

federalism implications" is 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, FMCSA 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.

Although this IFR has direct effects on the States, they are not substantial because the IFR will continue the status quo while allowing States more time to comply with the May 5, 2003, interim final rules. Thus, FMCSA has determined that this IFR does not have sufficient Federalism implications to warrant the preparation of a Federal Assessment.

As discussed in detail in the May 5 IFR [see 68 FR at 23847–23848], the provisions of 49 U.S.C. 31314, which require DOT to withhold certain Federal-aid highway funds from States that fail to comply substantially with the requirements for State participation in the CDL program, apply also to State compliance with those portions of the Transportation Security Administration (TSA) rule implementing Sec. 1012 that apply to States. In addition, 49 U.S.C. 31312 authorizes DOT to prohibit States from issuing CDLs if the Secretary determines "that a State is in substantial noncompliance" with 49 U.S.C. chapter 313. These penalties are available for DOT to use when and if appropriate to encourage State compliance with TSA's Sec. 1012 rule.

#### Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards-related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety and security, 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. FMCSA has assessed the potential effect of this IFR and has determined that it will not impose any costs on domestic or international entities and thus would have a neutral trade impact.

#### 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 FMCSA 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 FMCSA 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 why that alternative was not adopted.

This IFR 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 annually. Thus, FMCSA has not prepared a written assessment under the UMRA.

#### National Environmental Policy Act

FMCSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this IFR will not have any significant impact on the quality of the human environment.

#### Energy Impact

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

#### List of Subjects in 49 CFR Part 383

Administrative practice and procedure, Commercial driver's license, Commercial motor vehicles, Highway safety, Motor carriers.

■ For the reasons set forth in the preamble, the FMCSA amends title 49, Code of Federal Regulations, Chapter III, as follows:

#### **PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES [AMENDED]**

■ 1. The authority citation for part 383 continues to read as follows:

**Authority:** 49 U.S.C. 521, 31136, 31301 *et seq.*, 31502; Sec. 214 of Pub. L. 106–159, 113

Stat. 1766; Sec. 1012(b) of Pub. L. 107–56, 115 Stat. 397; and 49 CFR 1.73.

■ 2. Revise § 383.141 paragraphs (a) and (c) to read as follows:

#### **§ 383.141 General.**

(a) *Applicability date.* Beginning on April 1, 2004, this section applies to State agencies responsible for issuing hazardous materials endorsements for a CDL, and applicants for such endorsements. Individual State licensing agencies, pursuant to 49 CFR 1572.5(c)(4), may request an extension of the compliance date.

\* \* \* \* \*

(c) *Individual notification.* At least 180 days before the expiration date of the CDL or hazardous materials endorsement, a State must notify the holder of a hazardous materials endorsement that the individual must pass a Transportation Security Administration security screening process as part of any application for renewal of the hazardous materials endorsement. The notice must advise a driver that, in order to expedite the security screening process, he or she should file a renewal application as soon as possible, but not later than 90 days before the date of expiration of the endorsement. An individual who does not successfully complete the Transportation Security Administration security screening process referenced in paragraph (b) of this section may not be issued a hazardous materials endorsement.

\* \* \* \* \*

Issued on: November 5, 2003.

**Annette M. Sandberg,**  
*Administrator.*

[FR Doc. 03–28175 Filed 11–5–03; 2:44 pm]

BILLING CODE 4910-EX-P

## **DEPARTMENT OF HOMELAND SECURITY**

### **Transportation Security Administration**

#### **49 CFR Part 1572**

[Docket No. TSA–2003–14610; Amendment No. 1572–2]

RIN 1652-AA17

#### **Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License; Amended Interim Final Rule**

**AGENCY:** Transportation Security Administration (TSA), Department of Homeland Security (DHS).

**ACTION:** Interim final rule; amendment.

**SUMMARY:** The Transportation Security Administration (TSA) is amending its Interim Final Rule (IFR) that establishes standards for security threat assessments of individuals applying for, renewing, or transferring a hazardous materials endorsement (HME) for a commercial drivers license (CDL). TSA is adding a definition and moving the date on which fingerprint-based criminal history record checks must begin. TSA will not authorize a State to issue HME unless the State is collecting the biographical and criminal history information required with fingerprints and submitting fingerprints by April 1, 2004. If a State is unable to collect this information by April 1, 2004, the State must submit a request for extension to TSA on or before April 1, 2004. TSA may approve the extension request, but will not extend the due date beyond December 1, 2004. If the State cannot begin submitting fingerprints of HME applicants as of April 1, 2004, the State must submit a plan to TSA outlining the fingerprint process that it will deploy and a timeline to ensure that the State will be submitting fingerprints by December 1, 2004. The plan must be submitted by April 1, 2004, and be consistent with Federal Bureau of Investigation (FBI) fingerprint collection and submission procedures. TSA is not changing the provision in the IFR that requires individuals with a HME to surrender their endorsement if they do not meet the threat assessment standards in the rule.

**DATES:** *Effective Date:* This interim final rule is effective on November 3, 2003.

**FOR FURTHER INFORMATION CONTACT:** For technical questions: John Berry, Credentialing Program Office, Transportation Security Administration Headquarters, East Building, Floor 8, 601 12th Street, telephone: 571-227-1757, e-mail: [John.Berry1@dhs.gov](mailto:John.Berry1@dhs.gov). Steve Sprague, Maritime and Land, Transportation Security Administration, West Building, Floor 9, 701 12th Street, telephone: (571) 227-1468, [Steve.Sprague@dhs.gov](mailto:Steve.Sprague@dhs.gov).

For legal questions: Dion Casey, Office of Chief Counsel, Transportation Security Administration Headquarters, West Building, Floor 8, TSA-2, 601 South 12th Street, Arlington, VA 22202-4220 telephone: 571-227-2663; e-mail: [Dion.Casey@dhs.gov](mailto:Dion.Casey@dhs.gov); or Christine Beyer, same office address as above; telephone: 571-227-2657; e-mail: [Christine.Beyer@dhs.gov](mailto:Christine.Beyer@dhs.gov).

## Comments

TSA is not requesting comments to this amended interim final rule. Instead, TSA will publish a notice of proposed rulemaking shortly to address the criminal history background check process for HME applicants, and will solicit comments at that time. With publication of the NPRM, TSA will open a new docket and request comments on the security threat assessment process for HME applicants in its entirety.

### *Availability of Rulemaking Document*

You can get an electronic copy of this interim final rule (IFR) 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](http://www.access.gpo.gov/su_docs/aces/aces140.html); or
- (3) Visiting the TSA's Laws and Regulations Web page at [http://www.tsa.gov/laws\\_regs/gov\\_index.shtm](http://www.tsa.gov/laws_regs/gov_index.shtm).

In addition, copies are available by writing or calling the individuals in the **FOR FURTHER INFORMATION CONTACT** section. Please be sure to identify the docket number when making requests.

### *Small Entity Inquiries*

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

### *Background*

On May 5, 2003, TSA published an IFR that requires a security threat assessment of commercial drivers who are authorized to transport hazardous materials.<sup>1</sup> The IFR implements several statutory mandates, discussed below, including criminal history record checks, checks against international databases, and appeal and waiver procedures. (Although the statute does not clearly state that the criminal history background check must be based on fingerprinting, the criminal history databases cannot be accessed without

submitting fingerprints, when the check is done for a non-criminal justice purpose as is the case here.) In the IFR, TSA also stated that it would provide guidance on the form and manner fingerprints would be collected and adjudicated.

TSA requested and received comments from the States, labor organizations, and trucking industry associations. 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, it appears that the States are in the best position to develop a plan to ensure that HME holders will be fingerprinted. TSA, however, is best situated to examine whether an individual poses a security threat under the other provisions of the rule, such as alien status, and terrorist connections. Under this scheme, TSA would continue to make the final determination as to whether an individual poses a security threat, combining the criminal history information the State develops with the terrorist-related background information, including alien status and terrorist-related databases, that TSA develops. In addition, TSA would continue to administer appeals of the terrorist-related background information for individuals who believe the records on which TSA's determination is made are incorrect or involve mistaken identity. Finally, TSA would administer the waiver program set forth in the IFR for all HME applicants. Shortly after publication of this amended IFR, TSA is issuing a separate notice of proposed rulemaking (NPRM) to explain and solicit comments on the revised process.

## USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act was enacted on October 25, 2001.<sup>2</sup> 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 receipt of a notification under subsection (c)(1)(B), that the individual does not pose a

security risk warranting denial of the license.<sup>3</sup>

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 a 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 Administrator of TSA) of the results. The Secretary then determines whether the individual poses a security risk warranting denial of the endorsement. The background records check 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.

#### *Safe Explosives Act*

Congress enacted the Safe Explosives Act (SEA) on November 25, 2002.<sup>4</sup> Sections 1121–1123 of the SEA amended section 842(i) of Title 18 of the U.S. Code by adding several categories to the list of persons who may not lawfully “ship or transport any explosive in or affecting interstate or foreign commerce” or “receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce.” Prior to the amendment, 18 U.S.C. 842(i) prohibited the transportation of explosives by any person under indictment for or convicted of a felony, a fugitive from justice, an unlawful user or addict of any controlled substance, and any person who had been adjudicated as a mental defective or committed to a mental institution. The amendment added three new categories to the list of prohibited persons: aliens (with certain limited exceptions), persons dishonorably discharged from the armed forces, and former U.S. citizens who have renounced their citizenship. Individuals who violate 18 U.S.C. 842(i) are subject to criminal prosecution.<sup>5</sup> These incidents are investigated by the Bureau of Alcohol,

Tobacco, Firearms, and Explosives (ATF) of the Department of Justice and referred, as appropriate, to 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 (DOT) 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 interim final rule in coordination with agencies within DOT, the Federal Motor Carrier Safety Administration and Research and Special Programs Administration, and triggered this exception. For the reasons set forth below, the action TSA takes now does not affect the application of the exception.

#### *The Interim Final 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 IFR (68 FR 23852). Under the IFR, 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 a mental defective or involuntarily committed to a mental institution; or (5) is considered to pose a security threat based on a review of pertinent databases.

The IFR also establishes conditions under which an individual who has been determined to be a security threat can appeal the determination, and a waiver process for those individuals who otherwise could not obtain an HME because they had a disqualifying felony, or were adjudicated as a mental defective or involuntarily committed to a mental institution. Finally, the IFR prohibits an individual from holding, and a State from issuing, renewing, or transferring, an HME for a driver unless the individual has met the TSA security threat assessment standards.

#### *Summary of the Amended IFR*

This amended IFR adds a definition and changes language in the original IFR

(68 FR 23852) regarding the date on which the States cannot issue, transfer, or renew HME unless a fingerprint-based background check has been completed. TSA provides a definition for the term “revoke” in response to comments received from the States. In some States, legislative language does not permit “revocation” of a hazardous material endorsement, but does permit removing authority to transport hazardous materials through disqualification, suspension, cancellation or other similar term. However, the IFR uses “revoke” when referring to individuals who are disqualified from holding a HME. Therefore, as requested by the States, we provide a definition to make clear that revocation is equivalent to cancellation, suspension, annulment, disqualification, or similar term.

TSA is delaying the date on which fingerprint-based criminal history record checks must be underway from November 3 for several reasons. First, TSA received comments from 23 States requesting an extension of time so that they can garner needed State legislative changes, funds, and infrastructure to implement the new background check portion of the HME program. The primary concerns identified by States include the cost of purchasing fingerprinting equipment; time needed to hire and train personnel to operate the fingerprinting equipment; and State legislative changes necessary to collect fees and implement the program. Most of the States requested Federal funding to assist with development of the program.

Second, TSA has worked closely with the States and pertinent nongovernmental organizations since the IFR was published and has determined that a “one size fits all” approach for fingerprint collection and adjudication is impractical. Each State currently has a system in place to license commercial drivers and award hazardous material endorsements. Also, each State currently has a system in place to collect fingerprints for criminal justice purposes and transmit them to the Attorney General. The States’ systems vary widely in terms of size, complexity, automation, and funding. The States have consistently stated that TSA should not prescribe one detailed fingerprinting program, but should set minimum standards so that the States can make use of their current resources and programs. This should minimize costs, take into account unique State legislative requirements, and accommodate the level of automation each State currently possesses. Based on the foregoing, TSA is delaying the date

<sup>3</sup> The Secretary of Transportation delegated the authority to carry out the provisions of this section to the Under Secretary of Transportation for Security/Administrator of TSA. 68 FR 10988, March 7, 2003.

<sup>4</sup> Pub. L. 107–296, November 25, 2002, 116 Stat. 2280.

<sup>5</sup> 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.

on which: (1) The information required in section 1572.5(e) of the IFR is collected; and (2) fingerprints are submitted.

#### *Information Collection*

With respect to the first requirement, as of April 1, 2004, the States must be collecting the biographical and criminal history information currently required in section 1572.5(e), with the applicant's certification under penalty of criminal prosecution that the information is correct. This requirement applies only to individuals who are applying for, renewing or transferring a HME. The State is not required to gather this information for all current HME holders as of April 1, 2004; however, it must be collecting the information as drivers become due for renewal or seek to transfer or obtain a HME.

This requirement enhances the State's ability to determine whether individuals with disqualifying offenses continue to transport hazardous materials in violation of the law. The individual's signature on the application required in section 1572.5(e) is a certification under penalty of 18 U.S.C. 1001 that the individual meets the security threat assessment standards set forth in the IFR. If the individual intentionally provides inaccurate information, an enforcement action can be initiated that may include imprisonment of not more than five years or a fine of up to \$250,000, or both. The government believes this adds a deterrent for HME holders who have committed disqualifying offenses but have not surrendered their HME as required by section 1572.5(b). However, it is important to note that nothing in this requirement alters an individual's ability to apply for a waiver under section 1572.143, if they have committed a disqualifying offense.

If the State is unable to collect the information required in section 1572.5(e) by April 2004, the State may submit a written request to TSA to delay the collection requirement. TSA understands that some States may need to seek legislative changes and fee authority, or raise funds in order to accomplish the collection requirement, and it may be impossible to do so by April 2004. However, TSA will not grant any delays beyond December 1, 2004.

#### *Fingerprint Submission*

With respect to the second requirement concerning fingerprint collection, the amended IFR provides that the State must be collecting fingerprints from individuals applying for, renewing, or transferring a HME and

submitting them to the FBI as of April 1, 2004. The fingerprint collection must be accomplished in a manner consistent with FBI procedures. If the State is unable to collect fingerprints on or before April 2004, the State must submit a plan to TSA by April 1, 2004 outlining the system it will put in place to capture fingerprints and pertinent information. The States must be collecting fingerprints and the required information for HME applicants no later than December 1, 2004.

As indicated in State comments to the IFR, most if not all States have devoted considerable attention to determining how the fingerprinting of HME applicants can be accomplished and coordinated within the existing hazardous material endorsement and commercial driver licensing programs. In meeting with the States, it has been evident that many States have a clear plan in mind to collect fingerprints and the other information required in section 1572.5(e), including the number of staff needed to administer the program, appropriate training for personnel involved in capturing fingerprints, and electronic upgrades necessary to handle increased data. Therefore, TSA does not anticipate that the States will have to expend significant time on developing the fingerprint collection plans. Many States will submit the plans they have been working with since publication of the IFR.

Also, each State currently has fingerprint collection procedures in place that meet the FBI's collection standards, in order to process fingerprints through the FBI for criminal enforcement. These procedures may include electronic capture, or paper capture that can be digitally transmitted to the FBI. In addition, the procedures require an applicant to present proof of identity when the fingerprints are captured and sign a document certifying that all information provided with the fingerprints is true, under penalty of 18 U.S.C. 1001. The State plan must include these procedures or others that the FBI approves in the collection portion of the program in order to be acceptable to TSA.

#### *Terrorist Checks*

Prior to December 2004, pursuant to § 1572.107, TSA will conduct name-based background checks of Federal and international databases relating to terrorist activity. TSA will then conduct (1) checks for wants and warrants for the crimes listed in § 1572.103; (2) checks of an individual's citizenship status under § 1572.105; and (3) checks

utilizing the Interstate Identification Index.

If TSA discovers during the course of these name-based checks that an individual poses a security threat, has committed a disqualifying offense, or is evading law enforcement, consistent with § 1572.5(c)(1), TSA will contact the appropriate law enforcement agency and/or direct the State to revoke the individual's HME. If the individual challenges TSA's assertion, TSA or the State will provide the individual with an opportunity to correct underlying records or cases of mistaken identity by submitting fingerprints or corrected court records.

With an estimated population exceeding 3.5 million drivers, the government must prioritize the background check process. TSA believes that these name-based checks enable the agency to focus on individuals who may pose a more immediate threat of terrorist or criminal activity, such as those who are wanted or under a warrant for one of the disqualifying crimes listed in § 1572.103, those who are not citizens or lawful permanent residents of the U.S., and those who may present a potential terrorist threat.

TSA has assessed the risks associated with the transportation of hazardous materials via commercial vehicle and has determined that in conducting name-based checks prior to December 2004 and initiating fingerprint-based criminal history checks as early as April 1, 2004, the risks are effectively addressed. The terrorist-related information that TSA will search prior to December 2004 is the best indication of an individual's predisposition to commit or conspire to commit terrorist acts. Evidence that an individual has been convicted recently of a felony such as theft or assault is important, and may indicate a security threat; but TSA has determined that the more imminent threat is an individual whose background includes terrorism-related information. This approach is consistent with the Patriot Act and the Safe Explosives Act, and meets the needs of the States.

Also, it is important to note that TSA is not delaying the September 2, 2003 compliance date set forth in § 1572.5(b) for surrendering a HME. This section requires any HME holder who does not meet the security threat assessment standards in part 1572 to surrender the endorsement beginning on September 2, 2003. For instance, an individual who knows that he or she has committed a disqualifying offense within the prescribed time periods, is required to relinquish their HME beginning September 2, 2003. Nothing in this

amended IFR alters this surrender requirement.

The surrender requirement buttresses TSA's determination that we should attempt to identify potential terrorist threats from terrorism-related information databases before analyzing criminal history records. As of today, all HME drivers are required to self-report any disqualifying offenses that would appear on a fingerprint-based criminal history records check. TSA will work closely with the State Departments of Motor Vehicles, labor organizations, and the trucking industry to communicate this surrender provision widely and to inform affected drivers of the existing waiver process.

Based on the foregoing, the exception found in 18 U.S.C. 845(a)(1) continues to apply, and persons otherwise prohibited from lawfully possessing explosives who are transporting explosives in commerce would not be subject to criminal prosecution under section 842(i).

#### *Section-by-Section Analysis*

TSA is adding a definition to § 1572.3 to make certain that the current IFR, which requires revocation of a HME under certain conditions, will not impose a condition in the HME process that the States cannot complete. As discussed earlier, in some States legislative language prohibits the 'revocation' of a HME legal, but permits the State to cancel, suspend, withdraw, or disqualify a hazardous material endorsement. TSA's new definition resolves this conflict with certain State legislation.

TSA makes several changes to § 1572.5 concerning the date on which TSA's threat assessment based on fingerprint-based criminal history record checks will begin. In paragraphs 1572.5(b) and (c), the new dates reflect TSA's decision to delay the date on which the States must be collecting information and submitting fingerprints to the FBI from November 3, 2003 to April 1, 2004, or under certain conditions to December 1, 2004 at the very latest.

Paragraph 1572.5(c)(4) establishes the requirement that TSA will not authorize a State to issue, renew, or transfer a HME unless it is collecting the information required in § 1572.5(e) and submitting fingerprints as of April 1, 2004. If the State cannot collect the required information by that date, the State may submit and TSA may approve a request to delay the collection requirement to December 1, 2004. Also, if the State cannot submit fingerprints from HME applicants by April 1, 2004, the State must submit a plan to TSA

explaining how fingerprint collection and submission will be accomplished before December 1, 2004.

#### *Compliance*

As discussed in detail in the IFR published by FMCSA on May 5, 2003, the provisions of 49 U.S.C. 31314, which require DOT to withhold certain Federal-aid highway funds from States that fail to comply substantially with the requirements for State participation in the CDL program, apply also to State compliance with those portions of the TSA rule implementing the Patriot Act that apply to States. In addition, 49 U.S.C. 31312 authorizes DOT to prohibit States from issuing CDLs if the Secretary determines "that a State is in substantial noncompliance" with 49 U.S.C. chapter 313. These penalties are available for DOT to use when and if appropriate to encourage State compliance with TSA's rule.

#### *Future Rulemaking*

It is important to note that TSA will publish a NPRM shortly after publication of this amended IFR, to propose minimum federal standards for the fingerprint collection, criminal history adjudication, and appeal process for HME applicants. In the NPRM, TSA will provide greater detail about what each State program should include, minimum standards for adjudication of the criminal history record check results, minimum standards for establishing an appeal process for the adjudication of the criminal history checks, and the potential costs for each portion of the background check.

TSA will rely heavily on the comments the States provide to ensure that no State is forced to adhere to a rigid form beyond its financial or technological capacity. The NPRM will propose minimum components that each State program should include, but would permit the States to determine how it meets the minimum standards.

The NPRM process will also provide TSA with the empirical data and information necessary to complete a comprehensive regulatory evaluation. TSA understands that the IFR and the amended IFR impose financial burdens on the States, some of which may be minimized through State and Federal fee authority. However, there may be States in which this is not possible, and TSA must seek a regulatory regime to prevent unnecessary financial burdens. TSA can achieve this through active participation of the States, the trucking industry, and private entities that may be able to provide low cost operational assistance.

In addition, on October 3, 2003, legislation was enacted<sup>6</sup> authorizing DHS to collect fees to cover the costs of implementing section 1012 of the Patriot Act. This new authority will aid TSA in completing the security threat assessment check for an estimated 3.5 million commercial drivers. Therefore, TSA is also issuing a separate proposed rule to determine reasonable costs of background checks, on which drivers, the States and other interested parties may comment.

#### **Rulemaking Analyses and Notices**

##### *Justification for Immediate Adoption*

TSA is issuing this final rule without prior notice and opportunity to comment pursuant to its 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."

The catastrophic effect of the attacks on the World Trade Center and Pentagon on September 11, 2001, revealed the vulnerability of the nation's transportation system to terrorism. National security and intelligence officials have warned that future terrorist attacks are likely. The number of commercial vehicles that carry hazardous materials is far greater than the number of aircraft that might be hijacked by terrorists. A vehicle carrying hazardous materials, if used as a weapon in a terrorist attack, could cause significant loss of life and property damage.

Section 1012 of the USA PATRIOT Act is a measure to increase the security of highway transportation of hazardous materials. Because of the likelihood of future terrorist attacks, and the potential for significant casualties and property damage in the event of a terrorist attack involving a vehicle carrying hazardous materials, TSA believes that immediate action is warranted, and TSA finds that notice and public comment procedures under 5 U.S.C. 553(b) are impracticable and contrary to the public interest.

It is important to note that TSA is not making fingerprint collection or submission of the State plan due upon publication of this document. The intervening months between the date this amended IFR is published and April 1, 2004 will provide additional time for the States to develop a plan for

<sup>6</sup>Department of Homeland Security Appropriations Act, 2004, Public Law 108-90, 117 Stat. 1137, October 1, 2003.

fingerprint collection or begin it. As indicated in comments to the IFR, most States have already devoted considerable time to determining how drivers could best be fingerprinted in light of each State's current hazardous material endorsement and licensing program. Submitting a fingerprint collection plan to TSA that reflects this thinking by April 1 should be possible. On the other hand, some States will be prepared to begin fingerprint collection within three months and so need not prepare or submit a new plan to TSA. Therefore, TSA believes that this amended IFR will not impose significant time constraints on the States.

By making the rule effective as of the date of publication, however, TSA can begin name checks of individuals against international and terrorist-related databases as soon as TSA has accurate driver data and is able to adjudicate the results of the checks.

#### 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. This amended interim final rule responds to the background check requirements of section 1012 of the USA PATRIOT Act by establishing the criteria that will be used in determining whether an individual applying for, transferring, or renewing a HME poses a security risk warranting denial of the endorsement.

TSA has performed a preliminary analysis of the expected costs of this interim final rule, but the figures may change when a full Regulatory Evaluation is completed in the proposed rulemaking that will follow publication of this document. TSA will prepare a full regulatory evaluation based on comments received from the States, the trucking industry, and pertinent nongovernmental organizations, which will improve the reliability of the cost and benefit estimates.

#### 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 the amended interim final rule will not have a significant economic impact on a substantial number of small entities.

Current industry practice is for 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 is an employment cost typically borne by the individual employee. This amended IFR will affect the States, but they are not considered "small governmental jurisdictions", such as small towns or boroughs. Therefore, the burden on small business entities from this rule is expected to be *de minimis*.

TSA conducted the required review of this rule accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b) 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 amended interim final rule contains information collection activities subject to the PRA. Accordingly, the following information requirements are being 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 establishing 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 as well as the disclosure of the applicant's citizenship, mental health defects, and criminal history. States must also submit a plan to TSA outlining the fingerprint process they intend to implement.

**Use of:** Truck drivers must complete an application and provide fingerprints for the purpose of conducting a background check. The States and local

agencies will most likely collect this information when individuals apply for, renew or transfer an HME. This information will be used to conduct background checks to ensure that these individuals do not have a disqualifying criminal offense on their record. In addition, the States' fingerprint collection plans will be used by TSA to ensure regulatory compliance, uniformity of standards, and adequacy of process.

**Respondents (including number of):** The likely respondents to this proposed information requirement are individuals applying for, renewing or transferring an HME and each of the 50 States, for a pool of approximately 3.5 million respondents.

**Frequency:** Estimates indicate that approximately 3.5 million people have an HME and this number is expected to grow by approximately 2.8% people per year for a ten-year total of approximately 4.5 million people (450,000 annualized). The number of fingerprint applications to be collected over a ten-year period is approximately 8.7 million (870,000 annualized). This number includes new applicants and renewals, which occur at least once every five years. States are required to submit their fingerprinting plans upon their completion or amendment.

**Annual Burden Estimate:** Fingerprint costs consist of a processing fee, processing time, and material. The average cost for the fingerprint process was estimated at approximately \$50 per set when the original IFR was published. However, empirical data and further research indicate that this estimate is low for the population covered by this rule. We also estimate that it would take an average of thirty minutes to complete an FBI fingerprint card and forward it to the FBI for further processing. Based on this information, TSA originally estimated that the background check process would involve 4.4 million hours over the ten-year (436,000 annualized) and would cost \$452 million over the ten-year period (\$45.2 million annualized). However, TSA now believes that these estimates may be low and requests comment from all affected parties concerning cost assumptions that can be made in preparing this analysis.

The agency is soliciting comments to—

(1) Evaluate whether the proposed 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 are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirement by January 6, 2004, and should direct them via fax to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS-TSA Desk Officer, at (202) 395-5806. Comments to OMB are most useful if received within 30 days of publication.

As protection provided by the Paperwork Reduction Act, as amended, 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. The amended interim final rule requires States to collect fingerprints or to submit a plan to TSA outlining how the fingerprint collection process would work. TSA will publish a NPRM shortly that will solicit comments from the States on the fingerprint collection process and other aspects of implementing the HME background check program. TSA will

continue to consult extensively with the States to ensure that any burdens are minimized to the extent possible.

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 TSA 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. In addition, 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 why that alternative was not adopted.

This interim final rule 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 annually. Thus, TSA has not prepared a written assessment under the UMRA.

#### *Environmental Analysis*

TSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this final rule will not have any significant impact on the quality of the human environment.

#### *Energy Impact*

TSA has assessed the energy impact of this rule in accordance with the Energy Policy and Conservation Act

(EPCA), Public Law 94-163, as amended (42 U.S.C. 6362). TSA has determined that this rule is not a major regulatory action under the provisions of the EPCA.

#### *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.

#### **List of Subjects in 49 CFR Part 1572**

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

#### **The Amendments**

■ For the reasons set forth in the preamble, the Transportation Security Administration amends 49 CFR Chapter XII, Subchapter D as follows:

#### **PART 1572—CREDENTIALING AND BACKGROUND CHECKS FOR LAND TRANSPORTATION SECURITY**

■ 1. The authority citation for part 1572 continues to read as follows:

**Authority:** 49 U.S.C. 114, 5103a, 40113, 46105.

■ 2. Amend § 1572.3 by adding the following definition in alphabetical order to read as follows:

#### **§ 1572.3 Terms used in this part.**

\* \* \* \* \*

*Revoke* means the process by which a State cancels, suspends, withdraws, annuls, or disqualifies a hazardous material endorsement.

\* \* \* \* \*

■ 3. In § 1572.5, revise paragraphs (b)(2)(i), (b)(2)(ii), (c)(1), (c)(2) introductory text and (c)(3) and add paragraph (c)(4) to read as follows.

**§ 1572.5 Security threat assessment for commercial drivers' licenses with a hazardous materials endorsement.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(i) From November 3, 2003 to December 1, 2004, an individual may submit fingerprints, in a form and manner specified by the State and TSA, when a State revokes the individual's hazardous materials endorsement under paragraph (c)(1) of this section.

(ii) When so notified by the State, an individual must submit fingerprints, in a form and manner specified by the State and TSA, when he or she applies to obtain, renew, or transfer a hazardous materials endorsement for a CDL, or when requested by TSA.

\* \* \* \* \*

(c)(1) Each State must 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 paragraph (d) of this section.

(2) No later than December 1, 2004:

\* \* \* \* \*

(3) From November 3, 2003 to June 1, 2005, while TSA is conducting a security threat assessment on an individual, if the individual holds a CDL with a hazardous materials endorsement, and is applying for renewal or transfer of the endorsement, the State that issued the endorsement may extend the expiration date of the individual's endorsement until the State receives a Final Notification of Threat Assessment or Notification of No Security Threat from TSA.

(4) TSA will not authorize a State to issue, renew, or transfer hazardous material endorsements unless the State issuing the endorsement is —

(i) Collecting the information required in § 1572.5(e) as of April 1, 2004; or the

State provides written justification for an extension of time not to exceed December 1, 2004 and TSA grants the extension; and

(ii) Submitting fingerprints in accordance with fingerprint collection standards of the Federal Bureau of Investigation and in accordance with procedures approved by TSA as of April 1, 2004; or the State submits a plan to TSA that describes how the State will collect fingerprints of individuals applying for, renewing, or transferring a hazardous materials endorsement no later than December 1, 2004.

\* \* \* \* \*

Issued in Arlington, VA on November 4, 2003.

**Stephen McHale,**

*Deputy Administrator.*

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