

adding a new section 5103a titled "Limitation on issuance of hazmat licenses." Section 5103a(a)(1) provides that a state may not issue a license to operate a motor vehicle transporting a hazardous material in commerce unless the Secretary of Transportation has first determined that the individual does not pose a security risk warranting denial of the license. Section 5103a(a)(2) subjects license renewals to the same requirements.

There is no "hazmat license" *per se* under state or Federal law. However, section 1012(b) of the USA PATRIOT Act also amended 49 U.S.C. 31305(a)(5), which prescribes fitness and testing standards for individuals operating a commercial motor vehicle carrying a hazardous material, by adding a new paragraph (C) to require a state to ensure that an individual has been vetted under 49 U.S.C. 5103a before the state issues a commercial driver's license (CDL). Thus, DOT and TSA interpret the "hazmat license" referred to in section 1012 as the hazardous materials endorsement to a CDL, which is required by 49 CFR 383.93(b)(4). To qualify for the hazardous materials endorsement, an individual must first pass a specialized knowledge test (§ 383.121) in addition to the requisite general knowledge and skills tests required for a CDL. Therefore, DOT and TSA consider section 5103a a *de facto* amendment to the CDL legislation.

Section 5103a(c) requires the Attorney General, upon the request of a state regarding issuance of a hazardous materials endorsement, to carry out a background records check of the individual applying for the endorsement and, upon completing the check, to notify the Secretary of Transportation 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.

TSA and DOT's Federal Motor Carrier Safety Administration (FMCSA) have developed regulations to implement the hazardous materials licensing provisions of the USA PATRIOT Act. TSA's regulation, published in today's edition of the **Federal Register**, addresses the procedures for making determinations as to whether an individual poses a security threat

warranting denial of a hazardous materials endorsement for a commercial driver's license and for appealing and issuing waivers to such a determination. Also in today's edition of the **Federal Register**, FMCSA is publishing a companion regulation amending Part 383 of the Federal Motor Carrier Safety Regulations (FMCSRs) to prohibit states from issuing, renewing, transferring, or upgrading a commercial driver's license with a hazardous materials endorsement unless the Attorney General has first conducted a background records check of the applicant, and TSA has determined that the applicant does not pose a security threat warranting denial of the hazardous materials endorsement.

Part 383 of the FMCSRs requires a driver to have a hazardous materials endorsement to the CDL only if the driver operates a commercial motor vehicle transporting hazardous materials in amounts required to be placarded under the HMR. FMCSA is amending Part 383 to require an operator of a commercial motor vehicle that transports materials on the CDC select agent list to have a hazardous materials endorsement to his or her CDL. Thus, TSA and FMCSA implementation of the USA PATRIOT Act is consistent with RSPA's assessment in HM-232 that the hazardous materials placarding thresholds, plus the CDC select agent list, cover materials that present the most significant security threats in transportation.

To assure consistency between the HMR and the FMCSR concerning the USA PATRIOT Act requirements for commercial motor vehicle drivers, in this final rule, we are amending Part 177 of the HMR to require compliance with Part 383 of the FMCSR.

TSA, with the assistance of DOT's Federal Railroad Administration, intends to issue a rule somewhat similar to the USA PATRIOT Act rule for railroad workers who are in security-sensitive positions. Upon issuance of such a rule, RSPA will issue an additional rule making any such railroad background check requirements part of the HMR.

V. Safe Explosives Act

Congress enacted the Safe Explosives Act (SEA) on November 25, 2002. Sections 1121–1123 of 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. Persons who violate 18 U.S.C. 842(i) are subject to criminal penalties.

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

The HMR define a Class 1 material as any substance or article that is designed to function by explosion—that is, an extremely rapid release of gas or heat—or one that, by chemical reaction within itself, functions in a similar manner even if not designed to do so. Class 1 materials are divided into six divisions. Assignment of an explosive to a division depends on the degree and nature of the explosive hazard presented. Thus, a Division 1.1 explosive is one that presents a mass explosive hazard. A mass explosion is one that affects almost the entire load simultaneously. A Division 1.2 explosive has a projection hazard, which means that if the material explodes, it will project fragments outward at some distance. A Division 1.3 explosive presents a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard. A Division 1.4 explosive has a minor explosion hazard