

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. Individuals who violate 18 U.S.C. 842(i) are subject to criminal prosecution.¹² These incidents are investigated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) of the Department of Justice and referred, as appropriate, to the United States Attorneys.

However, 18 U.S.C. 845(a)(1) provides an exception to section 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 and agencies thereof, and which pertains to safety." Under this exception, if DOT regulations address the transportation security issues of persons engaged in a particular aspect of the safe transportation of explosive materials, 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. For example, the regulations set forth in this rule disqualify persons convicted of certain felonies from obtaining a CDL with a hazardous materials endorsement. Because the regulations address a particular aspect of the safe transportation of explosives materials, *i.e.*, the threat to public safety posed by felons transporting hazardous materials, the exception contained in 18 U.S.C. 845(a)(1) applies, and felons transporting explosives in commerce would not be subject to criminal prosecution under section 842(i).

In addition, if DOT determines that certain aspects of the transportation of explosives do not pose a security threat and therefore do not warrant regulations, the exception contained in 18 U.S.C. 845(a)(1) also applies, and

persons engaged in such transportation would not be subject to criminal prosecution under section 842(i). As discussed in greater detail throughout this document, this rule addresses all of the categories of individuals who are prohibited from transporting explosives via commercial motor carrier under the SEA, and thus 18 U.S.C. 845(a)(1) excepts those categories of individuals from prosecution under section 842(i) for activities occurring during and incident to the transportation of explosives in commerce.

On February 6, 2003, TSA issued a regulation, effective immediately, establishing temporary requirements for all Canadian motor carriers and rail carriers using non-resident aliens to transport explosives into the U.S.¹³ In essence, the rule prohibits a Canadian commercial transporter of explosives from entering the U.S. unless he or she is identified as a known carrier. A transporter is considered a known carrier by submitting specified information to Transport Canada, an agency within the Canadian government that oversees transportation safety and security. Transport Canada conducts checks to ensure that the transporter is a legitimate entity authorized to do business in Canada, and that there are no security concerns with the transporter. Transport Canada forwards this information to TSA, which then conducts additional security checks and forwards the list of acceptable transporters to the U.S. Customs Service, which conducts checks at the U.S.-Canada border.

This rule triggers the exception in 18 U.S.C. 845(a)(1) for aliens entering the United States from Canada who are transporting, shipping, receiving, and possessing explosives incident to and in connection with the commercial transportation of explosives by rail, motor carrier, or water. Thus, such aliens will not violate 18 U.S.C. 842(i)(5) during such commercial transportation.

This rulemaking document includes this discussion of the SEA requirements because explosives are among the categories of substances that are defined as "hazardous materials" under FMCSA regulations at 49 CFR 383.5.¹⁴ This rule is specifically crafted to invoke the section 845(a)(1) exception with respect to domestic transporters of explosives in the trucking industry. A companion rule, to be issued by FMCSA, will

prohibit the issuance of a hazardous materials endorsement to an individual unless the individual has complied with TSA's security threat assessment regulations.

This rule prohibits an individual from holding a CDL with a hazardous materials endorsement if he or she (1) is an alien (unless he or she is a lawful permanent resident) or a U.S. citizen who has renounced his or her U.S. citizenship; (2) is wanted or under indictment for certain felonies; (3) has a conviction in civilian or military court for certain felonies; (4) has been adjudicated as a mental defective or committed to a mental institution; or (5) is considered to pose a security threat based on a review of various databases. In addition, FMCSA's existing CDL regulations prohibit individuals with a CDL from operating a commercial motor vehicle if he or she tests positive for a controlled substance, or has adulterated or substituted a test specimen for controlled substances.¹⁵ Thus, TSA and FMCSA rules cover individuals convicted of serious felonies, aliens,¹⁶ individuals under felony indictment, fugitives from justice, individuals adjudicated as mental defectives or committed to a mental institution, individuals who have renounced their U.S. citizenship, and unlawful users or addicts of any controlled substance.

TSA has also addressed the security risk that individuals who have been dishonorably discharged from the armed services pose. Under the Uniform Code of Military Justice, a person may only be dishonorably discharged if convicted of certain crimes. All crimes that may result in a dishonorable discharge do not give rise to a security threat. Under articles 133 and 134 of the Uniform Code of Military Justice, an individual may be dishonorably discharged for "conduct unbecoming an officer" and "disorders and neglects to the prejudice of good order and discipline." These violations may include bigamy, fraternization, and drunk and disorderly conduct. TSA believes that in most cases, these actions would not affect an individual's ability to safely and

¹⁵ 49 CFR 382.215.

¹⁶ TSA notes that the SEA does not prohibit lawful permanent residents and other narrow categories of aliens from transporting explosives. (18 U.S.C. 842(i)(5)). However, FMCSA's CDL regulations require a CDL holder to have a "State of domicile," which is defined as "that State where a person has his/her true, fixed, and permanent home and principal residence and to which he/she has the intention of returning whenever he/she is absent." (49 CFR 383.5). Lawful permanent residents of the U.S. are the only aliens who have a State of domicile under this definition. Thus, they are the only aliens who are permitted to have a CDL.

¹² The penalty for violation of 18 U.S.C. 842(i) is up to ten years imprisonment and a fine of up to \$250,000.

¹³ 68 FR 6083, February 6, 2003, Docket No. TSA-2003-14421.

¹⁴ See also, 49 CFR 173.50, which is the definition of explosives, promulgated by Research and Special Programs Administration.