

a full-blown regulatory analysis, since the anticipated impact is fairly small.

On October 24, 2001, the President signed the USA PATRIOT Act of 2001. The changes promulgated by this rule and the corresponding TSA rule are a direct response to this legislation.

These two rulemakings are the first implementing regulations for Sec. 1012; there are no Regulatory Flexibility Act comments to analyze.

According to the FMCSA Motor Carriers Management Information System (MCMIS) as of March 4, 2002, 59 percent (24,545) of the 41,527 carriers who haul hazardous materials have 6 or fewer power units (tractors), compared with 76 percent for all motor carriers. The Small Business Administration (SBA) defines small entities by their amounts of revenue, but FMCSA does not gather financial information on carriers. We use 6 power units as a proxy for small entities. Hazardous materials are thus more likely to be transported by motor carriers that are not small than is freight transported by trucks in general (*i.e.*, 41 percent of hazardous materials carriers are above the 6-power-unit threshold, compared to 24 percent of the industry as a whole).

Although these small entities will have to keep records on the status of all of their employees' hazardous materials endorsements, there is no additional administrative cost to them because they already have to maintain those records under the current system. These small businesses might be adversely affected if the number of available drivers who can qualify under TSA rules is significantly reduced. In that case, employers might find that they have to pay hazardous materials drivers a premium wage in order to continue to provide their level of service. Aggregate criminal history data on CMV drivers have never been compiled, however, and neither FMCSA nor TSA has any basis for estimating the number who may be disqualified by the TSA rule.

Because this rule is expected to have only a minimal impact upon small businesses, no special steps were taken to further minimize its impact.

The FMCSA is not aware of any other rules or procedures that duplicate or conflict with this rule.

Allowing differences in compliance or reporting for small entities would be contrary to the intent of Congress in issuing this mandate. The purpose of Sec. 1012 of the USA PATRIOT Act is to reduce the risk that potential terrorists will gain access to hazardous materials. If other, less costly, methods were available to attain the same end, they would be employed instead.

However, the FMCSA does not believe any such alternatives exist.

Therefore, the FMCSA certifies that this rule will not have a significant impact on a substantial number of small entities.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria in the Executive Order on Federalism (E.O. 13132, August 4, 1999, *see* 64 FR 43255, August 10, 1999) and it has been determined that the rule does not have federalism implications or a substantial direct effect on the States.

Although the CDL regulations (49 CFR part 383) issued to implement the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) apply to commercial motor vehicles (CMVs) operating in intrastate as well as interstate commerce [*see* 49 U.S.C. 31301(2)], they do not preempt State law. Instead, the Department of Transportation is required to withhold certain Federal-aid highway funds when a "State does not comply substantially with a requirement of [49 U.S.C.] 31311(a)" [*see* 49 U.S.C. 31314].

Sec. 1012 of the USA PATRIOT Act, however, codified the requirements for background records checks of hazardous materials drivers in 49 U.S.C. chapter 51. Regulations based on chapter 51 generally preempt inconsistent State, local, or tribal laws and regulations [*see* § 5125]. Notwithstanding its codification in chapter 51, Sec. 1012 is essentially an amendment to the CDL statute. That is especially apparent in Sec. 1012(b), which added a new subparagraph (C) to the "General driver fitness and testing" requirements in § 31305(a)(5) of the CMVSA. The amended provision says that the Secretary of Transportation shall prescribe regulations on minimum standards for testing and ensuring the fitness of an individual operating a commercial motor vehicle. The regulations * * * shall ensure that an individual who operates or will operate a commercial motor vehicle carrying a hazardous material * * * is licensed by a State to operate the vehicle after having first been determined under section 5103a of this title as not posing a security risk warranting denial of the license [49 U.S.C. 31305(a)(5)(C)]. Sec. 1012(b) thus transforms the procedures and result of the security review described in 49 U.S.C. 5103a into a prerequisite for a hazardous materials endorsement under chapter 313.

Sec. 1012(b) has additional ramifications. Under 49 U.S.C. 31311(a), [t]o avoid having amounts [of Federal-

aid highway funds] withheld from apportionment under section 31314 of this title, a State shall comply with the following requirements: The State shall adopt and carry out a program for testing and ensuring the fitness of individuals to operate commercial motor vehicles consistent with the minimum standards prescribed by the Secretary under section 31305(a) of this title * * *.

Section 31314(a), in turn, provides that [t]he Secretary of Transportation shall withhold 5 percent of the amount [of Federal-aid highway funds] required to be apportioned to a State under section 104(b) (1), (3), and (4) of title 23 on the first day of the fiscal year after the first fiscal year beginning after September 30, 1992, throughout which the State does not comply substantially with a requirement of section 31311(a) of this title.

A State that issues a hazardous materials endorsement to a CDL without complying with the TSA requirements implementing § 5103a has thus violated § 31305(a)(5)(C). Since § 31311(a)(1) requires compliance with § 31305(a) in order to avoid funding sanctions under § 31314, the FMCSA can withhold for the first year of noncompliance 5% (and 10% thereafter) of a State's annual apportionment of National Highway System, Surface Transportation Program, and Interstate Maintenance funds [23 U.S.C. 104(b) (1), (3), and (4), respectively].

In short, because the purpose of Sec. 1012(b) was to incorporate the background records check into the CDL requirements, and because noncompliance with the CDL requirements triggers funding sanctions, FMCSA has concluded that the only appropriate means to enforce TSA's rule implementing Sec. 1012 is to withhold Federal-aid highway funds from States that fail to comply with that rule or this rule. In view of the obvious implications of Sec. 1012(b), the agency is persuaded that non-complying States cannot be subjected to the mechanisms otherwise available to enforce regulations based on chapter 51, *i.e.*, injunctive action [§§ 5122, 5125], civil penalties [§ 5123] or criminal penalties [§ 5124].

The FMCSA has determined that the rule does not have federalism implications, *i.e.*, 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 (Sec. 1(a), E.O. 13132). In order to avoid the withholding of Federal-aid highway funds, all of the States have long since adopted CDL programs consistent with