

government documents are subject to public disclosure.³²

SSI is unclassified information that is subject to disclosure limitations under statute and TSA regulations.³³ Under 49 U.S.C. 114(s), the Administrator of TSA may designate categories of information as SSI if release of the information would be detrimental to the security of transportation. The SSI designation allows TSA to limit disclosure of this information to people with a need to know in order to carry out regulatory security duties.³⁴

Among the categories of information that the Administrator has defined as SSI by regulation is information concerning threats against transportation.³⁵ Thus, information that TSA obtains indicating that an individual poses a security threat, including the source of such information and the methods through which the information was obtained, will commonly be SSI or classified information. The purpose of designating such information as SSI is to ensure that those who seek to do harm to the transportation system and their associates and supporters do not obtain access to information that will enable them to evade the government's efforts to detect and prevent their activities. Disclosure of this information, especially to an individual specifically suspected of posing a threat to the transportation system, is precisely the type of harm that Congress sought to avoid by authorizing the Administrator to define and protect SSI.

Other types of information also are protected from disclosure by law due to their sensitivity in law enforcement and intelligence. In some instances, the release of information about a particular individual or his supporters or associates could have a substantial adverse impact on security matters. The release of the identities or other information regarding individuals related to a security threat determination by TSA could jeopardize sources and methods of the intelligence community, the identities of confidential sources, and techniques and procedures for law enforcement investigations or prosecution.³⁶ Release of such information also could have a substantial adverse impact on ongoing investigations being conducted by Federal law enforcement agencies, possibly giving a terrorist organization or other group a roadmap of the course

and progress of an investigation. In certain instances, release of information could alert a terrorist's co-conspirators to the extent of the Federal investigation and the imminence of their own detection, thus provoking flight.

For the reasons discussed above, TSA does not intend to provide any classified information to the individual, and TSA reserves the right to withhold SSI or other sensitive material protected from disclosure under law. As noted above, TSA expects that information will be withheld only for determinations based on § 1572.107, which involve watchlists and other databases. When the determination is based on the individual's criminal history or alien status, TSA expects that the supporting records most likely will be disclosed to the individual upon a written request to TSA.

Section 1572.143 Waivers

Certain individuals may request a waiver, which permits the individual to hold or obtain a hazardous materials endorsement even if he or she does not meet the standards for the authorization. For instance, TSA believes that individuals who have committed a disqualifying crime may be rehabilitated to the point that they may be trusted in potentially dangerous jobs, such as the transportation of hazardous materials. The rule provides criteria that TSA will consider if the individual does not meet the criminal history standards. TSA believes that these factors are good indicators that an individual may be rehabilitated to the point that a waiver is advisable. The factors are: (1) The circumstances of the disqualifying act or offense; (2) restitution made by the individual; (3) Federal or State mitigation remedies; and (4) other factors TSA believes bear on the individual's potential security threat. These factors are set forth in the MTSA, at 46 U.S.C. 70105(c)(2).

TSA is developing internal criteria that will be used to determine whether a waiver should be granted to ensure uniform application of the waiver process. For instance, TSA may grant waivers to individuals who have been adjudicated as a mental defective or committed to a mental institution, as specified in § 1572.109. A basis for a waiver may include a requirement that a court, board, commission, or other lawful authority has determined that the individual is no longer a danger to him- or herself or others, or is capable of managing his or her own affairs. TSA requests comment on the appropriate criteria the agency should consider when determining whether to grant a waiver to these individuals.

In reviewing waiver applications, TSA may consider the U.S. Sentencing Guidelines as informal guidance. The Guidelines address the mitigation of federal sentences and explain the factors and circumstances that should be considered when departing from standard federal sentences.

Also, TSA is considering placing additional criteria in the rule for determining whether a waiver should be granted to an individual with a disqualifying offense. The criteria include: (1) At least three years have elapsed from the date the individual was released from incarceration for the offense to the date the individual is applying for the waiver; (2) the individual provides written proof that he or she has successfully completed or is currently meeting the conditions of his or her parole or probation; and (3) the individual has not been arrested within those three years. TSA requests comments on whether these factors should be added to the rule.

Note that TSA will not grant waivers from the standards in § 1572.107. Determinations under that section already take into account individual circumstances, and do not contain specific criteria on which TSA could base a decision to grant or deny a waiver. An individual is finally denied under § 1572.107 only after TSA has considered all of the circumstances. While the individual may appeal an Initial Notification of Threat Assessment issued under that section, once TSA determines that the individual does not meet the standards, no waiver is appropriate. Also, individuals who do not meet the citizenship requirements of the rule are not subject to a waiver. As noted above, FMCSA regulations require CDL holders to be U.S. citizens or lawful permanent residents of the U.S., and TSA cannot waive that requirement.

After reviewing an individual's application for a waiver, TSA will send a written decision to the individual and, if the waiver is granted, the State in which the individual applied for the hazardous materials endorsement within 30 days of the date of the individual's application for a waiver.

Rulemaking Analyses and Notices

Justification for Immediate Adoption

TSA is issuing this final rule without prior notice and opportunity to comment pursuant to its authority under section 4(a) of the Administrative Procedure Act (5 U.S.C. 553(b)). This provision allows the agency to issue a final rule without notice and opportunity to comment when the agency for good cause finds that notice

³² See 5 U.S.C. 552 (b)(1).

³³ See 49 U.S.C. 114(s); 49 CFR part 1520.

³⁴ See 49 CFR 1520.5(b).

³⁵ See 49 CFR 1520.7(i).

³⁶ See 5 U.S.C. 552(b)(7)(D), (E).