

Regulations that implement the prohibited persons provisions of the Act are in §§ 555.11, 555.26, 555.106, and 555.142.

#### *B. Department of Transportation Exemption*

Current law, 18 U.S.C. 845(a)(1), provides an exemption from the Federal explosives laws (except for specified plastic explosives and bombing and arson offenses) 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." The Act did not amend this provision of the law. This provision exempts persons from application of the Federal explosives laws when (1) the Department of Transportation (DOT) has actually regulated a relevant aspect of the transportation of explosive materials or explicitly determined that regulation is not necessary; and (2) those regulations cover the particular aspect of the safe transportation of explosives that prompted Congress to enact the criminal statute from which exemption is sought. For purposes of this exemption, the term "safety" includes security concerns.

DOT has recently issued an interim final rule, effective February 3, 2003, that addresses security issues regarding transportation of explosives by aliens via commercial motor vehicles and railroads from Canada into the United States. 68 FR 6083 (February 6, 2003). In the new regulation, DOT has exercised its authority to make security determinations, and generally provides that Canadian truck and rail operators may transport explosives to the United States only after they have been the subject of security checks to ensure that the operators do not pose a security risk.

The DOT interim rule did not establish new requirements regarding the transportation of explosives by air or by water, but the supplementary information to that rule discussed the existing rules and procedures enforced by the Federal Aviation Administration (FAA) and the Transportation Security Administration (TSA), and by the United States Coast Guard, regulating aliens transporting explosives in commerce into the United States by air or by water, respectively.

DOT is currently assessing the need for new or revised regulations concerning security aspects of the commercial transportation of explosives and certain other hazardous materials by air, rail, highway, and vessel carriers. As part of this assessment, DOT is examining the extent to which security

concerns related to prohibited persons who handle explosives incident to and in connection with the commercial transportation of explosives are already addressed under existing regulations. Where such concerns are not currently addressed in the existing DOT regulatory scheme, DOT has the authority to issue new or revised regulations in the future addressing the security risks posed by the commercial transportation of explosives by any of the categories of prohibited persons. For example, DOT has stated that it plans to issue regulations in the near future to implement the provisions of section 1012 of the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). This statute requires, in pertinent part, that the Department of Justice conduct background checks on drivers of commercial motor vehicles applying to States for a hazardous materials endorsement and report the results of the background check to DOT, which will then determine whether the driver poses a security risk.

When DOT has exercised its authority to assess the security risks related to persons who handle explosives incident to and in connection with the transportation of explosives in commerce, and has an existing regulation or has implemented a new or revised regulation addressing this aspect of the transportation of explosives by a particular mode, whether by truck, railroad, air, or water, ATF's authority to enforce the Federal explosives laws against such persons during the commercial transportation of explosives is preempted under 18 U.S.C. 845(a)(1), to the extent that the regulation and security assessment address the prohibited categories set forth in 18 U.S.C. 842(i). For example, if DOT conducts a security assessment and adopts regulations to permit certain felons to obtain a commercial driver's license with a hazardous materials endorsement, then ATF would have no authority to enforce 18 U.S.C. 842(i)(1) against such felons while they are shipping, transporting, receiving, or possessing explosives incident to and in connection with the commercial transportation of explosives.

It is important to note that DOT's regulatory authority covers commercial transportation only. Thus, the preemption of the explosives laws occurs only during the commercial transportation of the explosives (and applies only to the shipping, possessing and receiving incident to and in connection with commercial transportation). A prohibited person who ships, transports, receives, or possesses explosives not incident to and

in connection with commercial transportation will violate 18 U.S.C. 842(i) irrespective of DOT's regulation.

ATF has amended 27 CFR 555.141(a)(1) to include language clarifying the DOT exception of 18 U.S.C. 845(a)(1).

ATF has recently been advised that the trucking industry may employ persons who are subject to Federal explosives disabilities. It is ATF's longstanding position that a driver transporting explosive materials in a truck or other vehicle has possession of such materials. Thus, if the driver falls within any of the categories of prohibited persons, the driver may not knowingly ship or transport any explosive in interstate or foreign commerce or receive or possess any explosive which has been shipped or transported in interstate or foreign commerce, unless the person is addressed by a current DOT security assessment regulation as discussed above, or one of the other statutory exemptions applies. See 18 U.S.C. 845(a).

It is not ATF's intention to place unnecessary obstacles in the path of legitimate commerce in explosive materials. However, Congress has made it clear that the persons specified in section 842(i) may not lawfully possess explosives unless their activities fall within one of the statutory exceptions in 18 U.S.C. 845(a) or they apply for and receive relief from disabilities under 18 U.S.C. 845(b). ATF encourages any individual who is a prohibited person, who has a need to possess or transport explosives for purposes of his employment, and who is not within the scope of any DOT security assessment regulation, to apply for relief under 18 U.S.C. 845(b) as soon as possible. ATF will process relief applications as quickly as possible when a person's employment is contingent upon lawful possession of explosives.

#### **VIII. Interstate Commerce Element of 18 U.S.C. 842(i)**

The Act also amended section 842(i) to broaden the interstate commerce element of the statute. Prior to amendment, section 842(i) made it unlawful for prohibited persons to ship or transport any explosive in interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in interstate or foreign commerce. The amendment adds "or affecting" before "interstate" each place the term appears in section 842(i). This provision became effective on January 24, 2003.

Regulations that implement this provision of the Act are in § 555.26.