

amended IFR alters this surrender requirement.

The surrender requirement buttresses TSA's determination that we should attempt to identify potential terrorist threats from terrorism-related information databases before analyzing criminal history records. As of today, all HME drivers are required to self-report any disqualifying offenses that would appear on a fingerprint-based criminal history records check. TSA will work closely with the State Departments of Motor Vehicles, labor organizations, and the trucking industry to communicate this surrender provision widely and to inform affected drivers of the existing waiver process.

Based on the foregoing, the exception found in 18 U.S.C. 845(a)(1) continues to apply, and persons otherwise prohibited from lawfully possessing explosives who are transporting explosives in commerce would not be subject to criminal prosecution under section 842(i).

Section-by-Section Analysis

TSA is adding a definition to § 1572.3 to make certain that the current IFR, which requires revocation of a HME under certain conditions, will not impose a condition in the HME process that the States cannot complete. As discussed earlier, in some States legislative language prohibits the 'revocation' of a HME legal, but permits the State to cancel, suspend, withdraw, or disqualify a hazardous material endorsement. TSA's new definition resolves this conflict with certain State legislation.

TSA makes several changes to § 1572.5 concerning the date on which TSA's threat assessment based on fingerprint-based criminal history record checks will begin. In paragraphs 1572.5(b) and (c), the new dates reflect TSA's decision to delay the date on which the States must be collecting information and submitting fingerprints to the FBI from November 3, 2003 to April 1, 2004, or under certain conditions to December 1, 2004 at the very latest.

Paragraph 1572.5(c)(4) establishes the requirement that TSA will not authorize a State to issue, renew, or transfer a HME unless it is collecting the information required in § 1572.5(e) and submitting fingerprints as of April 1, 2004. If the State cannot collect the required information by that date, the State may submit and TSA may approve a request to delay the collection requirement to December 1, 2004. Also, if the State cannot submit fingerprints from HME applicants by April 1, 2004, the State must submit a plan to TSA

explaining how fingerprint collection and submission will be accomplished before December 1, 2004.

Compliance

As discussed in detail in the IFR published by FMCSA on May 5, 2003, the provisions of 49 U.S.C. 31314, which require DOT to withhold certain Federal-aid highway funds from States that fail to comply substantially with the requirements for State participation in the CDL program, apply also to State compliance with those portions of the TSA rule implementing the Patriot Act that apply to States. In addition, 49 U.S.C. 31312 authorizes DOT to prohibit States from issuing CDLs if the Secretary determines "that a State is in substantial noncompliance" with 49 U.S.C. chapter 313. These penalties are available for DOT to use when and if appropriate to encourage State compliance with TSA's rule.

Future Rulemaking

It is important to note that TSA will publish a NPRM shortly after publication of this amended IFR, to propose minimum federal standards for the fingerprint collection, criminal history adjudication, and appeal process for HME applicants. In the NPRM, TSA will provide greater detail about what each State program should include, minimum standards for adjudication of the criminal history record check results, minimum standards for establishing an appeal process for the adjudication of the criminal history checks, and the potential costs for each portion of the background check.

TSA will rely heavily on the comments the States provide to ensure that no State is forced to adhere to a rigid form beyond its financial or technological capacity. The NPRM will propose minimum components that each State program should include, but would permit the States to determine how it meets the minimum standards.

The NPRM process will also provide TSA with the empirical data and information necessary to complete a comprehensive regulatory evaluation. TSA understands that the IFR and the amended IFR impose financial burdens on the States, some of which may be minimized through State and Federal fee authority. However, there may be States in which this is not possible, and TSA must seek a regulatory regime to prevent unnecessary financial burdens. TSA can achieve this through active participation of the States, the trucking industry, and private entities that may be able to provide low cost operational assistance.

In addition, on October 3, 2003, legislation was enacted⁶ authorizing DHS to collect fees to cover the costs of implementing section 1012 of the Patriot Act. This new authority will aid TSA in completing the security threat assessment check for an estimated 3.5 million commercial drivers. Therefore, TSA is also issuing a separate proposed rule to determine reasonable costs of background checks, on which drivers, the States and other interested parties may comment.

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 and comment procedures are "impracticable, unnecessary or contrary to the public interest."

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 have warned that future terrorist attacks are likely. The number of commercial vehicles that carry hazardous materials is far greater than the number of aircraft that might be hijacked by terrorists. A vehicle carrying hazardous materials, if used as a weapon in a terrorist attack, could cause significant loss of life and property damage.

Section 1012 of the USA PATRIOT Act is a measure to increase the security of highway transportation of hazardous materials. Because of the likelihood of future terrorist attacks, and the potential for significant casualties and property damage in the event of a terrorist attack involving a vehicle carrying hazardous materials, TSA believes that immediate action is warranted, and TSA finds that notice and public comment procedures under 5 U.S.C. 553(b) are impracticable and contrary to the public interest.

It is important to note that TSA is not making fingerprint collection or submission of the State plan due upon publication of this document. The intervening months between the date this amended IFR is published and April 1, 2004 will provide additional time for the States to develop a plan for

⁶Department of Homeland Security Appropriations Act, 2004, Public Law 108-90, 117 Stat. 1137, October 1, 2003.