

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 hazardous materials regulations promulgated by the Research and Special Programs Administration (RSPA) extensively regulate the movement of explosives [49 CFR Parts 171–180]. Furthermore, TSA's rule prohibits a person from obtaining a hazardous materials endorsement to CDL if he or she is under indictment for or convicted of a broad range of felonies [49 CFR 1572.5(d)(1)(ii) and 1572.103(a)(1), (a)(3), and (b)]; is a fugitive [§§ 1572.5(d)(1)(ii) and 1572.103(a)(3)]; has been adjudicated a mental defective or committed to mental institution [§ 1572.5(d)(1)(iii)]; is an alien, with certain exceptions [§§ 1572.5(d)(1)(i) and 1572.105]; or has renounced U.S. citizenship [§§ 1572.5(d)(1)(i) and 1572.105]. TSA also has addressed the security risk that individuals who have been dishonorably discharged from the armed services pose. For example, a discharge from the U.S. armed forces under dishonorable conditions is usually the result of a conviction in military court, and some such convictions will disqualify a person from holding a hazardous materials endorsement under this rule. Therefore, FMCSA believes that TSA has addressed § 842(i)(6). FMCSA has a comprehensive regulatory regime to disqualify drug users from operating commercial motor vehicles [49 CFR Part 382] which we believe addresses § 842(i)(3).

This interim final rule, by requiring States to comply with the TSA rule on background checks, essentially incorporates into the Federal Motor Carrier Safety Regulations the TSA regulations governing eligibility for a hazardous materials endorsement. Taken together, RSPA's hazardous materials regulations, FMCSA's drug and alcohol testing regulations, and FMCSA's CDL regulations which incorporate by reference TSA's standards for obtaining a hazardous materials endorsement, fully address the prohibitions in 18 U.S.C. 842(i) and thus, pursuant to 18 U.S.C. 845(a)(1), preclude application of § 842(i)(1)–(7) to

persons engaged in the commercial transportation of hazardous materials by motor vehicle.

Some of the requirements of the TSA rule apply directly to drivers seeking hazardous materials endorsements, others to the States that issue such endorsements. Sec. 1012 of the USA PATRIOT Act imposes certain requirements on the States. Sec. 1012(b) [49 U.S.C. 31305(a)(5)(C)] authorizes FMCSA to require States to comply with TSA regulations adopted to carry out Sec. 1012(a). The TSA rule, however, is also based on other statutory authorities which enable that agency to impose requirements directly on applicants for hazardous materials endorsements. In amending 49 CFR part 384, which sets the minimum standards that State CDL programs must maintain in order to avoid the withholding of Federal-aid highway funds, FMCSA has therefore distinguished between those provisions of the TSA regulation that are based on Sec. 1012 and apply to States, and those provisions that apply to drivers. For example, 49 C.F.R. 1572.5(e) requires States to have applicants complete a form that includes specific information, while § 1572.5(b)(1)(iii) requires anyone holding a hazardous materials endorsement who is convicted of, or under indictment for, a disqualifying crime listed in § 1572.103 to report the offense to the State of issuance and surrender the endorsement to the State. The first requirement applies to the State, the second does not. A State therefore would not be penalized if drivers failed to comply with § 1572.5(b)(1)(iii) or some other provision that applies directly to drivers rather than the State.

#### Rulemaking Analyses and Notices

Under the Administrative Procedure Act (APA), an agency may, for good cause, immediately promulgate a final rule if it finds that prior notice and opportunity for comment “are impracticable, unnecessary, or contrary to the public interest” [5 U.S.C. 553(b)(3)(B)].

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 warn that future terrorist attacks are likely. The number of commercial motor vehicles that carry hazardous materials is far greater than the number of aircraft that might be hijacked by terrorists. Sec. 1012 of the USA PATRIOT Act is an attempt to increase the security of highway transportation of hazardous materials. In

view of the urgency of putting into operation the background records checks required by the Act, FMCSA finds that prior notice and opportunity for comments are both impracticable and contrary to the public interest. The delays inherent in such a process could make the difference between stopping and overlooking a terrorist threat.

This rule is effective upon publication, although compliance will be delayed for 180 days to allow TSA to consult with the States and other parties about the best means of conducting background checks on CDL-holders who have or want a hazardous materials endorsement. During that period, we are soliciting public comments on the rule and will later make changes that may be required, either because of the comments submitted or experience with the IFR. This rule, however, must remain consistent with the requirements imposed by TSA's companion rule. Comments received after the comment closing date will be filed in the docket and considered to the extent practicable. In addition to late comments, the FMCSA will also continue to file relevant information in the docket as it becomes available after the comment period closing date. Please continue to review the docket for new material.

#### Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of the Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, February 26, 1979) because of significant public interest in security issues since the events that occurred on September 11, 2001. This IFR implements some of the requirements of Sec. 1012 of the USA PATRIOT Act by prohibiting States from issuing or renewing a CDL endorsement to operate a motor vehicle transporting a hazardous material unless TSA has determined that the applicant does not pose a security risk warranting denial of the license. Along with RSPA and TSA rules, it also addresses 18 U.S.C. 842(i) and 845(a)(1).

#### Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), an agency is required to evaluate proposed rulemakings to determine the effects of its action upon small entities. FMCSA does not believe that these proposals meet the threshold values for requiring