

**DEPARTMENT OF TRANSPORTATION**

[4910-EX-P]

**Federal Motor Carrier Safety Administration**

49 CFR Parts 383 and 384

[Docket No. FMCSA-2000-11117] - 12

RIN 2126-AA70

**Limitations on the Issuance of Commercial Driver's Licenses with a Hazardous Materials Endorsement****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The FMCSA amends the Federal Motor Carrier Safety Regulations (FMCSRs) to prohibit States from issuing, renewing, transferring or upgrading a commercial driver's license (CDL) with a hazardous materials endorsement unless the Transportation Security Administration (TSA) has first conducted a background records check of the applicant and determined that the applicant does not pose a security risk warranting denial of the hazardous materials endorsement. This interim final rule implements part of the requirements of Sec. 1012 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) and certain provisions of the statutes dealing with explosives. The remaining requirements of Sec. 1012 are implemented by a TSA interim final rule published elsewhere in today's issue of the FEDERAL REGISTER.

**DATES:** This rule is effective on [Insert date of publication in the FEDERAL REGISTER.]. State compliance with this rule is required by [Insert date 180 days after date of publication in the FEDERAL REGISTER.]. Comments must be received on or before [Insert date 60 days after publication in the FEDERAL REGISTER.].

**ADDRESSES:** You can mail, fax, hand deliver or electronically submit written comments to the Docket Management Facility, United States Department of Transportation, Dockets Management Facility, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001, FAX (202) 493-2251, on-line at <http://dmses.dot.gov/submit>. You must include the docket number that appears in the heading of this document in your comments. You can examine and copy all comments at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. You can also view all comments or download an electronic copy of this document from the DOT Docket Management System (DMS) at <http://dms.dot.gov/search.htm> by typing the last four digits of the docket number appearing in the heading of this document. The DMS is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the “help” section of the web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Comments received after the comment closing date will be included in the docket and we will consider late comments to the extent practicable. The FMCSA may, however, issue a final rule at any time after the close of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Valerie Height, (202) 366-0901, Regulatory Development Division, FMCSA, 400 7<sup>th</sup> Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION**

## **Background**

On September 11, 2001, several terrorist attacks were made against the United States, which resulted in catastrophic human casualties and property damage. Two commercial aircraft were hijacked and flown into the World Trade Center in New York; and a similar attack occurred against the Pentagon. A fourth aircraft went down near Pittsburgh, Pennsylvania—the result of a hijacking attempt. Soon after, letters containing anthrax—a dangerous biological substance—were delivered to media and congressional and postal offices in Florida, New York, and Washington, D.C. Several more lives were claimed during these incidents. National security and intelligence officials continue to warn that future terrorist attacks against civilian targets are possible.

In response to these events, Congress passed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001” (USA PATRIOT Act) [Pub. L. 107-56, October 26, 2001, 115 Stat. 272]. Sec. 1012 of the USA PATRIOT Act [115 Stat. 396] amended the Hazardous Materials Transportation Act (49 U.S.C. chapter 51) by adding a new § 5103a entitled “Limitation on issuance of hazmat licenses.” Section 5103a(a)(1) provides that “[a] State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Transportation has first determined . . . that the individual does not pose a security risk warranting denial of the license.” There is no “hazmat license” per se, under State or Federal law, but Sec. 1012(b) amended the fitness and testing standards of the statute that created the Commercial Driver’s License (CDL) program to require that drivers not be granted a CDL unless they have “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)]. The Department of Transportation (DOT) therefore interprets the license referred to in § 5103a as the hazardous materials endorsement to a CDL, which is required by 49 CFR 383.93(b)(4). To qualify for the endorsement, the individual must first pass a specialized hazardous materials knowledge test (§ 383.121) in addition to the requisite general knowledge and skills tests.

Section 5103a is therefore a de facto amendment to the CDL legislation.

FMCSA shares with TSA the responsibility for implementing the requirements of Sec. 1012. TSA has developed regulations governing the security risk determination process (see 49 CFR Part 1572) and has responsibility for that program. FMCSA has revised its regulations to require State licensing agencies to issue or renew a hazardous materials endorsement for a CDL only if TSA has determined that the applicant does not pose a security risk warranting denial of such endorsement. For the purpose of determining applicability, a CDL renewal, transfer, or upgrade is also considered a new issuance and falls within the scope of these requirements, if it involves a hazardous materials endorsement.

This interim final rule (IFR) is effective upon publication in the FEDERAL REGISTER. States, however, will not be required to comply with the requirements of the rule until [Insert date 180 days after the date of publication in the Federal Register.] This will allow TSA sufficient time to confer with the States and other entities about the best means of carrying out the TSA rule.

### **Definitions**

Consistent with the requirements of Sec. 1012, the FMCSA is amending 49 CFR 383.5 to add the term “alien” and to revise the existing terms “hazardous

materials” and “commercial motor vehicle.” Under Sec. 1012, “alien” has the same meaning given the term in Sec. 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)), i.e., any individual not a citizen or national of the United States.

Similarly, § 5103a(b)(2) expanded the meaning of “hazardous materials” to include “any chemical or biological material or agent determined by the Secretary of Health and Human Services or the Attorney General to pose a threat to national security.” FMCSA has worked closely with the Department of Justice and the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), in defining an appropriate list. After careful consideration, and with the agreement of TSA, FMCSA has decided to cross-reference the CDC list of Select Agents and Toxins in 42 CFR, part 73. A hazardous material is therefore defined as any material that: (1) in accordance with Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.*), has been determined to pose an unreasonable risk to health, safety, and property when transported in commerce and that is required to be placarded under subpart F of part 172 of the Hazardous Materials Regulations (HMR) (49 CFR parts 171-180); or (2) any quantity of any material listed as a select agent or toxin by CDC in 42 CFR part 73.

The HMR do not require placarding for the transportation of all hazardous materials, because the Research and Special Programs Administration (RSPA) has determined that some such materials do not pose serious risks in smaller quantities. For example, explosives (Class 1 hazardous materials) may not be transported unless they have been tested, classified and approved by the agency. Class 1 materials are divided into six divisions, depending on the degree and nature of the explosive hazard presented. A Division 1.1 material presents a mass explosive hazard, i.e., virtually the entire amount

explodes simultaneously. A Division 1.4 material, on the other hand, has a minor explosion hazard that is largely confined to the package and does not involve projection of fragments. And some explosives, when mixed with other materials, will not explode at all. RSPA's regulations therefore require placards for the transportation of explosives and other hazardous materials that pose significant threats to the public, but not for those which are unlikely to cause harm, whether because of their chemical properties, minimal quantities, or for other reasons. RSPA has determined that non-placarded shipments do not present a sufficient security risk in transportation to warrant the application at this time of the TSA background check requirements to persons who possess or transport such materials.

Conforming changes were made to the § 383.5 definition of a commercial motor vehicle and the description of a hazardous materials endorsement under § 383.93(b)(4) to ensure that drivers newly covered by the hazardous materials definition—transporters of any quantity of any material defined as a Select Agent or Toxin under CDC regulations—are required to obtain a CDL with a hazardous materials endorsement, and are subject to the new TSA security screening process for drivers. Paragraph (d) under the § 383.5 definition of a commercial motor vehicle (CMV) now cross-references the new hazardous materials definition. This change effectively broadens the scope of the CMV definition to include vehicles of any size that are used to transport any quantity of a Select Agent or Toxin. Likewise, the hazardous materials endorsement description under § 383.93(b)(4) now references a vehicle “[u]sed to transport hazardous materials as defined in § 383.5 of this part.”

### **Limitation on Learner's Permit**

In order to make the rules governing the CDL learner's permit consistent with the purpose of Sec. 1012 and TSA's implementing regulations, § 383.23(c) has been amended to provide that a learner's permit does not authorize the holder of the permit to transport hazardous materials as defined in § 383.5. A person with a learner's permit must pass the general knowledge and skills tests (§§ 383.111, 383.113), the special hazardous materials knowledge test (§ 383.121), and the TSA background records check before he/she is eligible for a CDL with a hazardous materials endorsement.

### **Changes in State Procedures and Requirements**

Several important changes to commercial driver's licensing procedures and regulations are required to implement this rule. These revisions will only apply to licensing procedures for hazardous materials endorsements issued with a CDL.

The driver application (§ 383.71) and State licensing (§ 383.73) procedures have been amended to require all individuals to pass the TSA security screening process when renewing, upgrading, transferring, or newly applying for a CDL with a hazardous materials endorsement.

Similarly, new subpart I prohibits the issuance of a hazardous materials endorsement for a CDL unless TSA has determined that the applicant does not pose a security risk warranting denial of the endorsement. Section 383.141(c) requires a State to notify an individual at least 180 days (6 months) prior to the expiration date of the CDL or hazardous materials endorsement that he/she must pass the new TSA security screening process as a prerequisite to obtaining a hazardous materials endorsement, and therefore must immediately begin the renewal process. All States should urge drivers

who intend to reapply to do so as soon as possible after receiving the notification. This will prevent the security risk review from unnecessarily delaying the renewal process.

States have widely varying renewal periods for CDLs and hazardous materials endorsements. To ensure that each holder of a hazardous materials endorsement for a CDL routinely and uniformly receives a security screening, § 383.141(d) requires States to adopt, at minimum, a 5-year renewal cycle for a hazardous materials endorsement for a CDL. As the TSA rule indicates, however, background checks utilizing the names of, and biographical data on, all drivers currently holding hazardous materials endorsements will begin almost immediately. If a driver is found not to meet its security threat assessment standards, TSA will notify the State that his/her hazardous materials endorsement should be revoked.

The TSA rule also addresses the prohibitions in 18 U.S.C. 842(i), which were recently amended by Sec. 1123 of the Homeland Security Act [Pub. L. 107-296, November 25, 2002, 116 Stat. 2135, at 2283]. Sec. 842(i) makes it a criminal offense for certain persons to ship or transport explosives in interstate commerce, or to receive or possess any explosive so shipped or transported. This prohibition applies to a person who is under indictment for, or convicted of, a felony [§ 842(i)(1)]; is a fugitive from justice [§ 842(i)(2)]; is an unlawful user of, or addicted to, a controlled substance [§ 842(i)(3)]; has been adjudicated a mental defective or committed to a mental institution [§ 842(i)(4)]; is an alien, except permanent resident aliens and certain other specified aliens [§ 842(i)(5)]; was discharged from the U.S. armed forces under dishonorable conditions [§ 842(i)(6)]; or has renounced U.S. citizenship [§ 841(i)(7)].

The prohibition in § 842(i), however, does not apply to any aspect of the commercial transportation of explosives which is regulated by the Department of Transportation and which pertains to safety [18 U.S.C. 845(a)(1)]. The Department of Justice has interpreted this provision to exempt persons from application of § 842(i) when (1) DOT has actually regulated a relevant aspect of the transportation of explosives, and (2) those regulations cover the particular aspect of the safe transportation of explosives that prompted Congress to enact the criminal statute from which exemption is sought. For purposes of § 845(a)(1), if DOT determines that persons engaged in certain aspects of the transportation of explosives do not pose a security risk and do not warrant regulation, 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.

The hazardous materials regulations promulgated by the Research and Special Programs Administration (RSPA) extensively regulate the movement of explosives [49 CFR Parts 171-180]. Furthermore, TSA's rule prohibits a person from obtaining a hazardous materials endorsement to CDL if he or she is under indictment for or convicted of a broad range of felonies [49 CFR 1572.5(d)(1)(ii) and 1572.103(a)(1), (a)(3), and (b)]; is a fugitive [ §§ 1572.5(d)(1)(ii) and 1572.103(a)(3)]; has been adjudicated a mental defective or committed to mental institution [ § 1572.5(d)(1)(iii)]; is an alien, with certain exceptions [ §§ 1572.5(d)(1)(i) and 1572.105]; or has renounced U.S. citizenship [ §§ 1572.5(d)(1)(i) and 1572.105]. TSA also has addressed the security risk that individuals who have been dishonorably discharged from the armed services pose. For example, a discharge from the U.S. armed forces under dishonorable conditions is usually the result of a conviction in military court, and some such convictions will disqualify a person from

holding a hazardous materials endorsement under this rule. Therefore, FMCSA believes that TSA has addressed § 842(i)(6). FMCSA has a comprehensive regulatory regime to disqualify drug users from operating commercial motor vehicles [49 CFR Part 382] which we believe addresses § 842(i)(3).

This interim final rule, by requiring States to comply with the TSA rule on background checks, essentially incorporates into the Federal Motor Carrier Safety Regulations the TSA regulations governing eligibility for a hazardous materials endorsement. Taken together, RSPA's hazardous materials regulations, FMCSA's drug and alcohol testing regulations, and FMCSA's CDL regulations which incorporate by reference TSA's standards for obtaining a hazardous materials endorsement, fully address the prohibitions in 18 U.S.C. 842(i) and thus, pursuant to 18 U.S.C. 845(a)(1), preclude application of § 842(i)(1)-(7) to persons engaged in the commercial transportation of hazardous materials by motor vehicle.

Some of the requirements of the TSA rule apply directly to drivers seeking hazardous materials endorsements, others to the States that issue such endorsements. Sec. 1012 of the USA PATRIOT Act imposes certain requirements on the States. Sec. 1012(b) [49 U.S.C. 31305(a)(5)(C)] authorizes FMCSA to require States to comply with TSA regulations adopted to carry out Sec. 1012(a). The TSA rule, however, is also based on other statutory authorities which enable that agency to impose requirements directly on applicants for hazardous materials endorsements. In amending 49 CFR part 384, which sets the minimum standards that State CDL programs must maintain in order to avoid the withholding of Federal-aid highway funds, FMCSA has therefore distinguished between those provisions of the TSA regulation that are based on Sec. 1012 and apply to

States, and those provisions that apply to drivers. For example, 49 C.F.R. 1572.5(e) requires States to have applicants complete a form that includes specific information, while § 1572.5(b)(1)(iii) requires anyone holding a hazardous materials endorsement who is convicted of, or under indictment for, a disqualifying crime listed in § 1572.103 to report the offense to the State of issuance and surrender the endorsement to the State. The first requirement applies to the State, the second does not. A State therefore would not be penalized if drivers failed to comply with § 1572.5(b)(1)(iii) or some other provision that applies directly to drivers rather than the State.

### **Rulemaking Analyses and Notices**

Under the Administrative Procedure Act (APA), an agency may, for good cause, immediately promulgate a final rule if it finds that prior notice and opportunity for comment “are impracticable, unnecessary, or contrary to the public interest” [5 U.S.C. 553(b)(3)(B)].

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 warn that future terrorist attacks are likely. The number of commercial motor vehicles that carry hazardous materials is far greater than the number of aircraft that might be hijacked by terrorists. Sec. 1012 of the USA PATRIOT Act is an attempt to increase the security of highway transportation of hazardous materials. In view of the urgency of putting into operation the background records checks required by the Act, FMCSA finds that prior notice and opportunity for comments are both impracticable and contrary to the public interest. The delays inherent

in such a process could make the difference between stopping and overlooking a terrorist threat.

This rule is effective upon publication, although compliance will be delayed for 180 days to allow TSA to consult with the States and other parties about the best means of conducting background checks on CDL-holders who have or want a hazardous materials endorsement. During that period, we are soliciting public comments on the rule and will later make changes that may be required, either because of the comments submitted or experience with the IFR. This rule, however, must remain consistent with the requirements imposed by TSA's companion rule. Comments received after the comment closing date will be filed in the docket and considered to the extent practicable. In addition to late comments, the FMCSA will also continue to file relevant information in the docket as it becomes available after the comment period closing date. Please continue to review the docket for new material.

**Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

The FMCSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and is significant within the meaning of the Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, February 26, 1979) because of significant public interest in security issues since the events that occurred on September 11, 2001. This IFR implements some of the requirements of Sec. 1012 of the USA PATRIOT Act by prohibiting States from issuing or renewing a CDL endorsement to operate a motor vehicle transporting a hazardous material unless TSA has determined that the applicant

does not pose a security risk warranting denial of the license. Along with RSPA and TSA rules, it also addresses 18 U.S.C. 842(i) and 845(a)(1).

### **Regulatory Flexibility Act**

Under the Regulatory Flexibility Act (5 U.S.C. 601-612), an agency is required to evaluate proposed rulemakings to determine the effects of its action upon small entities. FMCSA does not believe that these proposals meet the threshold values for requiring 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: “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 – . . . (5) shall ensure that an individual who operates or will operate a commercial motor vehicle carrying a hazardous material – . . . (C) 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: (1) 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 the requirements of 49 CFR part 383. The security risk review mandated by this rule and the corresponding TSA rule is merely an incremental addition to the broader CDL requirements and will be managed by State licensing personnel who are already familiar with that program. The amendments to part 383 included in this rule will not have a substantial direct effect on the States or change the relationship between the national government and the States.

Sec. 4(c) of E.O. 13132 also provides that "[a]ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated." FMCSA has tailored this IFR as narrowly as possible to the purposes of Sec. 1012. Furthermore, the rule does not preempt State law.

Sec. 3(a) of E.O. 13132 requires Federal agencies, “[t]o the extent practicable,” to consult with State and local officials before taking actions that have federalism implications. As discussed above, this rule does not have federalism implications requiring consultation. In any case, formal consultation with the States before issuing this rule would not be “practicable,” because the objectives of Sec. 1012 and the continued threat of terrorism require implementation of the security risk review at the earliest possible moment. Nonetheless, FMCSA has communicated with all of the States on this issue. The Assistant Administrator wrote to licensing officials in each State on October 31, 2001, briefly summarizing Sec. 1012 and asking them to continue issuing and renewing hazardous materials endorsements until the rulemaking necessary to implement the new requirement had been completed. Furthermore, DOT and TSA have held extensive discussions with the Compact Council created pursuant to the National Crime Prevention and Privacy Compact Act of 1998 [42 U.S.C. 14616] about the requirement that fingerprints be submitted when seeking criminal history record checks for noncriminal justice purposes. The new regulations and the corresponding implementation plans have been explained to Compact Council, nine of whose fifteen members are State officials.

**Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

## **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3520), a Federal agency must obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. An analysis of this rule has been made by the FMCSA, and it has been determined that it will affect the information collection burden associated with the currently-approved information collection covered by OMB Control No. 2126-0011, entitled "Commercial Driver Licensing and Test Standards." The OMB approved the most recent update of this information on October 3, 2002, at 819,982 burden hours. The approval period runs through October 31, 2005.

This IFR will increase the burden hours associated with this information collection by 17,250 hours. The implementation of this IFR will require the State DMVs to enter into the Commercial Driver's License Information System (CDLIS) an indication of whether the applicant is a U.S. citizen or resident alien (and if a resident alien, the alien registration number); and whether the driver is or is not a security risk. We estimate the time required to add this information to CDLIS to be approximately 1 minute, and the number of annual hazardous materials endorsement applications to be 1,035,000 per year. Therefore, we estimate the additional burden associated with this IFR to be 17,250 hours (1,035,000 x 1 minute, divided by 60 minutes).

We estimate the additional costs to the State DMVs associated with this information collection to be approximately \$765,000. This will be a one-time cost that each State and the District of Columbia (at \$15,000 per State) would need to expend to

update their systems to accommodate the new fields and recordkeeping requirements of this IFR.

We particularly request your comments on whether the collection of information is necessary for FMCSA to achieve the purpose of Sec. 1012 in helping to prevent terrorist incidents, including (1) whether the information is useful to this goal; (2) the accuracy of the estimate of the burden of the information collection; (3) ways to enhance the quality, utility and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

You may submit comments on the information collection burden addressed by this interim final rule to the Office of Management and Budget (OMB). The OMB must receive your comments by [Insert date 90 days after date of publication in the FEDERAL REGISTER]. You must mail or hand deliver your comments to: Attention: Desk Officer for the Department of Transportation, Docket Library, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, 725 17th Street, N.W., Washington, DC 20503.

#### **National Environmental Policy Act**

FMCSA has analyzed this rule under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (NEPA) and has determined that it will not have a significant impact on the quality of the human environment. The rule will slightly expand the number of commercial drivers who must obtain a hazardous materials endorsement and require minor changes to State regulations and procedures. The TSA rule, which this rule is designed in part to enforce, will disqualify an unknown number of

drivers who have been convicted of certain offenses from holding a hazardous materials endorsement to a CDL. That should reduce the risk that hazardous materials could be used as a terrorist weapon. The net effect of these two rules on the human and physical environment is expected to be positive.

#### **Executive Order 13211 (Energy Supply, Distribution, or Use)**

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action within the meaning of Section 4(b) of the Executive Order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

FMCSA anticipates that the TSA rule, which this rule requires the States to comply with, will prevent some drivers with criminal records from receiving or renewing hazardous materials endorsements. As mentioned above, however, comprehensive criminal history data on CMV drivers do not exist, and neither FMCSA nor TSA can reliably estimate the number who may be disqualified by the TSA rule. Anecdotal evidence suggests that the number of drivers who have committed the serious disqualifying offenses listed in the TSA rule is quite small. In addition, endorsements will henceforth be available only to U.S. citizens or lawful permanent resident aliens. FMCSA has no information on the number of temporary legal – or illegal – aliens who may currently hold hazardous materials endorsements. This rule has no effect on the supply or use of energy, nor do we believe it will cause a shortage of drivers qualified to distribute energy (e.g., gasoline, fuel oil, etc.). If the number of drivers with hazardous materials endorsements drops noticeably as a result of this rule, they might be able to

command higher wages, but we expect the supply of drivers to be adequate to meet the demand.

#### **Unfunded Mandates Reform Act of 1995**

This rule does not impose a Federal mandate resulting in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. (2 U.S.C. 1531 et seq.) States will have to make changes to their licensing procedures under this rule. Associated with those changes will be modest set-up costs as well as more significant ongoing costs to process the applications for hazardous materials endorsements. However, we assume that States will charge applicants for a hazardous materials endorsement a fee sufficient to cover their added costs.

#### **Executive Order 12630 (Taking of Private Property)**

This rule will not effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutional Protected Property Rights.

#### **Executive Order 12988 (Civil Justice Reform)**

This action meets applicable standards in Sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### **Executive Order 13045 (Protection of Children)**

We have analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This IFR requires States to comply with the TSA rule on background records checks prior to obtaining a hazardous materials endorsement authorizing a driver to transport hazardous materials in commerce.

Specifically, it requires the applicant to pass a TSA screening process for the purpose of determining whether the individual is a security risk. This action will not cause an increase in the number of hazardous materials incidents, nor increase the number of non-hazardous materials commercial motor vehicle crashes. Its purpose is to ensure public safety by preventing the use of a commercial motor vehicle hauling hazardous materials in the commission of terrorist acts against the United States. Therefore, the FMCSA certifies that this action is not an economically significant rule and does not concern an environmental risk to health or safety that may disproportionately affect children.

**List of Subjects in 49 CFR Part 383**

Administrative practice and procedure, Commercial driver's license, Commercial motor vehicles, Highway safety, Motor carriers.

For the reasons set forth in the preamble, the FMCSA amends title 49, Code of Federal Regulations, Chapter III, as follows:

**PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS;  
REQUIREMENTS AND PENALTIES [AMENDED]**

1. Revise the authority citation for part 383 to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 et seq., 31502; Sec. 214 of Pub. L. 106-159, 113 Stat. 1766; Sec. 1012(b) of Pub. L. 107-56, 115 Stat. 397; and 49 CFR 1.73.

2. Amend § 383.5 to add in alphabetical order a new definition for “alien” and to revise the definitions of “commercial motor vehicle” and “hazardous materials” as follows:

**§ 383.5 Definitions**

\* \* \* \* \*

Alien means any person not a citizen or national of the United States.

\* \* \* \* \*

Commercial motor vehicle (CMV) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(a) Has a gross combination weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or

(b) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more); or

(c) Is designed to transport 16 or more passengers, including the driver; or

(d) Is of any size and is used in the transportation of hazardous materials as defined in § 383.5 of this part.

\* \* \* \* \*

Hazardous materials means any material that has been designated as hazardous under 49 U.S.C. 5103 and is required to be placarded under subpart F of 49 CFR part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

\* \* \* \* \*

3. Amend § 383.23 to revise paragraph (c) to read as follows:

**§ 383.23 Commercial driver's license**

\* \* \*

(c) Learner's permit. State learners' permits, issued for limited time periods according to State requirements, shall be considered valid commercial drivers' licenses

for purposes of behind-the-wheel training on public roads or highways, if the following minimum conditions are met:

(1) The learner's permit holder is at all times accompanied by the holder of a valid CDL;

(2) He/she either holds a valid automobile driver's license, or has passed such vision, sign/symbol, and knowledge tests as the State issuing the learner's permit ordinarily administers to applicants for automotive drivers' licenses; and

(3) He/she does not operate a commercial motor vehicle transporting hazardous materials as defined in § 383.5 of this part.

4. Amend § 383.71 to add a new paragraph (a)(9) and revise paragraphs (b)(3), (c)(3) and (d) to read as follows:

**§ 383.71 Driver application procedures**

(a) \* \* \*

(9) If applying for a hazardous materials endorsement, comply with Transportation Security Administration requirements codified in 49 CFR Part 1572, and provide proof of citizenship or immigration status as specified in Table 1 to this section. A lawful permanent resident of the United States requesting a hazardous materials endorsement must additionally provide his or her Bureau of Citizenship and Immigration Services (BCIS) Alien registration number.

**Table 1 to § 383.71 – List of Acceptable Proofs of Citizenship or Immigration**

STATUS	PROOF OF STATUS
U.S. Citizen	<ul style="list-style-type: none"> <li>• U.S. Passport</li> <li>• Certificate of birth that bears an official seal and was issued by a State, county, municipal authority, or outlying possession of the United States</li> </ul>

	<ul style="list-style-type: none"> <li>• Certification of Birth Abroad issued by the U.S. Department of State (Form FS-545 or DS 1350)</li> <li>• Certificate of Naturalization (Form N-550 or N-570)</li> <li>• Certificate of U.S. Citizenship (Form N-560 or N-561)</li> </ul>
Lawful Permanent Resident	<ul style="list-style-type: none"> <li>• Permanent Resident Card, Alien Registration Receipt Card (Form I-551)</li> <li>• Temporary I-551 stamp in foreign passport</li> <li>• Temporary I-551 stamp on Form I-94, Arrival/Departure Record, with photograph of the bearer</li> <li>• Reentry Permit (Form I-327)</li> </ul>

\* \* \* \* \*

(b) \* \* \*

(3) If the applicant wishes to retain a hazardous materials endorsement, he/she must comply with the requirements for such endorsement specified in § 383.71(a)(9) and State requirements as specified in § 383.73(b)(4); and \* \* \*

(c) \* \* \*

(3) If a person wishes to retain a hazardous materials endorsement, he/she must comply with the requirements specified in § 383.71(a)(9) and pass the test specified in § 383.121 for such endorsement.

(d) License upgrades. When applying to operate a commercial motor vehicle in a different group or endorsement from the group or endorsement in which the applicant already has a CDL, all persons shall:

(1) Provide the necessary certifications as specified in § 383.71(a)(1) and (a)(4);

(2) Pass all tests specified in § 383.71(a)(2) and (a)(3) for the new vehicle group and/or different endorsements; and

(3) To obtain a hazardous materials endorsement, comply with the requirements for such endorsement specified in § 383.71(a)(9).

\* \* \* \* \*

5. Amend § 383.73 to add new paragraphs (a)(5), and revise paragraphs (b)(4), (c)(4), and (d)(1) to read as follows:

**§ 383.73 State procedures**

(a) \* \* \*

(5) For persons applying for a hazardous materials endorsement, require compliance with the standards for such endorsement specified in § 383.71(a)(9).

(b) \* \* \*

(4) If such applicant wishes to retain a hazardous materials endorsement, require compliance with standards for such endorsement specified in § 383.71(a)(9) and ensure that the driver has, within the 2 years preceding the transfer, either: \* \* \*

(c) \* \* \*

(4) If such applicant wishes to retain a hazardous materials endorsement, require the driver to pass the test specified in § 383.121 and comply with the standards specified in § 383.71(a)(9) for such endorsement.

(d) \* \* \*

(1) Require such driver applicant to provide certifications, pass tests, and meet applicable hazardous materials standards specified in § 383.71(d); and \* \* \*

\* \* \* \* \*

6. Amend § 383.93 to add a new paragraph (b)(4) to read as follows:

**§ 383.93 Endorsements**

\* \* \* \* \*

(b) \* \* \*

(4) Used to transport hazardous materials as defined in § 383.5 of this part.

\* \* \* \* \*

7. Add a new Subpart I to this part to read as follows:

**Subpart I – Requirement for Transportation Security Administration approval of hazardous materials endorsement issuances**

**§ 383.141 General.**

(a) Effective date. On or after [Insert date 180 days after date of publication in the FEDERAL REGISTER.], this section applies to State agencies responsible for issuing hazardous materials endorsements for a CDL, and applicants for such endorsements.

(b) Prohibition. A State may not issue, renew, upgrade, or transfer a hazardous materials endorsement for a CDL to any individual authorizing that individual to operate a commercial motor vehicle transporting a hazardous material in commerce unless the Transportation Security Administration has determined that the individual does not pose a security risk warranting denial of the endorsement.

(c) Individual notification. At least 180 days prior to the expiration date of the CDL or hazardous materials endorsement, a State must notify the holder of a hazardous materials endorsement that the individual must pass a Transportation Security Administration security screening process as part of any application for renewal of the hazardous materials endorsement. During the first 180 days after the effective date of this rule, a State must give the holder of a hazardous materials endorsement as much

advance notice as practicable. The notice must advise a driver that, in order to expedite the security screening process, he or she should file a renewal application as soon as possible, but not later than 90 days before the date of expiration of the endorsement. An individual who does not successfully complete the Transportation Security Administration security screening process referenced in paragraph (b) of this section may not be issued a hazardous materials endorsement.

(d) Hazardous materials endorsement renewal cycle. Each State must require that hazardous materials endorsements be renewed every 5 years or less so that individuals are subject to a Transportation Security Administration security screening requirement referenced in paragraph (b) of this section at least every 5 years.

\* \* \* \* \*

**PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S  
LICENSE PROGRAM [AMENDED]**

8. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301 et seq., 31502; Sec. 103 of Pub. L. 106-159, 113 Stat. 1753; and 49 CFR 1.73.

9. Add new § 384.233 to read as follows:

**§ 384.233 Background records checks**

(a) The State shall comply with Transportation Security Administration requirements concerning background records checks for drivers seeking to obtain, renew, transfer or upgrade a hazardous materials endorsement in 49 CFR Part 1572, to the extent those provisions impose requirements on the State.

(b) The State shall comply with each requirement of 49 CFR 383.141.

*Whe*  
Issued on: ~~APR 18 2003~~

**APR 25 2003**



Warren E. Hoemann  
Acting Deputy Administrator