to establish two new user fees in addition to the FBI fee for performing the CHRC on behalf of government agencies for non-governmental applicants: (1) A fee to cover TSA's costs of performing and adjudicating security threat assessments, appeals, and waivers (Threat Assessment Fee); and (2) a fee to cover the costs of collecting and transmitting fingerprints and applicant information (Information Collection and Transmission Fee).

[20] Department of Homeland Security Appropriations Act, 2004, section 520, Pub. L. 108–90, October 1, 2003, 117 Stat. 1137.

Under the Fee NPRM, if a State opts to collect fingerprints and applicant information itself, the State would be required to (1) collect and remit to TSA the Threat Assessment Fee in accordance with the requirements of the Fee NPRM and (2) collect and remit to the FBI its user fee to perform a criminal history records check. The State then would be free to collect a fee under State law, such as to cover its costs of collecting and transmitting fingerprints and applicant information.

If a State opts to permit a TSA agent to collect and transmit fingerprints and applicant information, the State would not be required to collect and remit to TSA any fees under the Fee NPRM. Rather, a TSA agent would (1) collect and remit to TSA the Threat Assessment Fee and FBI fee; and (2) collect the Information Collection and Transmission Fee (which TSA will use to pay the agent for its services). TSA will remit to the FBI the appropriate FBI fee.

VIII. Section-by-Section Analysis

Section 1572.3 Terms Used in This Part

Section 1572.3 adds and revises definitions of terms used throughout part 1572. The term ''adjudicate'' is added to describe the process by which an individual's security threat assessment is analyzed to determine whether the individual meets the security threat assessment standards. When TSA receives the results of the fingerprint- and intelligence-related checks, TSA analyzes the information for criminal history, immigration status, mental competency, and connections to terrorist activity to determine if the applicant should be disqualified under the standards described in this rule. The process of making this determination is the adjudication process.

''Alien'' means a person not a citizen or national of the United States. This definition is consistent with the definition of that term provided in the USA PATRIOT Act, which defines ''alien'' by referring to the definition provided in section 101(a)(3) of the Immigration and Nationality Act (INA). Section 101(a)(3) of the INA defines ''alien'' as any person not a citizen or national of the United States.

The Current Rule permits lawful permanent residents and U.S. citizens to hold an HME after successfully completing TSA's security threat assessment. This IFR expands the group of potential HME holders to include lawful nonimmigrants, refugees, and asylees who possess valid, unrestricted evidence of employment authorization, so long as they meet the threshold requirement of being qualified to hold a CDL. TSA is making this change in response to comments received from the States, trucking companies, and individual drivers. Many are concerned that prohibiting aliens who are in the United States working lawfully from transporting hazardous materials will adversely impact the movement of commerce in areas where the concentration of non-citizens is high.

TSA has evaluated the potential risks associated with this change and determined that it will not adversely impact security. Almost all of these individuals undergo background and security checks before obtaining lawful immigration status. Then, they will be subject to the full security threat assessment TSA conducts, which includes a variety of international sources, before being authorized to hold an HME. TSA has determined that, based on these facts and the high level of industry interest in permitting certain aliens to transport hazardous materials, the potential security risks have been effectively addressed and these individuals should be permitted to transport hazmat. This decision is discussed in greater detail in TSA's response to comments received.

''Alien registration number'' means the number issued by DHS to an individual when he or she becomes a lawful permanent resident or attains other non-citizen status. We are adding ''or attains other non-citizen status'' to account for the fact that we are now permitting other non-citizens to apply for a hazmat endorsement.

TSA is adding the term ''applicant'' to mean an individual who applies to obtain, renew or transfer an HME. Regardless of which phase the individual is in, the term ''applicant'' can be used to accurately describe the individual for ease of reference.

We are adding a definition for the term ''Assistant Secretary'' in this IFR, because of a slight difference in the IFR concerning which TSA official makes final determinations of appeals and waivers. In this IFR, only the Assistant Secretary, TSA's highest ranking official or his or her appointed designee, can make a final determination on the appeal of a disqualification under § 1572.107. Due to the fact that the information used for these checks may be classified, and therefore not available to the applicant for review, TSA believes that it is appropriate to provide a high level of scrutiny on these final determinations.

The terms ''commercial driver's license'' and ''endorsement,'' are used here as defined in the Current Rule and in FMCSA's regulations at 49 CFR 383.5. We are not making any changes to these definitions.

TSA is changing the definition of ''convicted'' in this rule. In the Current Rule, convicted means any plea of guilty or *nolo contendere*, or any finding of guilt. Under the IFR, TSA will include the effect that a reversal, pardon, or expungement has on a conviction. Each of these actions nullifies the conviction for purposes of determining whether an applicant meets the security threat standards. It is important to note that the definition also explains what an effective expungement is. For purposes of complying with this rule, the expungement must remove the criminal record from the applicant's file and cannot impose any restrictions or disabilities on the applicant. Also, if the applicant is permitted to withdraw a guilty plea or plea of nolo contendere and the case is dismissed, the individual is no longer considered to have a conviction. TSA believes it is necessary to include this level of detail in the definition to ensure that applicants are treated consistently across the country. Procedures on expungements vary from state to state, and may change at any time. Therefore, TSA hopes to avoid inconsistent application of the law against hazmat drivers by providing the new definition.

We are making three changes to the definition of ''date of service'' in § 1572.3. In the Current Rule, date of service is the date of personal delivery; the mailing date shown on a certificate of service; the date shown on the postmark if there is no certificate of service; another mailing date shown by other evidence if there is not certificate of service or postmark; or the date of an e-mail showing when the document was sent. We are changing ''e-mail'' to ''electronic transmission'' to reflect more accurately the type of information exchange that will likely occur among the States, TSA, and TSA's agent. In addition, we are replacing ''the date shown on the postmark if there is no certificate of service'' with ''10 days from the date of mailing, if there is no certificate of service.'' TSA believes that this change is more reasonable, considering the fact that many drivers are away from home for at least a week and may not have enough time to initiate an appeal without this change. Finally, we are changing the language for circumstances where a document is mailed and there is no certificate of service. In these cases, date of service is the date on which the document is mailed to the mailing address designated by the applicant on the application. TSA makes this change to

underscore that TSA considers the information the applicant puts on the application as accurate and will rely on it for service of documents.

The term ''day'' used in the rule means calendar day and is the same definition used in the Current Rule.

''Determination of No Security Threat'' is an administrative determination by TSA that an individual does not pose a security threat that warrants denial of the authorization to transport hazardous materials. Also, TSA will issue a Determination of No Security Threat to the State when TSA issues a waiver. This term is a replacement for ''Notification of No Security Threat'' that is used in the Current Rule, but has the same meaning. TSA will use ''determination'' in place of ''notification'' throughout the definitions.

The term ''Director'' refers to the officer designated by the Assistant Secretary to administer the appeal and waiver programs described in this part, unless the Assistant Secretary is specifically designated in the rule to administer the appeal or waiver program. The Director is authorized to name a designee to perform these duties, except where the IFR specifically designates the Assistant Secretary to administer the appeal or waiver program.

TSA is adding a definition of explosive or explosive device, which includes an explosive or explosive material defined in 18 U.S.C. 232(5), 841(c)–(f), and 844(j), and a destructive device defined in 18 U.S.C. 921(a)(4) and 26 U.S.C. 5845(f). The addition of this definition does not alter the substance of the rule in any way; it simply provides clarity for individuals looking for guidance on the items that constitute an explosive. The list is illustrative, not exhaustive.

''Final Determination of Threat Assessment'' means a final determination by TSA that an individual does not meet the standards required to hold or obtain a hazardous materials endorsement. A Final Determination may not be administratively appealed. In the Current Rule, this action is referred to as a Final Notification of Threat Assessment. We are changing ''notification'' to ''determination'' to reflect more accurately the action being taken.

''Final Disposition'' is a new term in the IFR that describes the actions that must be taken when a security threat assessment is complete.

TSA is adding a definition of ''firearm or other weapon,'' which includes firearms defined in 18 U.S.C. 921(a)(3) or 26 U.S.C. 5845(a) or items contained on the U.S. Munitions Import List at 27 CFR 447.21. The addition of this definition does not alter the substance of the rule in any way; it simply provides clarity for individuals looking for guidance on the items that constitute an explosive. The list is illustrative, not exhaustive.

A ''hazardous material'' means any material that: (1) In accordance with Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*), has been determined to pose an unreasonable risk to health, safety, and property when transported in commerce and that is required to be placarded under subpart F of part 172 of the Hazardous Materials Regulations (49 CFR parts 171–180); or (2) any quantity of any material listed as a select agent or toxin by Centers for Disease Control and Prevention (CDC) in 42 CFR part 73. This is the same definition used in section 103 of the Hazardous Materials Transportation Act and in the Current Rule.

DOT evaluates materials to determine whether their respective characteristics, properties, and quantities in transportation merit special marking, storage, and handling procedures. TSA, in consultation with DOT, has determined that non-placarded shipments do not present a sufficient security risk in transportation to warrant application at this time of the TSA background check requirements to persons who possess or transport these materials, including persons subject to 18 U.S.C. 842(i).

''Hazardous materials endorsement (HME)'' is the authorization issued by a State Department of Motor Vehicles (DMV) to transport hazardous materials in commerce. An HME attaches to a truck driver's commercial driver's license (CDL), which is also issued by a State DMV.

''Incarceration'' means confinement to a jail, half-way house, treatment facility, or other institution, on a full or part-time basis pursuant to a sentence imposed due to a conviction. This definition is taken from a statutory definition of ''imprisoned'' in 22 U.S.C. 2714, which relates to denial of passports due to certain drug offense convictions. It is the same as the definition used in the Current Rule. We have used this definition of incarceration because it is used in similar Federal regulatory programs, such as those involving the issuance or approval of passports. See 5 CFR 890.1003; 42 CFR 1001.2.

TSA is adding a definition for ''imprisoned or imprisonment,'' which is a new term used in § 1572.107. It means confined to a prison, jail, or institution for the criminally insane, on a full-time basis pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity. Time spent confined or restricted to a half-way house, treatment facility, or similar institution pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity does not constitute imprisonment for purposes of this rule. TSA added this term to cover instances in which we believe time spent in a half-way house or treatment facility should not be relevant to determining whether a driver poses a security threat.

''Initial Determination of Threat Assessment'' means an initial administrative determination by TSA that an individual poses a security threat that warrants denial of the authorization to transport hazardous materials. An Initial Determination may be administratively appealed. We are changing this term to ''Initial Determination'' from ''Initial Notification,'' to reflect more accurately the action being taken. In addition, the words ''the authorization for which the individual is applying'' have been deleted to make the language clearer.

''Initial Determination of Threat Assessment and Immediate Revocation'' means an initial administrative determination that an individual poses a security threat that warrants immediate revocation of an HME. Upon issuance of this document, the State must immediately revoke the hazmat endorsement. The driver has an opportunity to appeal this determination, but the appeal transpires after the revocation has occurred. TSA will issue this document only where we believe the driver may pose an imminent threat to transportation, national security, or other individuals. We are adding this definition to distinguish the notification documents used in an immediate revocation from the more common Initial Determination process.

''Lawful permanent resident'' means an individual who has been lawfully admitted for permanent residence in the United States, as defined in 8 U.S.C. 1101. In the statute, ''lawfully admitted for permanent residence'' means ''the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.'' The language in this definition has been changed slightly from the Current Rule,

but substantively, the meaning is the same.

''Mental institution'' means a mental health facility, mental hospital, sanitarium, psychiatric facility, and any other facility that provides diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital. This definition is taken from standards concerning individuals with a mental disability, which ATF promulgated at 27 CFR 478.11. This definition is the same one used in the Current Rule. We are using this ATF definition because we are implementing standards concerning mental capacity and the authorization to transport explosives and other hazmat, which ATF previously administered before TSA published the Current Rule.

The term ''pilot state'' is defined here as a State that chooses to volunteer to begin the complete security threat assessment process prior to January 1, 2005. This definition is used in the Current Rule.

''Revoke'' means the process by which a State cancels, rescinds, withdraws or removes a hazardous materials endorsement. This definition is revised to include all terms a State may have in its statute that are equivalent to the term ''revoke.'' Several States commented that the local statute does not use ''revoke'' and asked that we include other terms consistent with the State statute to ensure that a State does not violate its own statute when it revokes or rescinds a hazardous materials endorsement. TSA's interest is in the cessation of a driver's right to carry hazardous materials, and not to impact the driver's ability to maintain his commercial drivers license.

''State'' means a State of the United States and the District of Columbia. This definition is taken from The Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. 31301(14), which created the CDL program. This has not changed from the Current Rule.

''Transportation security incident'' means a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area. This definition is taken from the Maritime Transportation Security Act (MTSA) (46 U.S.C. 70101). This definition has the same meaning as the definition used in the Current Rule, but is now consistent with the actual legislative language. TSA used ''severe transportation security incident'' in the Current Rule to make clear that the incident must result in significant damage, disruption, or loss of life to be a disqualifying offense in the hazmat program. TSA is making the change to use the actual legislative language to make the IFR consistent with the statute.

''Withdrawal of Initial Determination of Threat Assessment'' is the document TSA issues to an applicant when the security threat assessment process initially indicates that an applicant may pose a security threat, but on appeal, TSA determines that the person does not pose a security threat. For instance, mistaken identity or incomplete court records may have led to an incorrect initial determination.

Section 1572.5 Scope and Standards for Hazardous Materials Endorsement Security Threat Assessment

This section describes the individuals and entities subject to the requirements in Subpart A and the standards those individuals must meet.

Subpart A applies to State agencies that are responsible for issuing commercial drivers licenses and HMEs, and applicants who hold or apply for a new, renewal or transfer HME.

The standards TSA applies to determine whether an individual poses or is suspected of posing a security threat that warrants denial of an HME have been established by statute, the USA PATRIOT Act and the Safe Explosives Act. For the purposes of this IFR, an applicant does not pose a security threat if he or she (1) does not have a disqualifying criminal offense described in § 1572.103; (2) meets the immigration status requirements described in § 1572.105; (3) does not pose a security threat as described in § 1572.107; and (4) has not been adjudicated as lacking mental capacity as described in § 1572.109. This paragraph also explains that the security threat assessment will be based on the individual's fingerprints, name, and other identifying information.

Section 1572.7 Waivers of Hazardous Materials Endorsement Security Threat Assessment Standards

This section describes the individuals who may apply to TSA for a waiver. Applicants who have been convicted of certain criminal offenses and those who have been declared mentally incompetent in the past may apply for a waiver. Individuals convicted of treason, sedition, espionage, a crime involving a transportation security incident, and a crime of terrorism are not eligible for a waiver from TSA. This is a change from the Current Rule, which TSA believes is appropriate given the severity and level of risk these crimes reflect. Individuals who do not meet the immigration standards in § 1572.105 may not apply for a waiver. There is no circumstance or set of facts under which TSA would wish to suspend the application of the lawful immigration categories listed in section 105 to issue a waiver. Additionally, if TSA determines that an individual does not meet the standards in § 1572.107, the applicant is not eligible for a waiver. Granting a waiver to an individual determined to pose a security threat would undermine the purpose of this rule and the statutes that gave rise to it.

Section 1572.9 Applicant Information Required for a Security Threat Assessment for a Hazardous Materials Endorsement

This section describes all of the identifying information an applicant must provide in order for TSA to complete the fingerprint- and intelligence-related checks. The State is required to retain the information for one year, in either paper or electronic form. If the State opts to collect fingerprints and the applicant information, the State must submit applicant information to TSA electronically and the fingerprints to the FBI. If the State chooses to have TSA do the collection, the TSA agent will collect and retain the information, provide a copy of the application to the State, and submit the fingerprints to the FBI. We are requiring essentially the same information as is required in § 1572.5(e) of the Current Rule, but we now add the requirement to provide the applicant's physical identifying information, including hair and eye color, height and weight. Also, we are now requiring the applicant's mailing address, if it differs from the residential address, to facilitate delivering all notifications to the proper location. Finally, we are requesting the name and address of the applicant's current employer(s) so that TSA can notify the employer if a driver poses a security threat and is no longer authorized to transport hazmat.

This section also requires the applicant to acknowledge and certify that he or she meets the standards described in the application and does not have any of the disqualifying offenses. The applicant's certification is given under penalty of law— any false statement or misrepresentation may result in criminal prosecution.

Section 1572.11 Applicant Responsibilities for a Security Threat Assessment for a Hazardous Materials Endorsement

This section describes the standards with which each applicant must comply and the actions the applicant must take

in order to hold an HME. The requirements in this section are found in § 1572.5(b) of the Current Rule. As of September 2, 2003, current HME holders have been required to surrender the endorsement if the individual does not meet the standards described in the Current Rule. Also, applicants have an ongoing responsibility to report any violation of the standards to TSA and surrender the HME within 24 hours of the violation. Paragraph (d) of this section provides that the applicant may submit fingerprints to prove identity or disprove an adverse finding following the intelligence-related check, and must submit fingerprints when applying to obtain or renew an HME. With respect to transferring an HME when a driver changes residences, the driver is not required to undergo a security threat assessment in the new State until the term of years required in the driver's previous State of residence expires.

On October 1, 2003, legislation was enacted requiring TSA to collect reasonable fees to cover the costs of providing credentialing and background investigations in the transportation field, including implementation of the USA PATRIOT Act requirements.[21] As a result, TSA has initiated a proposed rulemaking to determine the reasonable fees that are necessary to cover each phase of TSA's security threat assessment. Paragraph (d)(3) refers to this fee authority and states that the fee TSA may charge in order to cover the cost of the security threat assessment must be paid by the employee or employer. It is important to note that this does not refer to any fees the States may charge to recover their costs, or the fees that the FBI has established to complete the search.

Section 1572.13 State Responsibilities for Issuance of Hazardous Materials Endorsement

This section lists all of the responsibilities that the States must perform in order to ensure that only individuals who meet the security threat assessment standards receive a hazmat endorsement. These requirements are very similar to the requirements in the Current Rule.

Paragraph (a) provides that each State must immediately revoke an individual's hazardous materials endorsement if TSA informs the State that the individual does not meet the standards for security threat assessment in § 1572.5. This provision is intended to address situations in which TSA becomes aware of an individual who may pose an immediate threat and should not be transporting hazardous materials. TSA envisions that this procedure will not occur frequently, but the States must be prepared to revoke an HME quickly if such an individual comes to TSA's attention. Any individual HME holder who falls into this category may appeal this action, as described in § 1572.141(i).

Paragraph (b) provides that as of January 31, 2005, for new HMEs and on May 31, 2005, for renewal and transfer HMEs, no State may issue or renew an HME for a CDL unless the State receives a Determination of No Security Threat from TSA. This IFR provides the later date for HME renewals and transfers in recognition of the States' need for additional time and resources to implement this program. TSA has completed a name-based check on all current HME holders and reruns this list periodically. TSA has disqualified those individuals that pose a security threat. Therefore, TSA has determined that staggering the implementation should not adversely impact security.

In addition, at least 60 days prior to the expiration date of the individual's endorsement, the State must notify each individual holding a hazardous materials endorsement issued by that State that he or she will be subject to the security threat assessment described in this part as part of an application for renewal of the endorsement. The notice must inform the individual that he or she may initiate the security threat assessment required by this part at any time after receiving the notice, but no later than 30 days before the expiration date of the individual's endorsement. If the individual does not initiate the security threat assessment at least 30 days before the expiration, their HME may expire before the security threat assessment is complete.

The timelines described in paragraph (b) have been shortened from the 180/90-day notification deadlines in the Current Rule as a result of comments received from the States and TSA's reconsideration of this requirement. Initially, TSA established the 180/90-day notification requirements in order to provide HME holders sufficient time to seek other employment if they believe they may be disqualified. However, now that the driver self-reporting requirement in § 1572.11 is in effect (as of September 2, 2003) those drivers must surrender their endorsement and may seek a waiver under § 1572.143.

Representatives of the trucking industry have expressed concern that shortening this advance notice time period from 180 days to 60 may not provide drivers enough time to complete the security threat assessment before the HME expires. If a driver begins the assessment 60 days prior to expiration of his HME, but receives an adverse initial finding, appeals it and then applies for a waiver, companies fear that drivers will not be available to transport hazmat because the HMEs will expire prior to completion of the appeal and waiver processes. Nothing in the rule prohibits the State, employer, or driver from beginning the security threat assessment more than 60 days prior to expiration of the HME. If a State, driver, or employer wishes to start the process earlier, they may do so.

In addition, TSA is adding paragraph (b)(3), which provides that the States may not begin processing renewal and transfer applicants prior to March 31, 2005'60 days before the fingerprint start date for renewal and transfer applicants. TSA is adding this requirement to ensure that TSA and State resources will be focused on new applicants as the nationwide implementation begins. TSA believes this requirement may minimize process, paperwork, and computer problems that are more likely to occur when a program of this size first begins.

Paragraph (c) provides that a State may volunteer to begin the security threat assessment program prior to January 31, 2005, if TSA approves the process the State intends to use. These Pilot States may not revoke, issue, renew or transfer a hazardous materials endorsement for a CDL unless the Pilot State: (1) collects the information required in § 1572.9; (2) collects and submits fingerprints in accordance with procedures approved by TSA; and (3) receives a Determination of No Security Threat or Final Determination of Threat Assessment from TSA. This provision appeared in the Current Rule and is intended to address any State that is ready to proceed prior to January 2005.

Paragraph (d) provides that a State may extend the expiration date of the HME for 90 days if TSA has not provided a Final Determination of Threat Assessment or Determination of No Security Threat before the endorsement expires. Any additional extensions must be approved in advance by TSA. This requirement appears in the Current Rule and TSA believes it is necessary to ensure that no applicant loses his or her HME due to unforeseen delays in the TSA or State process. For instance, if TSA or a State knows that a computer problem has developed that will delay a batch of background check data, the rule provides a mechanism for the State to extend the driver's HME. We are adding the 90-day extension limit in the IFR to ensure that an

[21] 2004 Department of Homeland Security Appropriations Act, Section 520, Pub. L. 108–90, October 1, 2003, 117 Stat. 1137.

applicant's HME is not extended indefinitely. TSA believes this time limit should also prevent miscommunication between TSA and the State. For instance, the State may send the appropriate information to TSA and assume TSA is conducting the security threat assessment, but the documents are lost or misidentified and the security threat assessment is not underway. Also, if TSA issues its Determination, but the State does not receive it for some reason, the rule requires communication between TSA and the State to resolve the delay.

Paragraph (e) requires the State to update the driver's permanent record with the results of the security threat assessment and the new expiration date of the HME; notify CDLIS of the results; and revoke or deny the HME within 15 days after receiving TSA's Determination of No Security Threat or Final Determination of Threat Assessment. These actions include updating the applicant's record; notifying CDLIS of the results of the security threat assessment; and revoking or denying the HME based on the results of the check. The rule requires the States to take these actions within 15 days after receipt of the Final Determination of Threat Assessment or the Determination of No Security Threat.

The IFR does not require the State to ''issue'' an HME within 15 days when the applicant successfully completes the security threat assessment, as the Current Rule did. TSA received comments from many States and their Association concerning the extreme hardship this restriction would place on the current licensing systems. In the States' current CDL and HME issuance systems, the renewal periods and expiration dates are tied to the driver's date of birth. All of the States would be required to make major changes to computer systems that contain the CDL and HME data if the expiration date must be tied to the date of issuance rather than date of birth. Technically, the State can deliver the HME to the driver within 15 days after TSA's notification, but its expiration date would run from the driver's birth date, not the date of issuance, as required in the Current Rule. TSA has concluded that the expense and disruption these substantive changes would cause outweigh any advantage gained by having the expiration dates stem from the date of issuance rather than a driver's date of birth. TSA will monitor this process and take additional regulatory action if needed.

New paragraph (f) provides that each State must notify TSA in writing as to whether the State wishes to have TSA collect and submit applicant information and fingerprints, or whether the State plans to undertake this responsibility. TSA must have each State declaration on or before December 27, 2004 and the declaration will remain in place until January 31, 2008, unless otherwise authorized by TSA. Throughout this rulemaking proceeding, approximately half of the States have indicated the desire to collect applicant fingerprints and information, and have the equipment, personnel, and funds to do so. Therefore, TSA is offering this choice to accommodate those State interests. For all other States, TSA, through an agent, will complete these tasks using TSA resources and the user fee collected for this purpose. The States' written declaration must be sent to the Hazmat Program Manager, TSA Credentialing Office, 601 S. 12th St., Arlington, VA 22202.

For TSA to prepare adequately to oversee and administer the fingerprint collection process, and so that any TSA agent can accurately assess costs, TSA must know how many States will complete these collections and how many will opt for TSA to perform these responsibilities. To develop accurate cost estimates necessary to determine the user fee TSA will charge to the applicant or employer, TSA and its agent must assess start-up and operational costs over a period of time. Therefore, the selection each State makes will remain in place until January 31, 2008 unless otherwise authorized by TSA. TSA believes that a shorter time period is not adequate to assess implementation costs on how many collection sites are needed, how much equipment and personnel will be necessary, the time it will take to collect prints in the large versus small States, and other operational issues. Finally, if TSA does not receive a written declaration from a State, TSA and its agent will assume responsibility for the collection and submission process for that State.

It is also important to note that if the State elects to collect applicant fingerprints and information, the State will gather the information that is required by the rule when the driver appears to provide fingerprints and initiate the process. The State must then forward the information to TSA electronically through CDLIS, the fingerprints to the FBI, and the corresponding fees to TSA and the FBI. As stated above, TSA is willing to assist with the electronic transmission of the information for a short period of time to give States enough time to upgrade their computer systems to perform electronic transfers routinely. TSA can devote resources to entering the data manually for a few months as long as the State is in the process of upgrading their system. If the State cannot complete the upgrade by July 2005, then the State should elect to have TSA capture fingerprints and information.

If TSA's agent collects applicant information and fingerprints, TSA will require the TSA agent to collect and remit to TSA the FBI's fee and TSA's threat assessment fee, in a form and manner approved by TSA. Also, the FBI will bill TSA on a monthly basis for the fingerprints submitted by TSA through TSA's agent and processed by the FBI. This process is discussed in the fee NPRM as well.

Depending on how many States elect to have TSA complete the fingerprint collection program and where they are located, drivers licensed in States that opt to have TSA collect fingerprints may be able to submit their fingerprints at any location where TSA has established a collection facility. For instance, if a driver in State A is working outside State A when it is time to submit fingerprints and information and State A elected to have TSA collect fingerprints, the driver may submit fingerprints at a TSA collection site that is much closer to where he is working at the time. In States that opt to do the collection, drivers will most likely have to submit the required information at a State collection point.

As discussed earlier in this document, TSA is conducting a parallel proposed rulemaking to address the amount of the fee that TSA intends to charge for the security threat assessment. TSA encourages all interested parties to follow and participate in that proceeding to assist TSA in developing reasonable, accurate fees.

TSA is adding a new paragraph (g) to this section in response to comments received from State DMVs and individual drivers concerning HME transfers. Pursuant to the FMCSA rules, drivers who change their State of residence must register with the new State of residence within 30 days and apply for a transfer HME. 49 CFR 383.71(b). Drivers and the DMV offices questioned whether a new security threat assessment is necessary each time a driver moves to another State, regardless of when the previous threat assessment occurred. TSA agrees that requiring a new threat assessment each time a driver moves is burdensome and unnecessary. Therefore, the rule now permits a transferring HME holder to forego a new security threat assessment in the new State of residence until the

renewal period established in the preceding issuing State expires.

Paragraph (h) provides that each State must retain all applicant information collected for the security threat assessment for at least one year. TSA believes this requirement is necessary to ensure that the information is available if questions or appeals arise in the course of the security threat assessment. The States, as licensing bodies, currently keep some of this information now as part of the commercial drivers license and HME program. The State may keep this information in paper or electronic form.

Section 1572.15 Procedures for Security Threat Assessment

This section describes the security threat assessment process in detail, and provides that no State can issue an HME unless the steps outlined in this section have been completed. The process includes the fingerprint-based check, an intelligence-related check, and a final disposition.

The fingerprint-based check covers an individual's criminal history to determine whether the applicant has been convicted of or incarcerated for a disqualifying felony under Federal, State, or local law. In addition, TSA can review databases related to an applicant's dishonorable discharge from the armed service, if any, during this phase of the security threat assessment, which may indicate whether the applicant has a disqualifying military conviction. This check requires collecting fingerprints and applicant information, and submitting the prints to the FBI and the information to TSA.

The intelligence-related check involves the use of an applicant's biographical and identification information that is collected during the HME application process. This check searches for potential terrorist activity, immigration status, and mental incompetency. In many cases, only certain Federal agencies are authorized to access the pertinent databases to complete these checks, and some of these databases may be classified.

Once TSA has received the results of the fingerprint- and intelligence-related checks, TSA reviews them to determine if the individual meets the security threat assessment standards. If the applicant meets the standards, TSA will notify the State with a Determination of No Security Threat for the applicant. Once the State receives this Determination, it issues or renews the HME.

If TSA determines that an applicant does not meet the standards for holding an HME, TSA issues an Initial Determination of Threat Assessment to the applicant. The Initial Determination includes the basis for the determination; instructions on how the individual may appeal the finding; and a statement that if the applicant does not appeal the finding, the Initial Determination becomes a Final Determination of Threat Assessment, which cannot be appealed. If the applicant does not appeal the finding, TSA notifies the issuing State, and the State cannot issue, renew, or transfer the applicant's HME.

If an applicant appeals the Initial Determination, but the appeal does not overturn the Initial Determination, TSA notifies the State and applicant with a Final Determination of Threat Assessment. However, if TSA determines that the Initial Determination was inaccurate (due to incomplete court records, for instance) and grants the appeal, TSA issues a Withdrawal of the Initial Determination of Threat Assessment to the applicant and a Determination of No Security Threat to the State.

This IFR now includes details of the process involved when an immediate revocation occurs. The State must immediately revoke an HME when so notified by TSA. TSA will issue an Initial Determination of Threat Assessment and Immediate Revocation when TSA's security threat assessment indicates that a driver may pose an imminent threat to national or transportation security. This issuance may also occur when an individual has a disqualifying offense, but has not surrendered his endorsement, as required by the rule. Under this procedure, the individual's HME is revoked immediately and he may appeal the revocation afterward. Also, if TSA does not receive an appeal of an Initial Determination of Threat Assessment and Immediate Revocation within the prescribed time periods, the Initial Determination becomes final. If TSA grants the appeal, TSA will issue a Withdrawal of the Initial Determination to the applicant and Determination of No Security Threat to the State.

It is important to note that TSA may begin the final disposition phase of the threat assessment process after receiving adverse information from the fingerprint- or intelligence-related portion of the check, even if both checks are not complete. For instance, if TSA obtains the results of an intelligence-related check before the fingerprint-based check, and the information identifies the applicant as a terrorist, TSA may issue its Initial and Final Determinations before the fingerprint check is complete. There is no reason to wait for all information to become available if the information in hand is disqualifying. We do not anticipate that this scenario will occur often.

An applicant may appeal an adverse finding due to the fingerprint- or the intelligence-related checks. This process will often be a ''correction of records'' because the basis of the appeal is that the records on which TSA relied are not accurate or involve a different individual. In the case of an appeal of the intelligence-related check, the data or documents that gave rise to the adverse finding may be classified or otherwise protected by law, in which case TSA cannot release the document or information. However, TSA will make every effort to provide as much information to the applicant as the law permits to facilitate a meaningful appeal.

Certain applicants disqualified from holding an HME may request a waiver of the standards. Individuals who commit certain disqualifying offenses or have a history of mental incapacity are eligible to apply for a waiver. Individuals identified as posing a threat under § 1572.107 or do not fall within the lawful immigration categories listed in the IFR are not eligible for a waiver.

TSA uses the term ''serves'' in the rule text for the process by which TSA will notify the States and applicants of the security threat assessment determinations. The definition of ''date of service'' in § 1572.3 includes the date of personal delivery; the mailing date shown on a certificate of service; 10 days from the date of mailing if there is no certificate of service; another mailing date shown by other evidence if there is no certificate of service or postmark; or the date on which an electronic transmission is sent.

TSA and the States have discussed the benefits of communicating this sort of information electronically, and so ''serve'' may include uploading the notifications to the State on a secure website. This method of communication would save time, paper, and money, and furthers the e-government movement. However, there may be instances in which a State would prefer to receive a determination in hard copy, and so TSA invites comment from the States on this issue.

TSA has some concern about the potential difficulty in providing notice to a driver who may be on the road for weeks at a time. The information required in § 1572.9 requests the applicant's mailing address if it differs from the residential address. Drivers should be careful when completing the application to provide the address that is best for appropriate notice from the State and TSA. We have amended the

definition of ''date of service'' to underscore that TSA will use the address given on the application for service of documents. We invite comment on this issue from drivers and their associations as to how this concern can be minimized.

Once the fingerprint- and intelligence-related checks are complete, paragraph (d) explains the actions TSA will take to conclude the assessment.

Section 1572.103 Disqualifying Criminal Offenses

Congress did not specify in the USA PATRIOT Act the criminal offenses that TSA must use to determine whether a person poses a security risk warranting denial of an HME. TSA considered the crimes listed in 49 U.S.C. 44936, which include misdemeanors and felonies, for individuals who have unescorted access to secured areas of airports or aircraft, security screeners, and other aviation personnel.

However, TSA included only felonies, and felonies that constitute the most serious crimes as disqualifying. The list includes crimes that demonstrate an individual's willingness to commit violent acts against others for personal reasons, such as murder or assault with intent to murder. The list also includes the crime of smuggling contraband. TSA is concerned with the possibility that such an individual could be involved intentionally, or may be used unwittingly by others with malicious intent, in transporting items that could be used to commit terrorist acts. The listed offenses are considered grounds for disqualification whether they are prosecuted by civilian or military authorities. If an applicant has a disqualifying criminal offense, but believes that under the particular circumstances of the offense the applicant should not be determined to pose a security threat, the applicant may request a waiver under § 1572.143.

This IFR makes changes to the Current Rule's list of crimes that disqualify an applicant for life from holding an HME. The Current Rule lists espionage, sedition, treason, arson, crimes involving a transportation security incident, improper transportation of a hazardous material under 49 U.S.C. 5124, any crime listed in 18 U.S.C. chapter 113B—Terrorism, and conspiracy or attempt to commit the crimes in paragraph 1572.103(a) as permanently disqualifying. TSA is reclassifying arson as an interim rather than permanent disqualifying offense. As discussed in greater detail above, TSA has concluded that an arson conviction does not typically present the same level of threat as a conviction for treason or espionage and is more analogous to the interim disqualifying offenses. Also, the IFR now makes a RICO conviction based on an underlying permanent disqualifying offense a permanently disqualifying offense. The Current Rule lists as permanently disqualifying the ''unlawful possession, use, sale, distribution, or manufacture of an explosive.'' We now add ''purchase, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in an explosive or explosive device'' to this list, because these additional actions regarding explosives are equally serious. TSA is reclassifying murder as a permanent rather than interim disqualifying offense. We believe it is more analogous to the other permanently disqualifying offenses in terms of the security threat it presents.

Under the Current Rule, individuals who have been convicted within the preceding seven years of, or incarcerated within the preceding five years for a criminal offense listed in § 1572.103(b), are disqualified until the seven- or five-year time period ends, whichever is later. In the Current Rule, the offenses in paragraph 1572.103(b) are murder; assault with intent to murder; kidnapping or hostage taking; rape or aggravated sexual abuse; unlawful possession, use, sale, purchase, distribution, or manufacture of a firearm or other weapon; extortion; dishonesty, fraud, or misrepresentation, including identity fraud; bribery; smuggling; immigration violations; violations of the Racketeer Influenced and Corrupt Organizations Act; 18 U.S.C. 1961, *et seq.*; robbery; and distribution of, intent to distribute, or importation of a controlled substance.

This IFR amends the list of interim disqualifying offenses in several ways. The Current Rule lists as disqualifying the ''unlawful possession, use, sale, distribution, or manufacture of a firearm or other weapon.'' We now add ''purchase, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in a firearm or other weapon'' to this list, because these additional actions regarding a weapon are equally serious. Second, we are removing ''simple possession'' of a controlled substance as disqualifying and making clear that ''possession with intent to distribute a controlled substance'' remains a disqualifying offense. TSA makes this change to ensure that only the most serious offenses, including those demonstrating a willingness to endanger others, are considered disqualifying. TSA is reclassifying arson as an interim rather than permanent disqualifying offense, as it is in the Current Rule. Finally, TSA is reclassifying murder as a permanently rather than interim disqualifying offense.

We note, as discussed when this rule first was adopted, that this rule cannot possibly list all of the offenses or other information that may be relevant to determining whether an individual poses a security threat that merits denial of a hazardous materials endorsement. Therefore, under § 1572.107, TSA may consider other criminal offenses and information not listed in § 1572.103, if they indicate the individual poses a security threat. TSA believes these changes in § 1572.107 clarify the extent of TSA's discretion. See 68 FR 23852 at 23861 col. 2–3.

TSA invites comment from all interested parties concerning this list of disqualifying criminal offenses. TSA must balance its responsibility to enhance the security of hazardous materials transportation against the knowledge that individuals who participate in criminal acts may subsequently become valuable members of the workforce. TSA wishes to minimize the adverse impact this program may have on individuals who have committed criminal offenses and served their sentences, without compromising the security of hazardous materials in transportation. Therefore, with limited exceptions, only convictions within the seven years prior to the date of the application to apply or renew a hazardous materials endorsement, or incarcerations that ended within five years prior to the date of application, will disqualify an individual. This approach is consistent with the requirements of MTSA.

Paragraph (c) states that an applicant who is under a want or warrant for any of the disqualifying offenses is disqualified until the want or warrant is released. TSA will adjudicate these cases and notify appropriate law enforcement agencies and the State. TSA will review the want and warrant records carefully to determine the nature of the charge, and if it does not involve a disqualifying offense, but is indicative of a serious criminal act, TSA may notify law enforcement pursuant to § 1572.107, discussed below.

Paragraph (d) describes how an arrest with no indication of a conviction, plea, sentence or other information indicative of a final disposition must be handled. The individual must provide TSA with written proof that the arrest did not result in a disqualifying criminal offense within 45 days after the date TSA notifies the individual. If TSA does not receive such proof in 45 days, TSA will notify the applicant and the State that

the applicant is disqualified from holding an HME.

Section 1572.105 Immigration Status

The USA PATRIOT Act and SEA require a check of the relevant databases to determine the applicant's status under U.S. immigration laws prior to authorizing the applicant to transport hazmat. In addition, longstanding rules concerning the qualifications needed to hold a CDL provide that the driver must have a State of domicile in the United States or hold a nonresident CDL.[22] The Current Rule requires applicants for an HME security threat assessment to be U.S. citizens or lawful permanent residents. As discussed in greater detail above, in this IFR, TSA expands the group eligible to apply for an HME security threat assessment to include individuals who are qualified to hold a CDL, but who are not U.S. citizens or lawful permanent residents. This group includes nonimmigrant aliens, asylees, and refugees, who are in lawful status and possess valid and unrestricted documentation establishing eligibility for employment. These changes are reflected in paragraph (a) of this section. TSA is making one additional change to paragraph (a)(1) of this section by adding that an applicant must be a citizen who has not renounced ''or lost'' his or her citizenship. TSA is adding this language to cover instances in which a citizen is stripped of U.S. citizenship, as is the case with Nazi war criminals. It is unlikely that this situation will arise in the context of hazmat drivers, but TSA wishes to make certain that the rule covers instances in which it does occur.

To determine an individual's immigration status, TSA checks the relevant immigration databases, and may perform other checks, including verifying the applicant's identity and Social Security Number.

Section 1572.107 Other Analyses

Section 1012 of the USA PATRIOT Act requires background checks of relevant international databases, such as Interpol-U.S. National Central Bureau, or other appropriate sources. TSA checks these databases and other databases that include information on terrorists and terrorist activity, violent gangs, fugitives from justice, and international criminal records. TSA may also check databases that assist in confirming an individual's identity. This IFR provides that TSA will check the following databases, and conduct a security threat analysis, before determining whether an individual poses a security threat: (1) Interpol and other international databases as appropriate; (2) terrorist watchlists and related databases; and (3) other databases relevant to determining whether an individual may pose or poses a security threat or that confirm an individual's identity.

New paragraph (c) also states that TSA may determine that an individual poses a security threat if the search TSA conducts under part 1572 reveals an extensive or very serious domestic or foreign criminal history, conviction for serious crimes not listed in § 1572.103, or an extensive period of imprisonment, foreign or domestic, exceeding 365 consecutive days. TSA is adding this language to the rule text to clarify the full application of this section and to provide sufficient notice to the public that there may be cases in which an applicant's criminal record includes convictions for serious crimes that are not specifically listed in § 1572.103, but may be disqualifying. Also, if an applicant has been imprisoned for more than a year, which is generally indicative of a serious offense or a long history of criminal activity, TSA may determine that the applicant poses an unacceptable security threat. We use the term ''imprisoned'' in the new language, which is indicative of a more serious criminal sentence; time sentenced to a half-way house or treatment facility is not used to calculate the period of ''imprisonment,'' as it is with respect to ''incarceration.''

As TSA noted in the May 5 IFR, we cannot possibly list all of the offenses or other information that may be relevant to determining whether an individual poses a security threat that warrants denial of a hazardous materials endorsement. The preamble of the May 5 IFR stated that, under § 1572.107, TSA may consider other criminal offenses and information not listed in § 1572.103, if they indicate the individual poses a security threat. See 68 FR 23852 at 23861. The rule text for § 1572.107 clearly states this authority. TSA believes we must have a level of discretion to carry out the intent of the USA PATRIOT Act and responsibly assess threats to transportation and the Nation, where the intelligence and threats are so dynamic. TSA understands that the flexibility this language provides must be used cautiously and on the basis of compelling information that can withstand judicial review. TSA invites comment on this section.

Section 1572.109 Mental Capacity

The explosives laws prohibit individuals who have been adjudicated as lacking mental capacity (''mental defect'' is used in the statutory language, but we use ''lacking mental capacity'' in the IFR because it is less pejorative, but has and is intended to have the same meaning) from transporting explosives. This IFR will implement this requirement by providing that any person who has been determined to lack mental capacity does not meet the standards for a security threat assessment. This section adopts the terms and standards concerning individuals with mental disabilities promulgated by ATF:

> The legislative history of the GCA [Gun Control Act of 1968] makes it clear that a formal adjudication or commitment by a court, board, commission or similar legal authority is necessary before firearms disabilities are incurred. H.R. Rep. 1956, 90th Cong., 2d Sess. 30 (1968). The plain language of the statute makes it clear that a formal commitment, for any reason, *e.g.*, drug use, gives rise to firearms disabilities. However, the mere presence of a person in a mental institution for observation or a voluntary commitment to a mental hospital does not result in firearms disabilities.[23]

ATF also cited several cases in which courts held that the GCA was designed to prohibit the receipt and possession of firearms by individuals who are potentially dangerous, including individuals who are mentally incompetent or afflicted with a mental illness, and individuals found not guilty by reason of insanity in a criminal case.[24] Finally, ATF added to the definition of ''adjudicated as mental defective'' an element from the Department of Veterans Affairs definition of ''mental incompetent'' an individual who because of injury or disease lacks the mental capacity to contract or manage his or her own affairs.[25]

An individual lacks mental capacity, for purposes of this IFR, if he or she has been committed to a mental institution or has been adjudicated as lacking mental capacity. An individual is adjudicated as lacking mental capacity if a court or other appropriate authority determines that the individual is a danger to himself or herself, or lacks the mental capacity to manage his or her affairs. An individual is ''committed to an institution'' if formally committed by a court; this term does not refer to voluntary admissions to a mental institution or hospital. This standard is in the Current Rule and the IFR.

[22] 49 CFR 384.212.

[23] 61 FR 47095, September 6, 1996.

[24] *Id.*

[25] *Id.*

Section 1572.111–1572.139 [Reserved]

Section 1572.141 Appeal Procedures

An individual may appeal an Initial Determination of Security Threat if he asserts that he meets all standards for the security threat assessment. For example, if the Initial Determination was based on information indicating that the applicant is an alien who is not in the United States lawfully, the applicant may provide TSA with evidence that the immigration record is inaccurate in an appeal.

An applicant initiates an appeal by providing TSA with a written request for the releasable materials upon which the Initial Determination was based, or by serving TSA with his or her written reply to the Initial Determination. If an applicant wishes to receive copies of the releasable material upon which the Initial Determination was based, he must serve TSA with a written request within 30 days after the date of service of the Initial Determination. TSA's response is due within 30 days. In response, TSA cannot provide any classified information, as defined in Executive Order (E.O.) 12968, or any other information or material protected from disclosure by law.

If an applicant wishes to reply to the Initial Determination, he or she must provide TSA with a written reply no later than 30 days after the date of service of the Initial Determination or the date of service of TSA's response to the applicant's request for materials. The applicant should explain why he or she is appealing the Initial Determination and provide evidence that the Initial Determination was incorrect. In an applicant's reply, TSA will consider only material that is relevant to whether he or she meets the standards for the security threat assessment. If an applicant does not dispute or reply to the Initial Determination, the Initial Determination becomes a Final Determination.

Under paragraph (c)(3) of this section, an applicant has the opportunity to correct a record on which an adverse decision is based. So long as the record is not classified or protected by law from release, TSA will notify the applicant of the adverse information and provide a copy of the record. If the applicant wishes to correct the inaccurate information, he or she must provide written proof that the record is inaccurate. The applicant should contact the jurisdiction responsible for the inaccurate information to complete or correct the information contained in the record. The applicant must provide TSA with the revised record or a certified true copy of the information from the appropriate entity before TSA can reach a determination that the applicant does not pose a security threat that warrants denial of the HME.

The Director will make the Final Determination on appeals that involve disqualifying criminal offenses, mental capacity, and immigration status. However, in a case where an Initial Determination of Threat Assessment is based on the applicant's connection to terrorist activity or similar threat under § 1572.107, the Assistant Secretary will review the appeal and make the Final Determination. This procedure is a change from the Current Rule that TSA believes is necessary to provide additional scrutiny for cases that will likely involve a review of classified information that the applicant is not permitted to see under law. In addition, the applicant in these cases is not eligible for a waiver of the standards if the Initial Determination stands. TSA believes that the review by the Assistant Secretary for these cases provides an additional protection that the agency's Final Determination is sound.

In considering an appeal, the Director or Assistant Secretary will review the Initial Determination, the materials upon which the Initial Determination is based, the applicant's reply and any accompanying information, and any other materials or information available to TSA. The Director or Assistant Secretary may affirm the Initial Determination by concluding that an individual poses a security threat. In this case, TSA serves a Final Determination of Threat Assessment on the applicant. The Final Determination includes a statement that the Director or Assistant Secretary has reviewed the Initial Determination, the materials upon which the Initial Determination was based, the reply, if any, and any other materials or information available to the Director or Assistant Secretary and has determined that the applicant poses a security threat. There is no administrative appeal of the Final Determination of Threat Assessment. However, as explained below, an applicant may apply for a waiver under certain circumstances. For purposes of judicial review, the Final Determination of Threat Assessment constitutes a final TSA order.

Paragraph (e) sets forth the procedures to follow if TSA determines that the applicant does not pose a security threat. TSA serves a Withdrawal of the Initial Determination on the applicant and a Determination of No Security Threat on the issuing State.

If TSA did not serve the individual with an Initial Determination of Threat Assessment, or grants a waiver, the agency will transmit a Determination of No Security Threat to the applicant and the State in which the applicant applied for the HME.

Paragraph (f) provides that TSA cannot disclose classified information, as defined in E.O. 12968 section 1.1(d), to the applicant, and TSA reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law, such as Sensitive Security Information (SSI); sensitive law enforcement and intelligence information; sources, methods, means, and application of intelligence techniques; and identities of confidential informants, undercover operatives, and material witnesses.

For determinations under § 1572.107, the finding that an individual poses a security threat will be based, in large part, on classified national security information, unclassified information designated as SSI, or other information that is protected from disclosure by law.

Classified national security information is information that the President or another authorized Federal official has determined, pursuant to E.O. 12968, must be protected against unauthorized disclosure to safeguard the security of American citizens, the country's democratic institutions, and America's participation within the community of nations.[26] Executive Order 12968 prohibits Federal employees from disclosing classified information to individuals who have not been cleared to have access to such information under the requirements of that Executive Order.[27] If the Director determines that an applicant who is appealing the intelligence-related check is requesting classified materials, the applicant will not be able to access classified national security information, and TSA has no authority to release this information to the applicant.

The denial of access to classified information under these circumstances is consistent with the treatment of classified information under the Freedom of Information Act (FOIA), which specifically exempts such information from the general requirement under FOIA that all government documents are subject to public disclosure.[28]

SSI is unclassified information that is subject to disclosure limitations under statute and TSA regulations.[29] Under 49

[26] *See* E.O. 12958, 60 FR 19825, April 20, 1995.

[27] *See* E.O. 12968, sec. 3.2(a), 6.2(a)(1), 60 FR 40245, Aug. 7, 1995.

[28] *See* 5 U.S.C. 552(b)(1).

[29] *See* 49 U.S.C. 114(s); 49 CFR part 1520 as amended by 69 FR 28066 (May 18, 2004).

U.S.C. 114(s), the Assistant Secretary of TSA may designate categories of information as SSI if release of the information would be detrimental to the security of transportation. Information that is designated as SSI must only be disclosed to people with a need to know, such as those needing to carry out regulatory security duties.[30]

The Assistant Secretary has defined information concerning threats against transportation as SSI by regulation.[31] Thus, information that TSA obtains indicating that an applicant poses a security threat, including the source of such information and the methods through which the information was obtained, will commonly be designated SSI or classified information. The purpose of designating this information as SSI is to ensure that those who seek to do harm to the transportation system and their associates do not obtain access to information that will enable them to evade the government's efforts to detect and prevent their activities. Disclosure of this information, especially to an applicant specifically suspected of posing a threat to the transportation system, is precisely the type of harm that Congress sought to avoid by authorizing the Assistant Secretary to define and protect SSI.

Other pieces of information also are protected from disclosure by law due to their sensitivity in law enforcement and intelligence. In some instances, the release of information about a particular individual or his or her supporters or associates could have a substantial adverse impact on security matters. The release by TSA of the identities or other information regarding individuals related to a security threat determination could jeopardize sources and methods of the intelligence community, the identities of confidential sources, and techniques and procedures for law enforcement investigations or prosecution.[32] Release of such information also could have a substantial adverse impact on ongoing investigations being conducted by Federal law enforcement agencies, by revealing the course and progress of an investigation. In certain instances, release of information could alert co-conspirators to the extent of the Federal investigation and the imminence of their own detection, thus provoking flight.

For the reasons discussed above, TSA will not provide any classified information to an applicant, and TSA reserves the right to withhold SSI or other sensitive material protected from disclosure under law. As noted above, TSA expects that information will be withheld only for determinations based on § 1572.107, which involve databases that list indicators of potential terrorist activity or threats. When the determination is based on the individual's criminal records, TSA expects that appropriate supporting records most likely can be disclosed to the applicant upon a written request to TSA. With respect to disqualifications based on immigration status, TSA will provide the driver with the reason for a denial, but may not be able to provide specific documentation on the applicant's alien status.

Under this IFR, TSA has the discretion to extend due dates both for an applicant and for the agency during the appeal process. An applicant must provide a written statement of good cause for extending the due date, within a reasonable time prior to the due date at issue. TSA has changed this section from ''within seven days'' to a ''reasonable time'' to provide the driver as much time as he or she reasonably needs. This change is also in line with the rules of civil procedure. TSA anticipates that if an applicant is attempting to correct erroneous records or gather documents in support of a waiver request, the individual may need additional time for the appropriate governmental agency or entity to produce the documents. As long as the applicant provides a sufficient explanation of these problems, TSA will likely extend the time needed to complete the process.

Paragraph (i) of this section describes the procedure for appealing an immediate revocation of an HME under § 1572.13(a). Immediate revocation will occur where TSA determines during the course of conducting a security threat assessment that sufficient factual and legal grounds exist to warrant immediate revocation of the HME. Under these circumstances, the applicant must surrender the endorsement and cease transporting hazardous materials prior to initiating an appeal. TSA understands that removing the individual from service without an opportunity to correct the record may have adverse consequences, but this mechanism will be used only in cases where the risk of imminent danger is significant and the adverse information is highly reliable. This procedure will also be used where a driver should have surrendered the endorsement and/or applied for a waiver, but failed to do so. The individual may appeal this decision, must include all supporting documentation when he or she submits the appeal, and may request releaseable documents from TSA.

Section 1572.143 Waiver Procedures

This section applies to applicants who have been disqualified from holding or obtaining an HME due to a disqualifying criminal offense or mental incompetency. The Current Rule provides that an applicant with any disqualifying offense or issues of mental competence may apply for a waiver. In this IFR, TSA prohibits applicants with certain criminal convictions from applying for a waiver. TSA has concluded that crimes of espionage, treason, sedition, a terrorist act, or a crime involving a transportation security incident are so highly indicative of a security threat that individuals convicted of them pose an ongoing, unacceptable risk to transportation security. Most likely, these individuals will be incarcerated for a very long term, but the rule now makes clear that convictions for these crimes disqualify an individual for life, with no opportunity to apply for a waiver. Individuals who are disqualified due to mental incompetence continue to be eligible for a waiver.

Waivers are offered because an applicant may be rehabilitated to the point that he or she can be trusted in sensitive or potentially dangerous work or has been declared mentally competent. The Current Rule and this IFR provide criteria that TSA considers if the individual does not meet the criminal history standards. TSA believes that these factors are good indicators that an individual may be rehabilitated to the point that a waiver is advisable. The factors are: (1) The circumstances of the disqualifying act or offense; (2) restitution made by the individual; (3) Federal or State mitigation remedies; (4) court records indicating that the individual has been declared mentally competent; and (5) other factors TSA believes bear on the potential security threat posed by the individual. Many of these factors are set forth in MTSA, at 46 U.S.C. 70105(c)(2).

With respect to mental competency, TSA will accept a court order or official medical declaration showing that an individual previously declared incompetent is now competent to support the waiver request. Generally, TSA will not grant waivers on the basis of a letter from a treating physician stating that the individual is capable of maintaining a job, because these submissions tend to be very subjective and vague. The standard in the rule states that an applicant is mentally

[30] *See* 49 CFR 1520.11 as added by 69 FR 28084–5.

[31] *See* 49 CFR 1520.5

[32] *See* 5 U.S.C. 552(b)(7)(D), (E).

incompetent if a court declares it or he or she is involuntarily committed to a mental hospital. Official documents that reverse these findings are necessary for TSA to grant a waiver. TSA requests comment on any additional criteria that the agency should consider when determining whether to grant a waiver.

TSA, however, will not grant waivers from the standards concerning immigration status or information discovered during a search under § 1572.107. With respect to immigration violations and findings under § 1572.107, individuals may appeal an Initial Determination based on assertions that the underlying records are incorrect, the applicant's identity is mistaken, or TSA's analysis of the records is not correct. However, if TSA finds that the Initial Determination is accurate, the individual is ineligible for a waiver.

After reviewing an individual's application for a waiver, TSA sends a written decision to the individual and, if the waiver is granted, a Determination of No Security Threat to the State in which the individual applied for the HME within 30 days after the date of the individual's waiver application.

Subpart C—Transportation of Explosives From Foreign Locations

In this IFR, TSA moves the existing standards concerning the transportation of explosives from Canada to the United States via commercial motor vehicle and rail to new subpart C. The existing standards are not changing substantively; they are just being moved to a separate Subpart.

Rulemaking Analyses and Notices

Justification for Immediate Adoption

TSA is issuing this interim final rule without prior notice and opportunity to comment on certain new standards, pursuant to authority under section 4(a) of the Administrative Procedure Act (5 U.S.C. 553(b)). This provision allows the agency to issue a final rule without notice and opportunity to comment when the agency for good cause finds that notice and comment procedures are ''impracticable, unnecessary or contrary to the public interest.''

TSA issued the May 5 IFR and request for comments that set forth most of the standards that are in the document we publish today. TSA received comments from the States and the trucking industry, and to the extent possible, we now make changes to the rule to accommodate those comments. However, certain details of the program implementation were not available to TSA when the Current Rule was published. The full program will become operational on January 31, 2005, and the States must have this information as soon as possible in order to implement the program.

Also, TSA must determine quickly how many States will elect to collect fingerprints and applicant information and how many will opt to have TSA complete this work, so that TSA can procure a contractor to establish a national fingerprinting collection system. This document requires the States to make this declaration within 30 days of publication of the rule so that TSA can publish a request for proposals to implement the program.

Therefore, TSA believes that issuing a proposed rule to address the changes and new provisions in the rule is contrary to the public interest and impracticable. Most of the amendments we are making to the Current Rule are minor and actually reduce burdens on the States. We are issuing this IFR with a request for comments and will publish a discussion and resolution of all comments received, and make any needed changes to the rule.

Regulatory Evaluation

Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order.

TSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is significant public interest in security issues since the events of September 11, 2001, and approximately 2.7 million commercial drivers are subject to the rule. This IFR amends existing standards that implement section 1012 of the USA PATRIOT Act by establishing the criteria used in determining whether an individual applying for, transferring, or renewing an HME poses a security risk warranting denial of the endorsement. OMB has reviewed this rule.

TSA has prepared a detailed analysis of the costs and benefits of the hazmat security threat assessment program, which has been placed in the docket. A summary of that analysis is set forth below.

Costs

The IFR results in a cost impact for TSA, States, and individuals applying for, transferring, or renewing an HME. TSA will incur costs for conducting security threat assessments and for bringing on line the systems, personnel, and resources to conduct the security threat assessments. The major cost-related areas for the States are applicant information and fingerprint collection, processing, and transmission. Hazmat driver applicants will incur opportunity costs in complying with the requirements of the IFR.

Individuals applying for, transferring, or renewing an HME will incur opportunity costs in complying with the requirements of the IFR. These applicants will also have cash expenditures, or out-of-pocket costs, that would be approximately equal to the total of: (1) Fingerprint associated costs, (2) fees established to cover information and fingerprint collection and transmission, and (3) the fee established to cover the cost of security threat assessments. Because the aforementioned costs have been estimated separately in this analysis, no separate estimate was made for out-of-pocket Hazmat driver applicant costs. Rather, to avoid double counting these costs, TSA assumed that out-of-pocket Hazmat driver applicant expenses are accounted for in the separate estimates of fingerprinting and associated costs, information and fingerprint collection and transmission costs, and TSA security threat assessment costs.

For this cost analysis, three scenarios were considered: (1) All States choose to collect applicant information and fingerprints, (2) 50 percent of the States choose to collect information and fingerprints, and (3) all States choose to allow a TSA agent to collect information and fingerprints. TSA estimated the total ten-year undiscounted cost at $534.1 million under scenario 1, $532.3 million under scenario 2, and $530.5 million under scenario 3.

Table 1 summarizes the ten-year discounted and undiscounted costs of the IFR. Separate estimates of costs are shown for States and TSA (Federal government costs). Table 1 also shows discounted and undiscounted opportunity costs to Hazmat drivers based on the time that they must spend providing information and fingerprints.

TABLE 1.—OVERALL SUMMARY OF TEN-YEAR COSTS UNDER THREE SCENARIOS

[millions]

	All States collect applicant information		50% of States collect applicant information		All States choose TSA agent	
	Undiscounted costs	Present value	Undiscounted costs	Present value	Undiscounted costs	Present value
Population (renewals, transfers, new applicants)	4.1	.....	4.1	.....	4.1	.....
Federal (TSA) Costs:						
Start Up (non-recur)	$4.8	$4.8	$4.8	$4.8	$4.8	$4.8
Recurring Costs	130.6	98.2	130.6	98.2	130.6	98.2
FP and Associated Cost	0.0	0.0	116.1	87.3	232.2	174.5
Total States (2004–2013)	135.4	103.0	251.5	190.3	367.6	277.5
States Cost:						
Start Up (non-recur)	3.6	3.6	1.8	1.8	NA	NA
FP and Associated Cost	232.2	174.5	116.1	87.3	NA	NA
Recordkeeping	6.4	4.8	6.4	4.8	6.4	4.8
Total States (2004–2013)	242.2	182.9	124.3	93.9	6.4	4.8
Opportunity Costs:						
Lost Time	156.5	117.6	156.5	117.6	156.5	117.6
Total Cost Impact	534.1	403.5	532.3	406.5	530.5	399.9

Benefits

The primary benefit of the rule will be increased protection of property and citizens in the U.S. from acts of terrorism. Part of TSA's mission is to ensure the security of hazardous materials in transportation so that these materials are not used in an act of terrorism. The changes envisioned in this interim final rule are an integral part of the total program needed by the transportation industry to prevent such acts of terrorism.

When quantifying benefits for which there are no exact parallels, similar magnitude events can demonstrate the ranges of possible magnitudes for either costs or benefits. Two terrorist attacks on U.S. soil provide examples of the harm that can occur from explosive material delivered in a van or light truck: The 1993 New York World Trade Center (WTC) bombing and the 1995 Oklahoma City Federal Building bombing. The 1993 WTC bombing killed six people, injured over 1,000, and resulted in over $510 million in insured losses. The Oklahoma City (OKC) bombing killed 168 people, injured 601, and resulted in over $125 million in insured losses. Total losses for these incidents were estimated at $685 million.

The intent of the IFR is to limit access to hazardous material by persons viewed as a security threat. The rule is designed to decrease the probability of terrorist incidents related to Hazmat misuse. Although the 1993 WTC and 1995 OKC bombings were not executed by Hazmat drivers, these examples show the potential damage that can occur using a van or light truck. If larger vehicles were used to carry out a terrorist attack, the damage could be far greater.

The IFR would establish a level of security that would reduce the likelihood of such an event occurring. The prevention of just one terrorist attack similar to the examples above over the next 10 years would offset the cost of this rule, and supports the rule as cost-beneficial. In addition, there are other benefits associated with ripple effects of incidents of this magnitude. This type of multiplier effect is important in determining benefits.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980, as amended, (RFA) was enacted by Congress to ensure that small entities (small businesses, small not-for-profit organizations, and small governmental jurisdictions) are not unnecessarily or disproportionately burdened by Federal regulations. The RFA requires agencies to review rules to determine if they have ''a significant economic impact on a substantial number of small entities.'' TSA has determined that this interim final rule will not have a significant economic impact on a substantial number of small entities.

Under the RFA, the term ''small entity'' has the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' This action will affect States, and States are governmental jurisdictions. However, States are not considered ''small governmental jurisdictions'' under the RFA. As defined by the RFA, small governmental jurisdictions include governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50 thousand.

The action would also affect individuals, but current industry practice is for individual drivers to obtain their CDL certification as a condition of employment. Individuals are required to have a current CDL with appropriate endorsements to be eligible for employment. This cost is an employment cost typically borne by the individual employee, but individuals are not considered small entities for purposes of the RFA. However, individuals who are independent truck drivers and owner-operators would be subject to the RFA. For these individuals, the IFR would impose costs for information collection and fees associated with background checks (a total of $57 per individual).

TSA estimates that the total cost for these individuals would be approximately $100 per individual once the TSA security threat assessment fee is established and opportunity costs are considered. These costs will be spread over a period of five years (incurred only during the 5-year renewal process). TSA does not consider these costs to be significant when compared to the total cost of maintaining and operating a truck and considering that they are spread over a 5-year period (incurred only during the 5-year renewal process). Therefore, the burden on small business

entities from this rule is expected to be *de minimis*.

TSA has conducted the required review of this rule pursuant to the RFA, 5 U.S.C. 605(b) and has determined that it will not have a significant impact on a substantial number of small entities. Accordingly, TSA certifies that this rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), a Federal agency must obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. This IFR contains information collection activities subject to the PRA. Accordingly, the following information requirements have been submitted to OMB for its review.

Title: Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License.

Summary: TSA is amending standards for security threat assessments of individuals applying for, renewing, or transferring a hazardous materials endorsement (HME) for a commercial driver's license (CDL), which in addition to the information already collected by the States for the purpose of HME applications, will now include fingerprints, immigration status, mental competency, and criminal history information.

Use of: Truck drivers must complete an application and provide fingerprints to undergo a security threat assessment. In States that opt to collect applicant information and fingerprints, the States and local agencies will most likely collect this information when individuals apply for, renew, or transfer an HME. In States that opt to have TSA collect the application and fingerprints, the States will continue to have responsibility for retaining the information that TSA collects.

Respondents (including number of): The likely respondents to this information requirement are individuals applying for, renewing or transferring an HME and each of the 50 States and the District of Columbia, for a total pool of approximately 2.7 million respondents.

Frequency: Estimates indicate that approximately 2.7 million people have an HME and this number is expected to initially decrease for the first three years, then grow by approximately 1.0% per year for a ten-year total of approximately 2.1 million people (210,000 annualized). The number of fingerprint applications to be collected over a ten-year period is approximately 4.1 million (407,000 annualized). This number includes new applicants, transfers, and renewals. States must notify each HME holder of the requirement to undergo a security threat assessment at least 60 days prior to the expiration date of the endorsement.

Annual Burden Estimate: Fingerprint costs consist of a processing fee, processing time, and material. The average collection cost for the fingerprint process was estimated at approximately $35 per set. TSA estimates that it will take an average of thirty minutes to complete an FBI fingerprint card and forward it to the FBI for further processing. Individual respondents will also be required to complete an application to certify their immigration status, mental competency, and relevant criminal history. TSA estimates this form will take an average of thirty minutes to complete. Thus, for individuals, the annual estimated burden is 407,000 hours at a cost of $14.25 million. Added to these estimates will be an annual recordkeeping burden of 4,800 hours plus $500,000 in data retention and reporting costs for all 50 states and the District of Columbia combined. TSA welcomes comment from the public concerning these estimates.

The agency is soliciting comments to—

(1) Evaluate whether the information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who must respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Pursuant to the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this information collection will be published in the **Federal Register** after OMB approves it.

Executive Order 13132 (Federalism)

Executive Order 13132 requires TSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under the Executive Order, TSA may construe a Federal statute to preempt State law only where, among other things, the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

This action has been analyzed in accordance with the principles and criteria in the Executive Order, and it has been determined that this Interim Final Rule does have Federalism implications or a substantial direct effect on the States. Under this rule, the States may choose to collect information and process fingerprints that will be the basis for TSA's security threat assessment. TSA will develop the detailed procedures for the program in consultation with the States.

TSA notes that FMCSA has communicated with the States on the requirements of the USA PATRIOT Act. The Assistant Administrator of FMCSA wrote to licensing officials in each State on October 31, 2001, briefly summarizing section 1012 of the USA PATRIOT Act, and asking them to continue issuing and renewing hazardous materials endorsements until the regulations implementing section 1012 were completed. Some States have already enacted legislation they consider necessary to carry out the mandates of section 1012.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with base year of 1995). Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows TSA to

adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation as to why that alternative was not adopted.

This action will require a State expenditure of less than $5.0 million in the first year of the recurring phase, regardless of whether it chooses to collect applicant information and fingerprints or allow a TSA agent to collect the required information. The ten-year State cost is estimated to range between $6.4 million and $242.2 million undiscounted, depending on the option selected by the State. Based on this estimate, TSA has determined that the action will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year.

Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA will continue to consult with Mexico and Canada under the North American Free Trade Agreement to ensure that any adverse impacts on trade are minimized. This rule applies only to individuals applying for a State-issued hazardous materials endorsement for a commercial drivers license. Thus, TSA has determined that this rule will have no impact on trade.

Environmental Analysis

TSA has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action will not have a significant effect on the human environment. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion. The FAA order continues to apply to TSA in accordance with the Homeland Security Act (Pub. L. 107–296), until DHS publishes its NEPA implementing regulations.

Energy Impact

The energy impact of this document has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 49 CFR Part 1572

Commercial drivers license, Criminal history records check, Explosives, Hazardous materials, Motor carriers, Motor vehicle carriers, Security measures, Security threat assessment.

The Amendments

■ In consideration of the foregoing, the Transportation Security Administration amends chapter XII of title 49, Code of Federal Regulations, as follows:

SUBCHAPTER D—MARITIME AND LAND TRANSPORTATION SECURITY

■ 1. Revise part 1572 to read as follows:

PART 1572—CREDENTIALING AND BACKGROUND CHECKS FOR LAND TRANSPORTATION SECURITY

Subpart A—Requirements To Undergo Security Threat Assessments

Sec.
1572.1 Applicability.
1572.3 Terms used in this part.
1572.5 Scope and standards for hazardous materials endorsement security threat assessment.
1572.7 Waivers of hazardous materials endorsement security threat assessment standards.
1572.9 Applicant information required for a security threat assessment for a hazardous materials endorsement.
1572.11 Applicant responsibilities for a security threat assessment for a hazardous materials endorsement.
1572.13 State responsibilities for issuance of hazardous materials endorsement.
1572.15 Procedures for security threat assessment.

Subpart B—Standards, Appeals, and Waivers for Security Threat Assessments

1572.101 Scope.
1572.103 Disqualifying criminal offenses.
1572.105 Immigration status.
1572.107 Other analyses.
1572.109 Mental capacity.
1572.111–1572.139 [Reserved]
1572.141 Appeal procedures.
1572.143 Waiver procedures.

Subpart C—Transportation of Explosives From Foreign Locations

1572.201 Transportation of explosives from Canada to the United States via commercial motor vehicle.
1572.203 Transportation of explosives from Canada to the United States via railroad carrier.

Authority: 49 U.S.C. 114, 5103a, 40113, 46105; 18 U.S.C. 842, 845.

Subpart A—Requirements To Undergo Security Threat Assessments

§ 1572.1 Applicability.

This part prescribes regulations for credentialing and security threat assessments for certain maritime and land transportation workers.

§ 1572.3 Terms used in this part.

For purposes of this part:

Adjudicate means to make an administrative determination of whether an applicant meets the standards in this part based on the merits of the issues raised.

Alien means any person not a citizen or national of the United States.

Alien registration number means the number issued by the United States Department of Homeland Security to an individual when he or she becomes a lawful permanent resident of the United States or attains other lawful, non-citizen status.

Applicant means an individual who is applying for a new, renewal, or transfer hazardous materials endorsement.

Assistant Secretary means Assistant Secretary for Homeland Security, Transportation Security Administration (Assistant Secretary), who is the highest ranking TSA official, or his or her designee, and who is responsible for making the final determination on the appeal of an intelligence-related check under this part.

Commercial drivers license (CDL) is used as defined in 49 CFR 383.5.

Convicted includes any plea of guilty or *nolo contendere*, or any finding of guilt, except when the finding of guilt is subsequently overturned on appeal, pardoned, or expunged. For purposes of this part, a conviction is expunged when the conviction is removed from the individual's criminal history record and there are no legal disabilities or restrictions associated with the expunged conviction, other than the fact that the conviction may be used for sentencing purposes for subsequent convictions. In addition, where an individual is allowed to withdraw an original plea of guilty or *nolo contendere* and enter a plea of not guilty and the case is subsequently dismissed, the individual is no longer considered to have a conviction for purposes of this part.

Date of service means—

(1) In the case of personal service, the date of personal delivery to the residential address listed on the application;

(2) In the case of mailing with a certificate of service, the date shown on the certificate of service;

(3) In the case of mailing and there is no certificate of service, 10 days from

the date mailed to the address designated as the mailing address on the application;

(4) In the case of mailing with no certificate of service or postmark, the date mailed to the address designated as the mailing address on the application shown by other evidence; or

(5) The date on which an electronic transmission occurs.

Day means calendar day.

Determination of No Security Threat means an administrative determination by TSA that an individual does not pose a security threat warranting denial of a hazardous materials endorsement.

Director means the officer designated by the Assistant Secretary to administer the appeal and waiver programs described in this part, except where the Assistant Secretary is specifically designated in this part to administer the appeal or waiver program. The Director may appoint a designee to assume his or her duties.

Endorsement is used as defined in 49 CFR 383.5.

Explosive or explosive device includes, but is not limited to, an explosive or explosive material as defined in 18 U.S.C. 232(5), 841(c) through 841(f), and 844(j), and a destructive device as defined in 18 U.S.C. 921(a)(4) and 26 U.S.C. 5845(f).

Final Determination of Threat Assessment means a final administrative determination by TSA, including the resolution of related appeals, that an individual poses a security threat warranting denial of a hazardous materials endorsement.

Final Disposition means the actions that must be taken following issuance of a Determination of No Security Threat, a Final Determination of Security Threat, or the grant of a waiver to ensure that a driver's record, a driver's endorsement, and the Commercial Drivers License Information System (CDLIS) accurately reflect the results of the fingerprint and intelligence-related checks.

Firearm or other weapon includes, but is not limited to, firearms as defined in 18 U.S.C. 921(a)(3) or 26 U.S.C. 5845(a) or items contained on the U.S. Munitions Import List at 27 CFR 447.21.

Hazardous material has the same meaning as defined in section 103 of the Hazardous Materials Transportation Act.

Hazardous materials endorsement (HME) means the authorization for an individual to transport hazardous materials in commerce, which must be indicated on the individual's commercial driver's license.

Imprisoned or imprisonment means confined to a prison, jail, or institution for the criminally insane, on a full-time basis pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity. Time spent confined or restricted to a half-way house, treatment facility, or similar institution pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity does not constitute imprisonment for purposes of this rule.

Incarceration means confined or otherwise restricted to a jail-type institution, half-way house, treatment facility, or another institution, on a full or part-time basis pursuant to a sentence imposed as the result of a criminal conviction or finding of not guilty by reason of insanity.

Initial Determination of Threat Assessment means an initial administrative determination by TSA that an individual poses or may pose a security threat warranting denial of a hazardous materials endorsement.

Initial Determination of Threat Assessment and Immediate Revocation means an initial administrative determination that an individual poses a security threat that warrants immediate revocation of an HME. Upon issuance of this document, the State must immediately revoke the hazmat endorsement.

Lawful permanent resident means an individual who has been lawfully admitted to the United States for permanent residence, as defined in 8 U.S.C. 1101.

Mental institution means a mental health facility, mental hospital, sanitarium, psychiatric facility, and any other facility that provides diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

Pilot State means a State which volunteers to begin the security threat assessment process prior to January 31, 2005.

Revoke means the process by which a State cancels, rescinds, withdraws, or removes a hazardous materials endorsement.

State means a State of the United States and the District of Columbia.

Transportation security incident means a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area, as defined in 46 U.S.C. 70101.

Withdrawal of Initial Determination of Threat Assessment is the document that TSA issues after issuing an Initial Determination of Security Threat, when TSA determines that the applicant does not pose a security threat warranting denial of a hazardous materials endorsement.

§ 1572.5 Scope and standards for hazardous materials endorsement security threat assessment.

(a) This subpart applies to—

(1) State agencies responsible for issuing an HME; and

(2) Applicants who are qualified to hold a commercial driver's license under 49 CFR parts 383 and 384, and are applying for a new, renewal, or transfer HME.

(b) In conducting the security threat assessment requirements in this part, the States and TSA use one or more of the following:

(1) An applicant's fingerprints.

(2) An applicant's name.

(3) Other identifying information.

(c) TSA has determined that an applicant does not pose a security threat warranting denial of an HME if:

(1) The applicant does not have a disqualifying criminal offense described in § 1572.103;

(2) The applicant meets the immigration status requirements described in § 1572.105;

(3) TSA conducts the analyses described in § 1572.107 and determines that the applicant does not pose a security threat; and

(4) The applicant has not been adjudicated as lacking mental capacity or committed to a mental institution, as described in § 1572.109.

(d) TSA may direct a State to revoke an individual's HME immediately if TSA determines during the security threat assessment that the individual poses an immediate threat to transportation security, national security or of terrorism.

(e) The regulations of the Federal Motor Carrier Safety Administration (FMCSA) provide that an applicant is disqualified from operating a commercial motor vehicle for specified periods if he or she has an offense that is listed in the FMCSA rules at 49 CFR 383.51. If records indicate that an applicant has committed an offense that would disqualify the applicant from operating a commercial motor vehicle under 49 CFR 383.51, TSA will not issue a Determination of No Security Threat until the State or the FMCSA determine that the applicant is not disqualified under that section.

§ 1572.7 Waivers of hazardous materials endorsement security threat assessment standards.

(a) An applicant may apply to TSA for a waiver of the standards described in § 1572.5, if the applicant—

(1) Has a disqualifying criminal offense described in paragraphs 1572.103(a)(5) through (a)(9), and paragraph 1572.103 (a)(10) if the underlying criminal offense is in paragraphs 1572.103 (a)(5) through (a)(9); or

(2) Has a disqualifying criminal offense described in § 1572.103(b); or

(3) Has a history of mental incompetence described in § 1572.109.

(b) [Reserved].

§ 1572.9 Applicant information required for a security threat assessment for a hazardous materials endorsement.

(a) For TSA to complete a security threat assessment, an applicant must supply the information required in this section when the applicant applies to obtain or renew a hazardous materials endorsement. When applying to transfer a hazardous materials endorsement, § 1572.13(g) applies.

(b) The application must include the following identifying information:

(1) Legal name, including first, middle, and last; any applicable suffix; and any other name used previously.

(2) Current mailing address and residential address if it differs from the mailing address; and the previous residential address.

(3) Date of birth.

(4) Social security number.

(5) Gender.

(6) Height, weight, hair and eye color.

(7) City, state, and country of birth.

(8) Immigration status and date of naturalization if the applicant is a naturalized citizen of the United States.

(9) Alien registration number.

(10) State of application, CDL number, and type of endorsement held.

(11) The name, telephone number, and address of the applicant's current employer(s).

(c) The application must include the disqualifying criminal offenses identified in § 1572.103.

(d) The application must include a statement, signature, and date of signature that the applicant:

(1) Was not convicted or found not guilty by reason of insanity of a disqualifying crime listed in § 1572.103(b) in a civilian or military jurisdiction during the 7 years before the date of the application;

(2) Was not released from incarceration in a civilian or military jurisdiction for committing a disqualifying crime listed in § 1572.103(b) during the 5 years before the date of the application;

(3) Is not wanted or under indictment in a civilian or military jurisdiction for a disqualifying criminal offense identified in § 1572.103;

(4) Was not convicted or found not guilty by reason of insanity of a disqualifying criminal offense identified in § 1572.103(a) in a civilian or military jurisdiction;

(5) Has not been adjudicated as lacking mental capacity or committed to a mental institution involuntarily;

(6) Meets the immigration status requirements described in § 1572.105;

(7) Has or has not served in the military, and if so, the branch in which he or she served, the date of discharge, and the type of discharge; and

(8) Has been informed that Federal regulations under § 1572.11 impose a continuing obligation to disclose to the State within 24 hours if he or she is convicted or found not guilty by reason of insanity of a disqualifying crime, or adjudicated as lacking mental capacity or committed to a mental institution, while he or she holds an HME.

(e) The application must include a statement reading:

Privacy Act Notice: Authority: The authority for collecting this information is 49 U.S.C. 114, 40113, and 49 U.S.C. 5103a. *Purpose:* This information is needed to verify your identity and to conduct a security threat assessment to evaluate your suitability for a hazardous materials endorsement for a commercial drivers license. Furnishing this information, including your SSN or alien registration number, is voluntary; however, failure to provide it will prevent the completion of your security threat assessment, without which you cannot be granted a hazardous materials endorsement. *Routine Uses:* Routine uses of this information include disclosure to the FBI to retrieve your criminal history record; to TSA contractors or other agents who are providing services relating to the security threat assessments; to appropriate governmental agencies for licensing, law enforcement, or security purposes, or in the interests of national security; and to foreign and international governmental authorities in accordance with law and international agreement.

The information I have provided on this application is true, complete, and correct to the best of my knowledge and belief and is provided in good faith. I understand that a knowing and willful false statement, or an omission of a material fact, on this application can be punished by fine or imprisonment or both (see section 1001 of Title 18 United States Code), and may be grounds for denial of a hazardous materials endorsement.

§ 1572.11 Applicant responsibilities for a security threat assessment for a hazardous materials endorsement.

(a) *Prohibitions.* An applicant does not meet the security threat assessment standards if he or she:

(1) Has a disqualifying criminal offense identified in § 1572.103, unless TSA grants a waiver under § 1572.143; or

(2) Does not meet the immigration status requirements identified in § 1572.105; or

(3) Has been notified by TSA that he or she poses a security threat under § 1572.107; or

(4) Has been adjudicated as lacking mental capacity or committed to a mental institution as described in § 1572.109, unless TSA grants a waiver under § 1572.143.

(b) *Surrender of endorsement.* If an individual is disqualified from holding an HME under paragraph (a) of this section, he or she must surrender the HME and notify TSA. Failure to surrender the HME and notify TSA may result in immediate revocation under § 1572.13(a) and/or civil penalties.

(c) *Continuing responsibilities.* An individual who holds an HME must surrender the HME and notify TSA within 24 hours, if he or she:

(1) Is convicted of, wanted, under indictment, or found not guilty by reason of insanity in a civilian or military jurisdiction for a disqualifying criminal offense identified in § 1572.103; or

(2) Is adjudicated as lacking mental capacity or committed to a mental institution as described in § 1572.109; or

(3) Renounces or loses U.S. citizenship; or

(4) Violates his or her immigration status and/or is ordered removed from the United States.

(d) *Submission of fingerprints.* (1) An applicant who has not already done so may submit fingerprints in a form and manner specified by TSA when a State revokes the applicant's HME under § 1572.13(a).

(2) When so notified by the State, an applicant must submit fingerprints and the information required in § 1572.9 in a form and manner specified by the State and TSA, when TSA requests it, or when the applicant applies to obtain or renew an HME. The procedures outlined in § 1572.13(g) apply to HME transfers.

(3) When submitting fingerprints and the applicant information required in § 1572.9, the applicant or the applicant's employer is responsible for the TSA fee and the FBI fee.

§ 1572.13 State responsibilities for issuance of hazardous materials endorsement.

(a) Each State must immediately revoke an individual's HME if TSA informs the State that the individual does not meet the standards for security threat assessment in § 1572.5 and issues an Initial Determination of Threat Assessment and Immediate Revocation.

(b) Beginning January 31, 2005 for new issuances, and May 31, 2005 for renewal or transfer issuances:

(1) No State may issue or renew a hazardous materials endorsement for a CDL unless the State receives a Determination of No Security Threat from TSA.

(2) Each State must notify each individual holding a hazardous materials endorsement issued by that State that he or she will be subject to the security threat assessment described in this part as part of an application for renewal of the endorsement, at least 60 days prior to the expiration date of the individual's endorsement. The notice must inform the individual that he or she may initiate the security threat assessment required by this section at any time after receiving the notice, but no later than 30 days before the expiration date of the individual's endorsement.

(3) No State may begin processing renewal or transfer applicants prior to March 31, 2005.

(c) Prior to January 31, 2005, as approved by TSA, a Pilot State may not revoke, issue, renew, or transfer a hazardous materials endorsement for a CDL unless the Pilot State—

(1) Collects the information required in § 1572.9;

(2) Collects and submits fingerprints in accordance with procedures approved by TSA; and

(3) Receives a Determination of No Security Threat or a Final Determination of Threat Assessment from TSA.

(d) The State that issued an endorsement may extend the expiration date of the endorsement for 90 days if TSA has not provided a Determination of No Security Threat or a Final Determination of Threat Assessment before the expiration date. Any additional extension must be approved in advance by the Director.

(e) Within 15 days of receipt of a Determination of No Security Threat or Final Determination of Threat Assessment from TSA, the State must—

(1) Update the applicant's permanent record to reflect:

(i) The results of the security threat assessment;

(ii) The issuance or denial of an HME; and

(iii) The new expiration date of the HME.

(2) Notify the Commercial Drivers License Information System operator of the results of the security threat assessment.

(3) Revoke or deny the applicant's HME if TSA serves the State with a Final Determination of Threat Assessment.

(f) On or before December 27, 2004, each State must submit a written declaration to TSA, which shall remain in effect until January 31, 2008, unless otherwise authorized by TSA, that states one of the following:

(1) The State elects to collect and submit applicant fingerprints and information, in accordance with the requirements of this part and applicable fingerprint submission standards of the FBI, and the associated TSA and FBI fees; or

(2) The State elects to have TSA/TSA agent collect and submit applicant fingerprints and information, in accordance with the requirements of this part and applicable fingerprint submission standards of the FBI, and the associated TSA and FBI fees. If TSA does not receive a written declaration from a State, TSA will assume responsibility for the collection and submission process.

(g) For applicants who apply to transfer an existing hazardous materials endorsement from one State to another, the second State will not require the applicant to undergo a new security threat assessment until the security threat assessment renewal period established in the preceding issuing State, not to exceed five years, expires.

(h) Each State must retain the application and information required in § 1572.9 for at least one year in paper or electronic form.

§ 1572.15 Procedures for security threat assessment.

(a) *Contents of security threat assessment*. The security threat assessment TSA completes includes a fingerprint-based criminal history records check, an intelligence-related background check, and a final disposition.

(b) *Fingerprint-based check*. In order to conduct a fingerprint-based criminal history records check, the following procedures must be completed:

(1) The State notifies the applicant that he or she will be subject to the security threat assessment at least 60 days prior to the expiration of the applicant's HME and that the applicant must begin the security threat assessment no later than 30 days before the date of the expiration of the HME.

(2) Where the State elects to collect fingerprints and applicant information under § 1572.13(f)(1), the State—

(i) Collects fingerprints and applicant information required in § 1572.9;

(ii) Provides the applicant information to TSA electronically, unless otherwise authorized by TSA;

(iii) Transmits the fingerprints to the FBI/CJIS in accordance with the FBI/CJIS fingerprint submission standards; and

(iv) Retains the signed application, in paper or electronic form, for one year and provides it to TSA if requested.

(3) Where the State elects to have TSA/TSA agent collect fingerprints and applicant information under § 1572.13(f)(2)—

(i) TSA provides a copy of the signed application to the State;

(ii) The State retains the signed application, in paper or electronic form, for one year and provides it to TSA if requested; and

(iii) TSA transmits the fingerprints to the FBI/CJIS in accordance with the FBI/CJIS fingerprint submission standards.

(4) TSA receives the results from the FBI/CJIS and adjudicates the results of the check in accordance with § 1572.103 and, if applicable, § 1572.107.

(c) *Intelligence-related check*. To conduct an intelligence-related check, the following procedures are completed:

(1) TSA reviews the applicant information required in § 1572.9;

(2) TSA searches domestic and international government databases described in §§ 1572.105, 1572.107, and 1572.109;

(3) TSA adjudicates the results of the check in accordance with §§ 1572.103, 1572.105, 1572.107, and 1572.109.

(d) *Final Disposition*. Following completion of the procedures described in paragraphs (b) and/or (c) of this section, the following procedures apply, as appropriate:

(1) TSA serves a Determination of No Security Threat on the State in which the applicant is authorized to hold an HME, if TSA determines that an applicant meets the security threat assessment standards described in § 1572.5.

(2) TSA serves an Initial Determination of Threat Assessment on the applicant if TSA determines that the applicant does not meet the security threat assessment standards described in § 1572.5. The Initial Determination of Threat Assessment includes—

(i) A statement that TSA has determined that the applicant poses or is suspected of posing a security threat warranting denial of the HME;

(ii) The basis for the determination;

(iii) Information about how the applicant may appeal the determination, as described in § 1572.141; and

(iv) A statement that if the applicant chooses not to appeal TSA's determination within 30 days after receipt of the Initial Determination, or does not request an extension of time within 30 days after receipt of the Initial Determination in order to file an appeal,

the Initial Determination becomes a Final Determination of Security Threat Assessment.

(3) TSA serves an Initial Determination of Threat Assessment and Immediate Revocation on the applicant and the State, if TSA determines that the applicant does not meet the security threat assessment standards described in § 1572.5 and may pose an imminent threat to transportation or national security, or of terrorism. The Initial Determination of Threat Assessment and Immediate Revocation includes—

(i) A statement that TSA has determined that the applicant poses or is suspected of posing a security threat warranting immediate revocation of an HME;

(ii) The basis for the determination;

(iii) Information about how the applicant may appeal the determination, as described in § 1572.141(i); and

(iv) A statement that if the applicant chooses not to appeal TSA's determination within 30 days after receipt of the Initial Determination and Immediate Revocation, the Initial Determination and Immediate Revocation becomes a Final Determination of Threat Assessment.

(4) TSA serves a Final Determination of Threat Assessment on the State in which the applicant applied for the HME and on the applicant, if the appeal of the Initial Determination results in a finding that the applicant poses a security threat.

(5) TSA serves a Withdrawal of the Initial Determination of Threat Assessment or a Withdrawal of Final Determination of Threat Assessment on the applicant and a Determination of No Security Threat on the State, if the appeal results in a finding that the applicant does not pose a threat to security, or if TSA grants the applicant a waiver pursuant to § 1572.143.

Subpart B—Standards, Appeals, and Waivers for Security Threat Assessments

§ 1572.101 Scope.

This subpart applies to applicants who hold or are applying to renew or transfer an HME.

§ 1572.103 Disqualifying criminal offenses.

(a) *Permanent disqualifying criminal offenses.* An applicant has a permanent disqualifying offense if convicted or found not guilty by reason of insanity in a civilian or military jurisdiction of any of the following felonies:

(1) Espionage.

(2) Sedition.

(3) Treason.

(4) A crime listed in 18 U.S.C. Chapter 113B—Terrorism, or a State law that is comparable.

(5) A crime involving a transportation security incident.

(6) Improper transportation of a hazardous material under 49 U.S.C. 5124 or a State law that is comparable.

(7) Unlawful possession, use, sale, distribution, manufacture, purchase, receipt, transfer, shipping, transporting, import, export, storage of, or dealing in an explosive or explosive device.

(8) Murder.

(9) Conspiracy or attempt to commit the crimes in this paragraph (a).

(10) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.*, or a State law that is comparable, where one of the predicate acts found by a jury or admitted by the defendant, consists of one of the offenses listed in paragraphs (a)(4) or (a)(8) of this section.

(b) *Interim disqualifying criminal offenses.* The felonies listed in paragraphs (b)(1) through (b)(14) of this section are disqualifying if either of the following factors is true: the applicant was convicted or found not guilty by reason of insanity of the crime in a civilian or military jurisdiction, within the 7 years preceding the date of application; or the applicant was released from incarceration for the crime within the 5 years preceding the date of application.

(1) Assault with intent to murder.

(2) Kidnapping or hostage taking.

(3) Rape or aggravated sexual abuse.

(4) Unlawful possession, use, sale, manufacture, purchase, distribution, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in a firearm or other weapon.

(5) Extortion.

(6) Dishonesty, fraud, or misrepresentation, including identity fraud.

(7) Bribery.

(8) Smuggling.

(9) Immigration violations.

(10) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.*, or a State law that is comparable, other than the violations listed in paragraph (a)(10) of this section.

(11) Robbery.

(12) Distribution of, possession with intent to distribute, or importation of a controlled substance.

(13) Arson.

(14) Conspiracy or attempt to commit the crimes in this paragraph (b).

(c) *Under want or warrant.* An applicant who is wanted or under indictment in any civilian or military jurisdiction for a felony listed in this section is disqualified until the want or warrant is released.

(d) *Determination of arrest status.* (1) When a fingerprint-based check discloses an arrest for a disqualifying crime listed in this section without indicating a disposition, TSA will so notify the applicant and provide instructions on how the applicant must clear the disposition, in accordance with paragraph (d)(2) of this section.

(2) The applicant must provide TSA with written proof that the arrest did not result in a disqualifying criminal offense within 45 days after the service date of the notification in paragraph (d)(1) of this section. If TSA does not receive proof in that time, TSA will notify the applicant and the State that the applicant is disqualified from holding an HME.

§ 1572.105 Immigration status.

(a) An applicant applying for a security threat assessment for an HME must be—

(1) A citizen of the United States who has not renounced or lost his or her United States' citizenship; or

(2) A lawful permanent resident of the United States, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101); or

(3) An individual who is—

(i) In lawful nonimmigrant status and possesses valid evidence of unrestricted employment authorization; or

(ii) A refugee admitted under 8 U.S.C. 1157 and possesses valid evidence of unrestricted employment authorization; or

(iii) An alien granted asylum under 8 U.S.C. 1158, and possesses valid evidence of unrestricted employment authorization.

(b) To determine an applicant's immigration status, TSA checks relevant Federal databases and may perform other checks, including verifying the validity of the applicant's social security number or alien registration number.

§ 1572.107 Other analyses.

(a) An applicant poses a security threat and is therefore disqualified under this section when TSA determines or suspects the applicant of posing a threat—

(1) To national security; or

(2) To transportation security; or

(3) Of terrorism.

(b) TSA checks the following databases and analyzes the resulting information before determining that an applicant does not pose a security threat warranting denial of an HME:

(1) Interpol and other international databases, as appropriate;

(2) Terrorist watchlists and related databases; and

(3) Any other databases relevant to determining whether an applicant poses or is suspected of posing a security threat, or that confirm an applicant's identity.

(c) TSA may determine that an applicant poses a security threat if the search conducted under this part reveals extensive foreign or domestic criminal convictions; a conviction for a serious crime not listed in § 1572.103, or a period of foreign or domestic imprisonment that exceeds 365 consecutive days.

§ 1572.109 Mental capacity.

(a) An applicant has lacking mental capacity if he or she has been—

(1) Adjudicated as lacking mental capacity; or

(2) Committed to a mental institution.

(b) An applicant is adjudicated as lacking mental capacity if—

(1) A court, board, commission, or other lawful authority has determined that the applicant, as a result of marked subnormal intelligence, mental illness, incompetence, condition, or disease, is a danger to him- or herself or others, or lacks the mental capacity to contract or manage his or her own affairs.

(2) This includes a finding of insanity by a court in a criminal case; and a finding of incompetence to stand trial or a finding of not guilty by reason of lack of mental responsibility by any court, or pursuant to articles 50a and 76b of the Uniform Code of Military Justice (10 U.S.C. 850a and 876b).

(c) An applicant is committed to a mental institution if he or she is formally committed to a mental institution by a court, board, commission, or other lawful authority, including involuntary commitment and commitment for lacking mental capacity, mental illness, and drug use. This does not include a commitment to a mental institution for observation or voluntary admission to a mental institution.

§§ 1572.111–1572.139 [Reserved]

§ 1572.141 Appeal procedures.

(a) *Scope.* This section applies to applicants who wish to appeal an Initial Determination of Threat Assessment.

(b) *Grounds for Appeal.* An applicant may appeal an Initial Determination of Threat Assessment if the applicant is asserting that he or she meets the security threat assessment standards identified in § 1572.5(c).

(c) *Appeal.* An applicant initiates an appeal by submitting a written reply to TSA or written request for materials from TSA. If the applicant fails to initiate an appeal within 30 days after receipt, the Initial Determination of Threat Assessment becomes final, and TSA serves a Final Determination of Threat Assessment on the State in which the applicant applied.

(1) *Request for materials.* Within 30 days after the date of service of the Initial Determination of Threat Assessment, the applicant may serve upon TSA a written request for copies of the materials upon which the Initial Determination was based.

(2) *TSA response.* (i) Within 30 days after receiving the applicant's request for materials, TSA serves copies of the releasable materials upon the applicant on which the Initial Determination was based. TSA will not include any classified information or other protected information described in paragraph (f) of this section.

(ii) Within 30 days after receiving the applicant's request for materials or written reply, TSA may request additional information or documents from the applicant that TSA believes are necessary to make a Final Determination.

(3) *Correction of records.* If the Initial Determination of Threat Assessment was based on a record that the applicant believes is erroneous, the applicant may correct the record, as follows:

(i) The applicant may contact the jurisdiction or entity responsible for the information and attempt to correct or complete information contained in his or her record.

(ii) The applicant must provide TSA with the revised record, or a certified true copy of the information from the appropriate entity, before TSA may determine that the applicant meets the standards for the security threat assessment.

(4) *Reply.* (i) The applicant may serve upon TSA a written reply to the Initial Determination of Threat Assessment within 30 days after service of the Initial Determination, or 30 days after the date of service of TSA's response to the applicant's request for materials under paragraph (d)(2) of this section, if the applicant served such request. The reply must include the rationale and information on which the applicant disputes TSA's Initial Determination.

(ii) In an applicant's reply, TSA will consider only material that is relevant to whether the applicant meets the standards described in paragraph (d) of this section for the security threat assessment in paragraph (b) of this section.

(5) *Final determination.* Within 30 days after TSA receives the applicant's reply, TSA serves a Final Determination of Threat Assessment or a Withdrawal of the Initial Determination as provided in paragraphs (d) or (e) of this section.

(d) *Final Determination of Threat Assessment.* (1) In the case of an appeal of an Initial Determination of Threat Assessment that is based on criminal offense under § 1572.103; immigration status under § 1572.105; or mental competency under § 1572.109; if the Director concludes that the applicant does not meet the security threat assessment standards described in § 1572.5, TSA serves a Final Determination of Threat Assessment upon the applicant and the issuing State.

(2) In the case of an appeal of an Initial Determination of Threat Assessment that is based on a threat to national security or transportation security, or of terrorism under § 1572.107, if the Assistant Secretary concludes that the applicant does not meet the security threat assessment standards described in § 1572.5, TSA serves a Final Determination of Threat Assessment upon the applicant and issuing State.

(3) The Final Determination includes a statement that the Director or Assistant Secretary has reviewed the Initial Determination, the applicant's reply and any accompanying information, if any, and any other materials or information available to him or her and has determined that the applicant poses a security threat warranting denial of an HME.

(e) *Withdrawal of Initial Determination.* If the Director or Assistant Secretary concludes that the applicant does not pose a security threat warranting denial of the HME, TSA serves a Withdrawal of the Initial Determination upon the applicant.

(f) *Nondisclosure of certain information.* In connection with the procedures under this section, TSA does not disclose classified information to the applicant, as defined in Executive Order 12968 section 1.1(d), and reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law.

(g) *Extension of time.* TSA may grant an applicant an extension of time of the limits described in this section for good cause shown. An applicant's request for an extension of time must be in writing and be received by TSA within a reasonable time before the due date to be extended. TSA may grant itself an extension of time for good cause.

(h) *Judicial review.* For purposes of judicial review, the Final Determination of Threat Assessment constitutes a final TSA order in accordance with 49 U.S.C. 46110.

(i) *Appeal of immediate revocation.* (1) If TSA directs a State to revoke an HME pursuant to § 1572.13(a) by issuing an Initial Determination of Threat Assessment and Immediate Revocation, the applicant may appeal this determination by following the appeal procedures described in paragraph (c) of this section.

§ 1572.143 Waiver procedures.

(a) *Scope.* This section applies to an applicant who—

(1) Has a disqualifying criminal offense described in § 1572.103(a)(5) through (a)(9), and paragraph 1572.103(a)(10) if the underlying criminal offense is in paragraphs 1572.103(a)(5) through (a)(9); or

(2) Has a disqualifying criminal offense described in § 1572.103(b); or

(3) Lacks mental capacity as described in § 1572.109.

(b) *Waivers.* (1) An applicant initiates a waiver request by sending a written request to TSA for a waiver at any time, but not later than 30 days after the date of service of the Final Determination of Threat Assessment.

(2) In determining whether to grant a waiver, TSA will consider the following factors:

(i) The circumstances of the disqualifying act or offense;

(ii) Restitution made by the applicant;

(iii) Any Federal or State mitigation remedies;

(iv) Court records or official medical release documents indicating that the individual no longer lacks mental capacity;

(v) Other factors that indicate the applicant does not pose a security threat warranting denial of the HME.

(c) *Grant or denial of waivers.* The Director will send a written decision granting or denying the waiver to the applicant and a Determination of No Security Threat to the State in which the applicant applied for the HME, within 30 days after service the applicant's request for a waiver, or longer period as TSA may determine for good cause.

(d) *Extension of time.* TSA may grant an applicant an extension of time of the limits described in paragraph (b) and (c) of this section for good cause shown. An applicant's request for an extension of time must be in writing and be received by TSA within a reasonable time before the due date to be extended. TSA may grant itself an extension of time for good cause.

Subpart C—Transportation of Explosives From Foreign Locations

§ 1572.201 Transportation of explosives from Canada to the United States via commercial motor vehicle.

(a) *Applicability.* This section applies to carriers that carry explosives from Canada to the United States using a driver who is not a United States citizen or lawful permanent resident alien of the United States.

(b) *Terms used in this section.* For purposes of this section:

Carrier means any ''motor carrier'' or ''motor private carrier'' as defined in 49 U.S.C. 13102(12) and (13), respectively.

Customs Service means the United States Customs Service.

Explosive means a material that has been examined by the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, in accordance with 49 CFR 173.56, and determined to meet the definition for a Class 1 material in 49 CFR 173.50.

Known carrier means a person that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all applicable laws and regulations governing the transportation of explosives.

Known driver means a driver of a motor vehicle who has been determined by the Governments of Canada and the United States to present no known security concern.

Known offeror means an offeror that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all applicable laws and regulations governing the transportation of explosives.

Lawful permanent resident alien means a lawful permanent resident alien of the United States as defined by 8 U.S.C. 1101(a)(2).

Offeror means the person offering a shipment to the carrier for transportation from Canada to the United States, and may also be known as the ''consignor'' in Canada.

(c) *Prior approval of carrier, offeror, and driver.* (1) No carrier may transport in commerce any explosive into the United States from Canada via motor vehicle if the driver of the vehicle is a not a United States citizen or lawful permanent resident alien unless the carrier, offeror, and driver are identified on a TSA list as a known carrier, known offeror, and known driver, respectively.

(2) The carrier must ensure that it, its offeror, and its driver have been determined to be a known carrier, known offeror, and known driver, respectively. If any has not been so determined, the carrier must submit the following information to Transport Canada:

(i) The carrier must provide its:

(A) Official name;

(B) Business number;

(C) Any trade names; and

(D) Address.

(ii) The following information about any offeror of explosives whose shipments it will carry:

(A) Official name;

(B) Business number; and

(C) Address.

(iii) The following information about any driver the carrier may use to transport explosives into the United States from Canada who is neither a United States citizen nor lawful permanent resident alien of the United States:

(A) Full name;

(B) Canada Commercial Driver's License number; and

(C) Both current and most recent prior residential addresses.

(3) Transport Canada will determine that the carrier and offeror are legitimately doing business in Canada and will also determine that the drivers are properly licensed and present no known problems for purposes of this section. Transport Canada will notify TSA of these determinations by forwarding to TSA lists of known carriers, offerors, and drivers and their identifying information.

(4) TSA will update and maintain the list of known carriers, offerors, and drivers and forward the list to the Customs Service.

(5) Once included on the list, the carriers, offerors, and drivers need not obtain prior approval for future transport of explosives under this section.

(d) *TSA checks.* TSA may periodically check the data on the carriers, offerors and drivers to confirm their continued eligibility and may remove from the list any that TSA determines is not known or is a threat to security.

(e) *At the border*—

(1) *Driver who is not a United States citizen or lawful permanent resident alien.* Upon arrival at the border, and prior to entry into the United States, the driver must provide a valid Canadian commercial driver's license to the Customs Service.

(2) *Driver who is a United States citizen or lawful permanent resident alien.* If the Customs Service cannot verify that the driver is on the list, and if the driver is a United States citizen or lawful permanent resident alien, the

driver may be cleared by the Customs Service upon providing:

(i) A valid United States passport; or

(ii) One or more other document(s) including a form of United States Federal or state government-issued identification with photograph, acceptable to the Customs Service.

(3) *Compliance.* If a carrier attempts to enter the United States without having complied with this section, the Customs Service will deny entry of the explosives and may take other appropriate action.

§ 1572.203 Transportation of explosives from Canada to the United States via railroad carrier.

(a) *Applicability.* This section applies to railroad carriers that carry explosives from Canada to the United States using a train crew member who is not a United States citizen or lawful permanent resident alien of the United States.

(b) *Terms under this section.* For purposes of this section:

Customs Service means the United States Customs Service.

Explosive means a material that has been examined by the Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, in accordance with 49 CFR 173.56, and determined to meet the definition for a Class 1 material in 49 CFR 173.50.

Known railroad carrier means a person that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all applicable laws and regulations governing the transportation of explosives.

Known offeror means an offeror that has been determined by the Governments of Canada and the United States to be a legitimate business operating in accordance with all applicable laws and regulations governing the transportation of explosives.

Known train crew member means an individual used to transport explosives from Canada to the United States who has been determined by the Governments of Canada and the United States to present no known security concern.

Lawful permanent resident alien means a lawful permanent resident alien of the United States as defined by 8 U.S.C. 1101(a)(2).

Offeror means the person offering a shipment to the railroad carrier for transportation from Canada to the United States, and may also be known as the ''consignor'' in Canada.

Railroad carrier means ''railroad carrier'' as defined in 49 U.S.C. 20102.

(c) *Prior approval of railroad carrier, offeror, and train crew member.* (1) No railroad carrier may transport in commerce any explosive into the United States from Canada via a train operated by a crew member who is not a United States citizen or lawful permanent resident alien unless the railroad carrier, offeror, and train crew member are identified on a TSA list as a known railroad carrier, known offeror, and known train crew member, respectively.

(2) The railroad carrier must ensure that it, its offeror, and each of its crew members have been determined to be a known railroad carrier, known offeror, and known train crew member, respectively. If any has not been so determined, the railroad carrier must submit the following information to Transport Canada:

(i) The railroad carrier must provide its:

(A) Official name;

(B) Business number;

(C) Any trade names; and

(D) Address.

(ii) The following information about any offeror of explosives whose shipments it will carry:

(A) Official name;

(B) Business number; and

(C) Address.

(iii) The following information about any train crew member the railroad carrier may use to transport explosives into the United States from Canada who is neither a United States citizen nor lawful permanent resident alien:

(A) Full name; and

(B) Both current and most recent prior residential addresses.

(3) Transport Canada will determine that the railroad carrier and offeror are legitimately doing business in Canada and will also determine that the train crew members present no known problems for purposes of this section. Transport Canada will notify TSA of these determinations by forwarding to TSA lists of known railroad carriers, offerors, and train crew members and their identifying information.

(4) TSA will update and maintain the list of known railroad carriers, offerors, and train crew members and forward the list to the Customs Service.

(5) Once included on the list, the railroad carriers, offerors, and train crew members need not obtain prior approval for future transport of explosives under this section.

(d) *TSA checks.* TSA may periodically check the data on the railroad carriers, offerors, and train crew members to confirm their continued eligibility and may remove from the list any that TSA determines is not known or is a threat to security.

(e) *At the border* (1) *Train crew members who are not United States citizens or lawful permanent resident aliens.* Upon arrival at a point designated by the Customs Service for inspection of trains crossing into the United States, the train crew members of a train transporting explosives must provide sufficient identification to the Customs Service to enable that agency to determine if each crew member is on the list of known train crew members maintained by TSA.

(2) *Train crew members who are United States citizens or lawful permanent resident aliens.* If the Customs Service cannot verify that the crew member is on the list and the crew member is a United States citizen or lawful permanent resident alien, the crew member may be cleared by the Customs Service upon providing:

(i) A valid United States passport; or

(ii) One or more other document(s) including a form of United States Federal or state government-issued identification with photograph, acceptable to the Customs Service.

(3) *Compliance.* If a carrier attempts to enter the United States without having complied with this section, the Customs Service will deny entry of the explosives and may take other appropriate action.

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David M. Stone,

Assistant Secretary.

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