

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Department of Justice is amending current regulations of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to remove the requirement that common or contract carriers taking possession of explosive materials for delivery to a licensee or permittee complete ATF Form 5400.8 (Explosives Delivery Record) prior to taking possession of explosive materials, regardless of whether they are hired by the distributor or by the distributee. ATF believes that this requirement is unduly burdensome and unnecessary. Furthermore, ATF does not believe that the elimination of this form will result in diversion of explosive materials to criminal or terrorist use. ATF will continue to require distributors of explosive materials to verify the identity of persons accepting possession of explosive materials for common or contract carriers, and will require distributors to record the name of the common or contract carrier and the full name of the driver in their permanent records.

The interim rule will remain in effect until superseded by final regulations.

**DATES:** *Effective date:* This interim rule is effective September 11, 2003.

*Comment date:* Comments must be submitted on or before October 14, 2003.

**ADDRESSES:** Send written comments to: James P. Ficaretta, Program Manager; Room 5150; Bureau of Alcohol, Tobacco, Firearms and Explosives; P.O. Box 50221; Washington, DC 20091-0221; *ATTN:* ATF No. 2. Written comments must include your mailing address and be signed, and may be of any length.

E-mail comments may be submitted to: [nprm@atf.gov](mailto:nprm@atf.gov). E-mail comments must contain your name, mailing address, and e-mail address. They must also reference this document number, as noted above, and be legible when printed on 8½" x 11" paper. ATF will treat e-mail as originals and ATF will not acknowledge receipt of e-mail. See the Public Participation section at the end of the **SUPPLEMENTARY INFORMATION** section for requirements for submitting written comments by facsimile.

**FOR FURTHER INFORMATION CONTACT:** James P. Ficaretta; Firearms, Explosives and Arson; Bureau of Alcohol, Tobacco, Firearms and Explosives; U.S. Department of Justice; 650 Massachusetts Avenue, NW., Washington, DC 20226, telephone (202) 927-8203.

**SUPPLEMENTARY INFORMATION:**

## Background

On March 20, 2003, ATF published in the **Federal Register** an interim final rule (68 FR 13768) implementing the Safe Explosives Act (SEA) (Title XI, Subtitle C of Public Law 107-296). The SEA, among other things, requires that all persons receiving explosives on and after May 24, 2003, obtain a Federal license or permit, and creates a new type of permit, the "limited permit." Except as otherwise provided, the interim rule became effective upon the date of publication in the **Federal Register**.

### *Delivery of Explosive Materials by Common or Contract Carrier*

In the preamble of the interim rule, ATF stated that on and after May 24, 2003, all common or contract carriers taking possession of explosive materials for delivery to a Federal explosive licensee or permittee (including a limited permittee) must complete an ATF Form 5400.8 (Explosives Delivery Record) prior to taking possession of the explosive materials. Specifically, ATF required common or contract carriers to document and certify certain identifying information. ATF also required distributors to verify the identity of the driver and to provide information regarding the distributee. This form is required only when delivery occurs by common or contract carrier and is not dependent on whether the carrier is hired by the distributor or distributee. Regulations that implement these requirements are contained in 27 CFR 555.103(b)(3) and 555.105(b)(6)(iii) and (iv). The form is not required when employees of distributors or distributees make delivery.

The primary purpose of ATF Form 5400.8 is to require verification of the identity of employees of common or contract carriers taking possession of explosive materials. 68 FR at 13771. Under ATF's longstanding position since 1970, employees of common or contract carriers have been subject to prohibitions under 18 U.S.C. 842(i) proscribing the transportation, shipment, receipt, or possession of explosives by persons convicted of or under indictment for felony offenses, fugitives, substance abusers, and mental defectives. The SEA, among other things, expanded these categories of prohibited persons to include aliens (with limited exceptions), dishonorable discharges, and renunciants. However, there is no authority in the SEA for ATF to conduct background checks on employees of common or contract carriers to ensure that such persons are not, for example, convicted felons,

fugitives, or aliens. ATF believes that, absent background checks, ATF should collect information to properly document and verify identities of commercial drivers to reduce the potential for diversion to criminal or terrorist use.

On May 5, 2003, shortly after publication of ATF's interim rule, the Department of Transportation (DOT) and the Department of Homeland Security promulgated three interim final rules generally exempting persons engaged in the commercial transportation of explosives from the application of 18 U.S.C. 842(i) while they are engaged in such transportation by motor carrier, water, and air. See 68 FR 23832 (Research and Special Programs Administration, DOT), 23844 (Federal Motor Carrier Safety Administration, DOT), 23852 (Transportation Security Administration (TSA), DHS) (to be codified at 49 CFR). On June 9, 2003, DOT and TSA also published a notice that extended this exemption to persons engaged in the commercial transportation of explosives via rail (68 FR 34470).

Additionally, on February 3, 2003, TSA, then an agency of DOT, promulgated regulations effectively allowing aliens to transport, ship, receive, and possess explosives incident to and in connection with the commercial transport of explosives by motor carrier or rail into the United States from Canada. This rule generally exempted such persons from the general prohibitions of 18 U.S.C. 842(i)(5). See 68 FR 6083 (February 6, 2003) (to be codified at 49 CFR Part 1572).

As a consequence, upon publication of the DOT and TSA rules, certain employees of motor, water, air, and rail carriers are no longer subject to 18 U.S.C. 842(i) while they are engaged in the commercial transportation of explosives. Rather, these employees are subject to DOT and TSA security threat assessment standards. To evaluate relevant security threat assessments, DOT and TSA now collect specific information to ensure that employees of common or contract carriers transporting explosives do not pose a security threat. Thus, ATF finds that there is a significantly diminished need to collect similar information via the ATF Form 5400.8 to ensure that explosives are not placed in the hands of prohibited persons for possible diversion to criminal or terrorist use.

In addition, while not explicitly stated in the interim rule, ATF also collects certain information on ATF Form 5400.8 to enable tracing of explosives deliveries by a distributor to a common or contract carrier. For