

operations. Requirements under consideration include expansion of background checks for those with access to air operations areas, and additional screening for those persons with access to the flight deck of all-cargo carriers.

The HMR establish requirements for the transportation of explosives on-board aircraft. Air carriers generally are prohibited from transporting explosives in amounts that would require placarding if transported by highway or rail. The HMR prohibit Division 1.1 and 1.2 explosives in any quantity from being transported by aircraft. A limited number of explosives classed as Division 1.3 are permitted for transportation by cargo aircraft in limited amounts. These include certain types of cartridges, flares, and distress signals. Additionally, a limited number of Division 1.4 explosives are permitted for transportation by passenger or cargo aircraft in limited amounts. Again, these include certain types of cartridges, detonators, fireworks, flares, fuses, and signal devices.

Under RSPA's exemptions program, a hazardous materials shipper or carrier may be granted an exemption from certain HMR requirements. An exemption authorizes a company or individual to transport a hazardous material in a manner that differs from the HMR, so long as an equivalent level of safety and security is maintained. Exemptions allow an operator quickly to implement new technologies and to evaluate new operational techniques that often enhance safety and increase productivity. In addition, exemptions permit timely movement of materials in an emergency or under adverse transportation conditions.

We have issued a limited number of exemptions that permit the transportation of certain explosives by air that would otherwise be prohibited for such transportation, including Division 1.1 and 1.2 explosives. There are currently 23 exemptions that authorize the transportation of explosives that are otherwise prohibited for transportation by air. All but one of these exemptions has been issued to an operator that is subject to TSA security requirements applicable to aircraft with a maximum certificated takeoff weight of 12,500 pounds or more. As discussed above, the TSA security requirements include provisions for CHRCs for all flight crewmembers, restricted access to the cockpit during flight, and ground security measures. We anticipate that the vast majority of exemptions applicants seeking to transport explosives by air that would otherwise be prohibited for such transportation will be air carriers that are subject to the

TSA security requirements, including requirements for CHRCs for flight crews.

Persons applying for and renewing exemptions that permit the transportation of explosives that are otherwise prohibited for air transportation will need to demonstrate that the exemption proposal maintains an equivalent level of safety, including security, as is required by transportation regulations. To this end, in this interim final rule, we are amending the procedural regulations for applying for an exemption in 49 CFR Part 107 to require applicants to certify compliance with transportation security laws and regulations. With respect to explosive materials that are otherwise forbidden for transportation by air, this will include a certification to RSPA that the carrier complies with all applicable TSA security requirements and that none of the "prohibited persons" listed in 18 U.S.C. 842(i), as amended by SEA, will participate in the transportation. Each exemption will require, as a condition of the exemption, that the holder be in conformance with applicable transportation security requirements, including the prohibitions in 18 U.S.C. 842(i), before loading and departure. Consequently, DOT and TSA security requirements apply to these exemption holders and the exemption holders are not subject to criminal enforcement under 18 U.S.C. 842(i) when transporting explosives in commerce. Explosives permitted for transportation by passenger or cargo-only aircraft under the HMR without an exemption are not subject to the security certification requirements.

RSPA has determined that the types and quantities of explosives permitted for transportation without an exemption by passenger or cargo-only aircraft under the HMR do not present a security risk sufficient to warrant application of the TSA background check requirements at this time to persons who transport those shipments in commerce or to persons who possess those shipments incidental to transportation in commerce, including persons subject to 18 U.S.C. 842(i). Moreover, TSA regulations applicable to airport security address the risk that unauthorized persons may gain access to explosives being transported by aircraft at major airports. We are continuing our assessment of the security risks posed by the transportation of explosives by aircraft and will take appropriate regulatory action, after public notice and comment, to address those risks. In light of this determination, the provisions of 18 U.S.C. 842(i) do not apply to air shipments of explosives permitted for

transportation without an exemption under the HMR.

The TSA security regulations, including background check requirements, apply to nearly all of the explosives otherwise prohibited for transportation by air that are transported by air under the terms of an RSPA exemption. An applicant for an exemption or an exemption renewal to transport such prohibited explosives will be required to certify that it complies with all applicable TSA security requirements as part of the exemption application process. Those few applicants for an exemption that are not subject to the TSA security requirements will be required to certify as part of the exemption application or renewal that none of the "prohibited persons" listed in 18 U.S.C. 842(i), as amended by SEA, will participate in the transportation.

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

As noted above, 18 U.S.C. 845(a)(1) provides an exception to the prohibited persons provisions in 18 U.S.C. 842(i) for "any aspect of the transportation of explosive materials via railroad, water, highway, or air, which are regulated by the United States Department of Transportation (DOT) and agencies thereof, and which pertain to safety."

DOT is authorized by the Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*) to designate material, including an explosive, as hazardous when transporting that material in commerce in a particular amount and form may pose an unreasonable risk to health, safety, or security. 49 U.S.C. 5103. DOT regulations applicable to the transportation of explosives by all modes include the classification, packaging, hazard communication, and operational requirements described elsewhere in this preamble and the driver licensing and qualification requirements established by FMCSA and incorporated into the HMR. Further, the HMR include specific requirements for security plans and training adopted in the HM-232 final rule. Under this final rule, the HMR also incorporate USCG and TSA security regulations applicable to the transportation of explosives in commerce.

As discussed in detail above, we assessed the security risks associated with the transportation in commerce of explosives as defined in 18 U.S.C. 841(c)-(f). Based on this assessment, we concluded that the most significant security risks are associated with the transportation of explosives shipments in quantities that require placarding