

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

#### 49 CFR Part 1572

[Docket No. TSA-2006-25541; Amendment No. 1572-6]

RIN 1652-AA50

### Drivers Licensed by Canada or Mexico Transporting Hazardous Materials to and Within the United States

**AGENCY:** Transportation Security Administration, DHS.

**ACTION:** Interim rule; request for comments.

**SUMMARY:** This interim rule announces that a commercial motor vehicle driver licensed in Canada or Mexico who holds a Free and Secure Trade (FAST) program card may use that card as an acceptable credential to transport placarded amounts of hazardous materials or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 within the United States. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires that, as of August 10, 2006, commercial motor vehicle drivers licensed in Canada or Mexico who transport hazardous materials in the United States must undergo a background check similar to the one required of U.S.-licensed operators with a hazardous materials endorsement (HME) on a commercial drivers license (CDL). The Transportation Security Administration (TSA) has determined that the background check required to obtain a credential under the FAST program meets the background check requirements of SAFETEA-LU. TSA invites comment on any other existing background check programs that satisfy the requirements under SAFETEA-LU. This interim rule also removes pre-existing procedures for commercial drivers who transport explosives into the United States from Canada, and replaces it with a revised provision that applies to commercial drivers who transport explosives, as well as other hazardous materials, into and within the United States.

**DATES:** *Effective Date:* This rule is effective on August 10, 2006.

*Comment Date:* Comments must be received by October 6, 2006.

**ADDRESSES:** You may submit comments, identified by the TSA docket number to this rulemaking, using any one of the following methods:

*Comments Filed Electronically:* You may submit comments through the docket web site at <http://dms.dot.gov>. You also may submit comments through the Federal eRulemaking portal at <http://www.regulations.gov>.

*Comments Submitted by Mail, Fax, or In Person:* Address or deliver your written, signed comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001; Fax: 202-493-2251.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

#### FOR FURTHER INFORMATION CONTACT:

Stephen Sadler, Director, Maritime and Surface Credentialing, Office of Transportation Threat Assessment and Credentialing, TSA-19, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202-4220; telephone (571) 227-2492; facsimile (703) 603-0409; e-mail [stephen.sadler@dhs.gov](mailto:stephen.sadler@dhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

This interim rule is being adopted without prior notice and prior public comment. However, to the maximum extent possible, operating administrations within DHS will provide an opportunity for public comment on regulations issued without prior notice. Accordingly, TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. See **ADDRESSES** above for information on where to submit comments.

With each comment, please include your name and address, identify the docket number at the beginning of your comments, and give the reason for each comment. The most helpful comments reference a specific portion of the rulemaking, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in two copies, in an unbound format, no larger than 8.5 by 11 inches, suitable for copying and electronic filing.

If you want TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-

addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

TSA will file in the public docket all comments received by TSA, except for comments containing confidential information and Sensitive Security Information (SSI)<sup>1</sup>. TSA will consider all comments received on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

#### *Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments*

Do not submit comments that include trade secrets, confidential commercial or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the rulemaking.

Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

Upon receipt of such comments, TSA will not place the comments in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold them in a separate file to which the public does not have access, and place a note in the public docket that TSA has received such materials from the commenter. If TSA receives a request to examine or copy this information, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and the Department of Homeland Security's (DHS') FOIA regulation found in 6 CFR part 5.

#### *Reviewing Comments in the Docket*

Please be aware that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR

<sup>1</sup> "Sensitive Security Information" or "SSI" is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

19477), or you may visit <http://dms.dot.gov>.

You may review the comments in the public docket by visiting the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is located on the plaza level of the Nassif Building at the Department of Transportation address, previously provided under **ADDRESSES**. Also, you may review public dockets on the Internet at <http://dms.dot.gov>.

#### Availability of Rulemaking Document

You can get an electronic copy using the Internet by—

(1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (<http://dms.dot.gov/search>);

(2) Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/fr/index.html>; or

(3) Visiting TSA's Security Regulations Web page at <http://www.tsa.gov> and accessing the link for "Research Center" at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

#### Small Entity Inquiries

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires TSA to comply with small entity requests for information and advice about compliance with statutes and regulations within TSA's jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT**. Persons can obtain further information regarding SBREFA on the Small Business Administration's web page at [http://www.sba.gov/advo/laws/law\\_lib.html](http://www.sba.gov/advo/laws/law_lib.html).

#### Abbreviations and Terms Used in This Document

CBP—Bureau of Customs and Border Protection

CDL—Commercial drivers license

CHRC—Criminal history records check

DHS—Department of Homeland Security

FAST—Free and Secure Trade program

HME—Hazardous materials endorsement

Hazardous Materials (hazmat)—

Materials transported in quantities requiring placarding under regulations issued by the U.S.

Department of Transportation or any quantity of a material listed as a select agent or toxin in 42 CFR part 73

SAFETEA—LU—The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users  
TSA—Transportation Security Administration  
TWIC—Transportation Worker Identification Credential

#### I. Background

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA—LU) was enacted on August 10, 2005.<sup>2</sup> Section 7105(h) of SAFETEA—LU requires that a commercial motor vehicle driver licensed by Canada or Mexico shall not operate a commercial motor vehicle transporting hazardous materials in the United States until the driver has undergone a background records check similar to the one required of commercial motor vehicle operators licensed in the United States to transport hazardous materials. This provision was to become effective six months after the date of enactment. However, the statute gave TSA the discretion to extend the implementation date an additional six months if necessary. On February 10, 2006, TSA published a notice in the **Federal Register** announcing that TSA had extended the deadline until August 10, 2006.<sup>3</sup> Accordingly, effective August 10, 2006, commercial motor vehicle operators licensed in Canada or Mexico who intend to transport hazardous materials in the United States must be able to demonstrate that they have undergone a background check similar to the background check required of U.S.-licensed drivers transporting hazardous materials.

#### II. Threat Assessment Standards for Transportation of Hazardous Materials

The current background check requirement for U.S.-licensed drivers of hazardous materials is found in TSA's hazardous materials rule (hazmat rule), which requires a security threat assessment for U.S. commercial drivers who apply for a new, renewal, or transfer of a hazardous materials endorsement (HME) on a commercial drivers license (CDL).<sup>4</sup> The hazmat rule applies to commercial drivers who transport hazardous materials in quantities requiring placarding under regulations issued by the U.S. Department of Transportation (DOT)<sup>5</sup> or who transport any quantity of a material listed as a select agent or toxin in 42

CFR part 73.<sup>6</sup> Persons who transport hazardous materials not requiring placarding and who do not transport any quantity of a material listed as a select agent or toxin in 42 CFR part 73 are not required to have an HME or a TSA threat assessment.

U.S.-licensed drivers who apply for, transfer, or renew a CDL with an HME must undergo fingerprint-based criminal history record checks (CHRC) and name-based checks against relevant immigration, intelligence, and international databases. An applicant is disqualified if he or she does not meet certain citizenship and immigration standards, is wanted or under indictment for certain felonies, has a conviction in military or civilian court for certain felonies, has been adjudicated as lacking mental capacity or involuntarily committed to a mental institution, or is determined to pose a security threat based on a review of pertinent databases.<sup>7</sup> TSA's hazmat rule also includes appeal and waiver procedures.

The hazmat rule, however, only applies to drivers who receive a CDL with an HME issued by a state of the United States or the District of Columbia. Therefore, under the hazmat rule, drivers licensed in Canada or Mexico who transport hazardous materials in the U.S. do not undergo the background records check that is required of U.S. licensed hazmat drivers.

TSA previously published a rule concerning the transportation of explosives from Canada (explosives rule) into the United States by drivers who are not U.S. citizens or lawful permanent residents.<sup>8</sup> In pertinent part, the rule, which was codified at 49 U.S.C. 1572.201 and is now superseded by this interim rule, provided that shipments of explosives entering the United States from Canada via commercial motor vehicles must be transported by U.S. citizens, lawful permanent residents, or a "known carrier, known driver, and known offeror" as determined by the governments of Canada and the United States. To implement this rule for drivers licensed in Canada, Canada conducts a check of commercial drivers licensed in Canada and authorized to transport explosives, and provides a list of the approved drivers to TSA. TSA conducts periodic name-based checks of the individuals on the list to confirm their continued eligibility to enter the

<sup>2</sup> Pub. L. 109–59, August 10, 2005, sec. 7105, codified at 49 U.S.C. 5103a(h).

<sup>3</sup> 71 FR 7057 (February 10, 2006).

<sup>4</sup> 69 FR 68720 (November 24, 2004); now codified in 49 CFR parts 1570, 1572.

<sup>5</sup> 49 CFR part 172.

<sup>6</sup> 49 CFR 383.5, 383.93(b)(4).

<sup>7</sup> 49 CFR 1572.5(c).

<sup>8</sup> 68 FR 6083 (February 6, 2003); formerly codified in 49 CFR 1572.201.

United States with explosives shipments and provides the list of approved drivers to the Bureau of Customs and Border Protection (CBP).<sup>9</sup> Prior to the effective date of this interim rule, all operators transporting explosives into the United States were required to appear on the list to be granted entry into the United States.

The threat assessment required in the explosives rule that is being replaced by this rule, however, was not as extensive as the one required of U.S.-licensed drivers under the hazmat rule. Further, the explosives rule applied only to the transport of explosives, a subset of the hazardous materials covered by the hazmat rule, and the explosives rule did not apply to drivers entering the United States from Mexico. Accordingly, the explosives rule does not provide a process similar to the one required of U.S. commercial motor vehicle operators who obtain an HME, and thus does not satisfy the requirements of SAFETEA-LU.

### III. Bureau of Customs and Border Protection FAST Card

TSA has identified a program currently in place that is conducted by the Bureau of Customs and Border Protection (CBP), an agency within the Department of Homeland Security (DHS), which requires a background records check that satisfies the vetting standard requirements as set forth under SAFETEA-LU for commercial vehicle operators licensed to operate in Mexico or Canada.<sup>10</sup> FAST is a voluntary program for those who seek expedited

processing at U.S. borders and CBP exercises full discretion in determining whether a person may be authorized to participate (or continue to participate) in this program.

The FAST program is a cooperative effort between CBP and the governments of Canada and Mexico to coordinate processes for the clearance of commercial shipments at the border. Eligibility for the FAST program requires participants (carriers, commercial drivers, importers, and southern border manufacturers) to submit an application and, if applicable, a security profile.<sup>11</sup> The FAST program allows known, low-risk participants to receive expedited border processing. Under the FAST Commercial Driver Program, commercial truck drivers licensed in Canada, Mexico, or the United States may volunteer to undergo a background records check and, if they complete it satisfactorily, may receive their individual FAST card and expedited entrance privileges for commercial purposes at the northern and southern borders, subject to other requirements.

Under the FAST Commercial Driver program, CBP verifies and validates applicant information, conducts a personal interview with each applicant, examines driver original identification and documentation, obtains fingerprints and a photograph, and conducts fingerprint-based criminal history records checks and name-based checks of pertinent intelligence and immigration databases. In addition, in accordance with the cooperative effort,

Canada conducts a similar background records check of applicants seeking FAST privileges on the northern border. Upon acceptance into the program, the driver is issued a FAST card that is valid for five years, subject to CBP suspension or revocation for violation of membership rules.<sup>12</sup> CBP also periodically checks the backgrounds of those who hold FAST cards against relevant databases to confirm ongoing eligibility. The background check conducted for FAST commercial driver applicants both meets the vetting standard set forth under SAFETEA-LU and is widely available to drivers licensed in Canada or Mexico.

TSA has concluded that the FAST background records check for commercial driver applicants is similar to that required for domestic HME drivers. Accordingly, TSA concludes that acceptance into the FAST Commercial Driver program is sufficient evidence that the holder of the card has undergone a threat assessment similar to that required for domestic HME holders.

TSA's conclusion that the background checks for the FAST program and for the HME program are similar is based on the general comparison summarized briefly in the table below. Both include thorough criminal history records checks, immigration status checks, and intelligence-based checks. Both request a substantial quantity of information from applicants to provide assurance of the individual's identity. As a result, TSA has determined that the FAST background check is similar to the one required of U.S.-licensed HME drivers.

COMPARISON OF HME AND FAST BACKGROUND CHECKS

	TSA assessment, HME	FAST card <sup>13</sup>
Application criteria:		
Full legal name (and aliases) .....	Y .....	Y
Current residence .....	Y .....	Y
Mail address (if different from residence) ...	Y .....	Y
Previous residence .....	Y .....	Y (5 yrs.).
Date of birth .....	Y .....	Y
Other personal identification information ....	Y .....	Y
Immigration status .....	Y .....	Y
Alien registration number .....	Y .....	Y
CDL number .....	Y .....	DLN or CDL.
Security threat assessment procedures:		
Intelligence-based checks .....	Y .....	Y
Fingerprint collected .....	Y .....	Y
Criminal records check .....	Y .....	Y
Application fee .....	Y .....	Y
Personal interview .....	N .....	Y
Validity period .....	5 years .....	5 years.

<sup>9</sup> Formerly 49 CFR 1572.201.

<sup>10</sup> 49 U.S.C. 5103a(h)(1).

<sup>11</sup> Membership in the Customs-Trade Partnership Against Terrorism (C-TPAT), another CBP

voluntary trade security program, is also required for some applicants. A security profile is required of C-TPAT applicants.

<sup>12</sup> FAST membership on the northern border is likewise subject to suspension by the Canadian government.

## COMPARISON OF HME AND FAST BACKGROUND CHECKS—Continued

	TSA assessment, HME	FAST card <sup>13</sup>
Disqualifying offenses .....	Temporary and permanently disqualifying crimes are listed in 49 CFR 1572. Conviction of any listed crime disqualifies the individual unless he or she obtains a waiver.	Consideration of crimes including, but not limited, to those listed in 49 CFR 1572, as well as customs and immigration offenses. Commission of some offenses does not lead to automatic ineligibility; considerations include date of offense, seriousness, and other factors.
Other eligibility criteria .....	U.S. citizenship or lawful status .....	Citizen or permanent resident of U.S., Mexico, or Canada.

For drivers who are denied participation in the FAST program, TSA is actively exploring other options for satisfying the SAFETEA-LU requirement. To date, TSA has not identified, and the Canadian and Mexican governments have not shown, another credential or process that demonstrates the holder has undergone a threat assessment similar to the one required of domestic HME holders. As a result of the SAFETEA-LU requirement, until TSA determines that another background check is similar to that prescribed in 49 CFR § 1572.5, commercial motor vehicle drivers licensed by Canada or Mexico who wish to transport hazardous materials into or within the United States will have to apply to the FAST Commercial Driver Program, successfully complete the FAST background records, and pay certain associated enrollment fees to transport hazardous materials in the United States.

It is important to remember that this IFR does not require drivers licensed in Canada and Mexico to obtain FAST cards; participation in FAST is voluntary. Rather, it provides an exception from the prohibition that SAFETEA-LU would impose otherwise, providing drivers the option of taking advantage of this opportunity to qualify to transport hazardous materials in the U.S. if they conclude that it is beneficial.

To apply for FAST, commercial drivers must fill out an application form. The application is available to review and download [http://www.cbp.gov/xp/cgov/import/commercial\\_enforcement/ctpat/fast/](http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/fast/). There are separate forms for northern and southern border participation.

Northern border (Canada-based) applicants must be approved by CBP, Citizenship and Immigration Canada (CIC), and Canada Border Services Agency (CBSA). The United States and Canada honor northern border FAST cards. For southern border (Mexico-based) applicants, the vetting process is completed exclusively by CBP. Northern and southern border FAST driver cards are equally valid at any CBP land border port of entry.

Applications for the northern border FAST participation should be mailed to: FAST Commercial Driver Program, 4551 Zimmerman Avenue, P.O. Box 66, Niagara Falls, ON L2E 6T1, Canada.

Southern border FAST applications should be mailed to: FAST Commercial Driver Program, U.S. Customs and Border Protection, Box 371124, Pittsburgh, PA 15251-7124, U.S.A. Express mail submissions of southern border applications may be mailed to: FAST Commercial Driver Program, U.S. Customs and Border Protection, Attn: 371124, 500 Ross St. 154-0640, Pittsburgh, PA 15250, U.S.A.

If TSA becomes aware of another background check that is similar to the threat assessment conducted on HME drivers, TSA will notify the public. TSA invites any person who knows of another background check that may be comparable to the one conducted for HME applicants to contact Stephen Sadler, Director, Maritime and Surface Credentialing, Office of Transportation Threat Assessment and Credentialing (see **FOR FURTHER INFORMATION CONTACT** section).

#### IV. TSA Determination

TSA has determined that commercial vehicle drivers licensed in Canada or Mexico who have been accepted into the FAST Commercial Drivers program by CBP have completed a background records check that satisfies the requirement under 49 U.S.C. 5103a (Section 7105(h)) of SAFETEA-LU. Use of the FAST card for these drivers brings consistency to the current rules so that the required background checks are

conducted on individuals who transport hazardous materials in the U.S., regardless of the authority that issues the license.

Commercial vehicle drivers licensed in Canada or Mexico who have been admitted to the FAST Commercial Driver program will be deemed to have satisfied the requirements of section 7105(h) of SAFETEA-LU and thus will not be prohibited under SAFETEA-LU from transporting placarded amounts of hazardous materials or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 within the United States, for as long as their FAST card remains valid. CBP will be responsible for enforcing these SAFETEA-LU requirements at all U.S. land borders.

Note that all other requirements relating to the transport of hazardous materials continue to apply, including those imposed by the U.S. Department of Transportation. Further, this rule does not supersede the requirements of Mexico and Canada for their drivers, such as for the appropriate drivers licenses and hazardous materials training.

#### V. Good Cause for Immediate Adoption and Immediate Effective Date

This action is being taken without providing prior notice and the opportunity for comment, and it provides for an effective date less than 30 days after publication in the **Federal Register**.

Sections 553(b) and (d) of the Administrative Procedure Act (APA) (5 U.S.C. 553) authorize agencies to dispense with certain notice procedures for rules when they find “good cause” to do so. Under section 553(b), the requirements of notice and opportunity for comment do not apply when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Section 553(d) allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30-day delayed

<sup>13</sup> The criteria outlined in this FAST card column are representative of the factors considered by CBP in reviewing applications for FAST participation. This is not a complete list of factors that may be considered by CBP and does not represent the factors that may be considered by the Canadian government for persons applying for FAST on the northern border. Persons applying for FAST on the northern border must be approved for participation by both CBP and the Canadian government.

effective date requirement in section 553.

TSA finds that delaying the effective date of the rule and providing an opportunity for prior notice and public comment on this final rule is contrary to the public interest. This rule will be published shortly before August 10, 2006, the date on which commercial drivers licensed in Canada or Mexico will be unable to transport hazardous materials into and within the United States unless this rule has become effective. There is a significant public interest in ensuring that commerce in hazardous materials between Canada and the United States and between Mexico and the United States is not interrupted. Such an interruption could cause economic harm to the United States as a result of the loss of important materials required by U.S. industry, and could also negatively impact the Canadian and Mexican economies.

#### VI. SAFETEA-LU Procedures

As a result of TSA's determination that: (1) The FAST background records check is similar to the security threat assessment standard required for hazmat drivers licensed in the United States; and (2) it meets the requirements of SAFETEA-LU, the procedures outlined below must be followed:

1. *Application for FAST cards.*

Beginning immediately, commercial vehicle drivers licensed by Canada or Mexico may apply for admission to the FAST Commercial Driver program.

2. *Commercial drivers licensed in Canada or Mexico transporting hazmat.* As of August 10, 2006, commercial vehicle drivers licensed by Canada or Mexico may use possession of a FAST card as evidence that they have undergone a background check similar to the background check required of U.S.-licensed drivers to transport hazardous materials or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 within the United States.

3. *Other requirements.* All other requirements relating to the transport of such materials continue to apply, such as those imposed by the U.S. Department of Transportation for transport of hazardous materials, and those imposed by the Governments of Mexico and Canada, as appropriate.

#### VII. Transportation of Explosives From Canada

In 2002, Congress amended section 842(i) of Title 18, United States Code (18 U.S.C. 842(i)); the amended section prohibits aliens from transporting explosives in interstate or foreign commerce. However, section 845(a)(1)

of 18 U.S.C., provides an exception to section 842(i). Section 845(a)(1) provides that the prohibitions in section 842(i) do not apply to aspects of the transportation of explosive materials that pertain to safety, including security, and that are regulated by the Department of Transportation or DHS. Therefore, to the extent that TSA rules address matters in section 842(i) (such as by addressing the security risk posed by the transportation of explosives by aliens), section 842(i) does not apply.

As noted above, in a separate rulemaking, TSA previously published a rule (explosives rule), then codified at 49 CFR 1572.201, concerning the transportation of explosives from Canada into the United States by drivers who are not U.S. citizens or lawful permanent residents.<sup>14</sup> The explosives rule rendered 18 U.S.C. 842(i) inapplicable to commercial motor vehicle drivers licensed by Canada transporting explosives in commerce. This interim rule implementing section 7105(h) of SAFETEA-LU applies to the transport of placarded amounts of explosives by motor vehicle within the meaning of 18 U.S.C. 845(a)(1); therefore, the prohibitions of 18 U.S.C. 842(i) do not apply to commercial motor vehicle drivers licensed by Canada or Mexico engaged in such transportation in commerce.

In pertinent part, the explosives rule provided that shipments of explosives entering the United States from Canada via commercial motor vehicle must be conducted by U.S. citizens, lawful permanent residents, or a "known carrier, known driver, and known offeror" as determined by the Governments of Canada and the United States. To implement this rule for its drivers, Canada conducts a check of drivers authorized to transport explosives and provides a list of the approved drivers to U.S. border control agents. TSA conducts periodic name-based checks of the individuals on the list to confirm their continued eligibility to enter the United States with explosives shipments.<sup>15</sup> All commercial drivers licensed in Canada transporting explosives into the United States had to appear on the list or they were not granted entry into the United States.

This interim rule removes the previous version of 49 CFR 1572.201 on the effective date of this rule and replaces it with this interim rule. Accordingly, commercial drivers licensed in Canada who transport explosives into the United States will

need to hold FAST cards and will no longer be subject to the requirements of the previous version of 49 CFR 1572.201.

The explosives rule applied to the transport of all explosives from Canada, both in placarded and non-placarded loads. However, after the explosives rule was published, TSA and the Pipeline and Hazardous Materials Safety Administration (PHMSA)<sup>16</sup> determined in the hazmat rulemaking that only placarded loads of explosives present a security and safety threat warranting the security threat assessment requirements of the hazmat rule for purposes of the security of domestic explosives transportation.<sup>17</sup> As a result of that determination, certain criminal provisions that previously applied to the transportation of non-placarded explosives no longer apply.<sup>18</sup> TSA now makes a similar determination with respect to the transportation of non-placarded explosives by non-U.S. registered drivers. TSA has examined the security aspects of the transportation of explosives by non-U.S. registered drivers and determined that only explosives shipped in the amount and type that require placarding present a security threat that warrants a background check similar to the check TSA conducts on U.S. licensed drivers. Based on this determination and to make the background records check requirements for commercial drivers licensed in Canada similar to those for U.S. drivers, commercial drivers licensed in Canada with non-placarded loads of explosives will no longer be required to comply with the explosives rule, nor will they be required to comply with § 1572.201 as it is adopted in this interim rule. In light of this determination, the provisions of 18 U.S.C. 842(i) do not apply to the transport of non-placarded explosives by commercial vehicle drivers licensed by Canada or Mexico engaged in such transportation in commerce.

#### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that a Federal agency consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or

<sup>16</sup> PHMSA, an agency within the U.S. Department of Transportation, was formally called Research and Special Programs Administration.

<sup>17</sup> 68 FR at 23832, 23835–36 (May 5, 2003).

<sup>18</sup> 18 U.S.C. 845(a)(1); 18 U.S.C. 842(i).

<sup>14</sup> 68 FR 6083 (February 6, 2003); formerly codified in 49 CFR 1572.201.

<sup>15</sup> Formerly 49 CFR 1572.201.

requires through regulations. As protection provided by the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

TSA has determined that there are no current or new information collection requirements associated with this rulemaking.

#### *Economic Impact Analyses*

##### *Regulatory Evaluation Summary*

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866, Regulatory Planning and Review (58 FR 51735, October 4, 1993), directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation).

##### *Executive Order 12866 Assessment*

In conducting these analyses, TSA has determined:

1. This rulemaking is not an economically “significant regulatory action” as defined in the Executive Order as the costs and benefits do not exceed \$100 million in any one year. The rulemaking is significant for other reasons as explained below.

2. This rulemaking is unlikely to have a significant impact on a substantial number of small entities.

3. This rulemaking will not impose significant barriers to international trade.

4. This rulemaking does not impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

Executive Order 12866 provides for making determinations whether a

regulatory action is “significant” and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. TSA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is significant public interest in security issues.

This rulemaking implements the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) which requires that, as of August 10, 2006, commercial motor vehicle drivers licensed in Canada or Mexico who transport hazardous materials in the United States must undergo a background check similar to the one required of U.S.-licensed operators with a hazardous materials endorsement (HME) on a commercial drivers license (CDL). However, the statute gave TSA authority to allow commercial motor vehicle drivers licensed in Canada or Mexico to transport hazardous materials in the United States if TSA determines that they have undergone a background check similar to that required for U.S. drivers. TSA has concluded that the background check required for a FAST card is similar to that required of U.S. drivers. Accordingly, commercial drivers licensed in Canada or Mexico may transport hazardous materials in the United States if they are in possession of a valid FAST card.

The benefits of this rule include preserving hazardous materials commerce between Canada and Mexico and the United States while enhancing the security of the United States. Hazardous materials, by definition, are “capable of posing an unreasonable risk to health, safety, and property.”<sup>19</sup> Drivers transporting hazardous materials have the capability to inflict harm purposely to people or property. This rule improves security by requiring Canadian- and Mexican-licensed commercial motor vehicles drivers transporting hazardous materials to pass an individual risk assessment conducted by CBP.

Before CBP issues a FAST card, each applicant must successfully pass a background check based on a risk assessment process. This process differs depending on which border the applicant chooses to cross. For a northern border applicant the driver must successfully pass a risk assessment by the Canadian government. Upon approval from Canada, CBP will conduct a full U.S. risk based

assessment.<sup>20</sup> A southern border application is sent to the CBP Risk Assessment Center. In both cases, the driver must report to a CBP issuance center to finalize the process and receive the FAST card. Only Canadian- and Mexican-licensed commercial motor vehicles drivers who are considered low risk and meet other criteria are approved for a FAST card and will be permitted to transport hazardous materials into the United States.

Canadian-licensed drivers who transport explosives into the United States are currently regulated by the explosives rule (49 CFR 1572.201), and will be affected by this rulemaking. Currently, these drivers must submit their names to the Canadian Government, which, in turn, provides a list of their names to TSA for periodic name-based checks of the listed individuals. This rule eliminates the need for multiple background checks by the U.S. Government.

Commercial vehicle drivers licensed in Canada or Mexico who currently have a valid FAST card may transport hazardous material in the U.S. As of June 2006, CBP has approved nearly 56,000 FAST cards for drivers licensed in Canada and over 8,000 FAST cards for drivers licensed in Mexico. These figures represent the entire population of commercial motor vehicle drivers, not only those who carry hazardous materials. TSA is unable to estimate precisely the number of drivers licensed in Canada or Mexico who still need to obtain FAST cards to continue to transport hazardous materials in the United States. The Canadian Government estimates 20,000 drivers carry hazardous materials across the U.S.-Canada border. DOT estimates 3,000 drivers carry hazardous materials across the U.S.-Mexico border. Using the Canadian and DOT estimates with other information, TSA is able to use a threshold approach to verify that the rule is not economically significant.

In May 2006, Transport Canada<sup>21</sup> issued a statement to stakeholders strongly recommending all commercial motor vehicle operators registered to operate in Canada who transport dangerous goods to apply for a FAST card prior to August 10, 2006. CBP has observed no significant increase in FAST applications since Transport

<sup>20</sup> U.S. Customs and Border Protection Bureau. FAST Fact Sheet. Accessed July 6, 2006. [http://www.cbp.gov/linkhandler/cgov/import/commercial\\_enforcement/ctpat/fast/fast.ctt/FASTBrochure.doc](http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/fast/fast.ctt/FASTBrochure.doc).

<sup>21</sup> Transport Canada is the department within the government of Canada responsible for transportation regulations, policy, and services.

<sup>19</sup> 49 CFR 105.5.

Canada's announcement. This observation leads TSA to believe that a large percentage of Canadian drivers who carry hazardous materials already have FAST cards to expedite border crossings.

In order for the rule to have an annual impact on the economy of \$100 million or more, all of the 23,000 drivers licensed in Canada or Mexico who transport hazardous materials in the United States would have to incur average annual costs in excess of \$4,347. The application fee for the card is \$50. CBP provides FAST enrollment sites located at several border locations. Using the fully loaded average U.S. truck driver wage rate of \$25.27,<sup>22</sup> 170 hours of opportunity cost would have to be incurred per card annually to reach the threshold. This upper limit is determined by multiplying the upper limit of the number of drivers by the hours of opportunity cost in getting the card times the average wage: 23,000 drivers  $\times$  [\$50/card + (N hours  $\times$  \$25.27/hr)] = \$100,000,000. N  $\approx$  170 hours.

TSA estimates that each application would require approximately 1 hour per driver, resulting in a \$75 total cost per driver. For the 23,000 estimated drivers a 1 hour opportunity cost would create a total rule cost of approximately \$1.7 million for all drivers assuming 1 FAST card per driver: 23,000 drivers  $\times$  [(50/card) + (1 hour  $\times$  \$25.27/hr)]  $\approx$  \$1.7 million.

#### Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act (RFA) of 1980 requires that agencies perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. For purposes of the RFA, small entities include small businesses, not-for-profit organizations, and small governmental jurisdictions. Individuals and States are not included in the definition of a small entity.

Because good cause exists for issuing an interim final rule and the agency did not publish a general notice of proposed rulemaking, this rule does not require a regulatory flexibility analysis. Although this rule does not require a regulatory flexibility analysis, we will consider the

effects of this interim rule under the Regulatory Flexibility Act.

This rule impacts only commercial motor vehicle drivers licensed in Canada and Mexico to carry hazardous materials in the United States. TSA assumes most of these drivers already have a FAST card. Drivers licensed in Canada or Mexico who are owner-operators and could be classified as small entities may be impacted. For those owner-operators who must apply for a FAST card, the burden is the cost of application plus opportunity cost, which is perhaps a total of \$75 as discussed above. At this low cost, there is no individual annual business revenue so low that TSA could envision both a viable business and a significant cost to revenue ratio. Lastly, as each owner-operator will evaluate the personal benefits as a business decision, only those that find it a benefit will take steps to obtain a FAST card.

#### International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA has assessed the potential effect of this rulemaking and has determined that it will impose the same costs on domestic and international entities and thus have a neutral trade impact.

Currently, all U.S.-licensed operators with a hazardous materials endorsement on a commercial driver's license are required to undergo a background check. This rule allows drivers licensed in Canada and Mexico to transport hazardous materials in the United States if they obtain FAST cards. The effect of this rule is to place Canada-licensed and Mexico-licensed drivers who transport hazardous materials on an equal footing with U.S. drivers. Even if the total costs were \$1.7 million as estimated, this cost would have no noticeable impact on either trade or the U.S. economy.

#### Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may

result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

This rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply and TSA has not prepared a statement under the Act.

#### Executive Order 13132, Federalism

TSA has analyzed this interim final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications.

#### Environmental Analysis

TSA has reviewed this action under the Department of Homeland Security (DHS) Management Directive 5100.1, "Environmental Planning Program" (effective April 19, 2006), which guides TSA compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). We have determined that this proposal is covered by the following categorical exclusions (CATEX) listed in Table 1 of the DHS regulation: A3(a) (administrative and regulatory activities involving the promulgation of rules and the development of policies); A3(d) (guidance documents that interpret or amend an existing regulation without changing its environmental effect); and B10 (identifications, inspections, surveys or monitoring of imported products that cause little or no physical alteration of the environment). In addition, we have determined that the conditions set out in paragraph 3.2 (Conditions and Extraordinary Circumstances) are satisfied. This IFR is issued to ensure that the motor vehicle transportation of hazardous materials between Canada and the United States and between Mexico and the United States meets U.S. laws, without significant interruption. This IFR will not cause any change in the technical aspects of commercial transportation of hazardous materials across the northern and southern U.S. borders after August 10, 2006.

#### Energy Impact Analysis

The energy impact of the action has been assessed in accordance with the Energy Policy and Conservation Act

<sup>22</sup> Wage rates are from the BLS Web site accessed on July 14, 2006. <http://data.bls.gov/PDQ/outside.jsp?survey=cm>. Occupation Code: 53–3032, Truck Drivers, Heavy and Tractor-Trailer, for a mean rate of \$17.05 and a fringe multiplier from Transportation and Material Moving Occupations, All Civilian; [http://www.bls.gov/oes/current/oes\\_nat.htm#b53-0000](http://www.bls.gov/oes/current/oes_nat.htm#b53-0000).

(EPCA), Pub. L. 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

#### List of Subjects in 49 CFR Part 1572

Commercial drivers license, Criminal history background checks, Explosives, Hazardous materials, Motor carriers, Motor vehicle carriers, Security measures, Security threat assessment.

#### The Amendments

■ For the reasons set forth in the preamble, the Transportation Security Administration amends Chapter XII of Title 49, Code of Federal Regulations, by amending part 1572 as follows:

#### PART 1572—CREDENTIALING AND BACKGROUND CHECKS FOR LAND TRANSPORTATION SECURITY

■ 1. The authority citation for part 1572 continues to read as follows:

**Authority:** 49 U.S.C. 114, 5103a, 40113, and 46105; 18 U.S.C. 842, 845; Sec. 520, Pub. L. 108–90, 117 Stat. 1156 (6 U.S.C. 469).

#### Subpart C—Transportation of Hazardous Materials to and Within the United States by Land Modes

■ 2. Revise the heading for Subpart C as set forth above.

■ 3. Revise § 1572.201 to read as follows:

##### § 1572.201 Transportation of hazardous materials via commercial motor vehicle from Canada or Mexico to and within the United States.

(a) *Applicability.* This section applies to commercial motor vehicle drivers licensed by Canada or Mexico.

(b) *Terms used in this section.* For purposes of this section:

*FAST* means Free and Secure Trade program of the Bureau of Customs and Border Protection (CBP), a cooperative effort between CBP and the governments of Canada and Mexico to coordinate processes for the clearance of commercial shipments at the border.

*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. *See* 49 CFR 383.5.

*Hazardous materials endorsement (HME)* means the authorization for an

individual to transport hazardous materials in commerce, which must be indicated on the individual's commercial driver's license.

(c) *Background check required.* A commercial vehicle driver who is licensed by Canada or Mexico may not transport hazardous materials into or within the United States unless the driver has undergone a background check similar to the one required of U.S.-licensed operators with a hazardous materials endorsement (HME) on a commercial drivers license, as prescribed in § 1572.5.

(1) A commercial vehicle driver who holds a current Free and Secure Trade (FAST) program card satisfies the requirements of this section.

(2) Commercial vehicle drivers who wish to apply for a FAST program card must contact the FAST Commercial Driver Program, Bureau of Customs and Border Protection (CBP), Department of Homeland Security.

Issued in Arlington, Virginia, on August 2, 2006.

**Kip Hawley,**

*Assistant Secretary.*

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