

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Part 1522

[Docket No. TSA-2004-19605]

RIN 1652-AA33

Fees for Security Threat Assessments for Hazmat Drivers

AGENCY: Transportation Security Administration (TSA), Department of Homeland Security (DHS).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: In response to recent statutory requirements, the Transportation Security Administration (TSA) proposes to establish a fee for security threat assessments that TSA is required to perform on individuals who apply for or renew a hazardous materials endorsement for a commercial driver's license. TSA also proposes to establish a fee for collection and transmission of fingerprints, which is necessary to perform the security threat assessments. TSA intends to use fees collected under this proposed rule to pay for the costs of the security threat assessments and the costs of collection and transmission of fingerprints.

DATES: Submit comments by December 1, 2004.

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

Comments Filed Electronically: You may submit comments through the docket Web site at <http://dms.dot.gov>. 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 19477), or you may visit <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.

Comments that include trade secrets, confidential commercial or financial

information, or sensitive security information (SSI) should not be submitted to the public regulatory docket.¹ Please submit such comments separately from other comments on the rule. Comments containing trade secrets, confidential commercial or financial information, or SSI should be appropriately marked as containing such information and submitted by mail to the individual listed in **FOR FURTHER INFORMATION CONTACT**.

Reviewing Comments in the Docket: You may review the public docket containing comments in person in 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 above. Also, you may review public dockets on the Internet at <http://dms.dot.gov>.

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

FOR FURTHER INFORMATION CONTACT: For technical questions: Mr. Randall Fiertz, Office of Revenue, Transportation Security Administration Headquarters, West Building, Floor 12, TSA-14, 601 South 12th Street, Arlington, VA 22202; telephone: (571) 227-2323; e-mail: TSA-Fees@dhs.gov.

For legal questions: Mr. Dion Casey, Office of Chief Counsel, Transportation Security Administration Headquarters, East Building, Floor 12, TSA-2, 601 South 12th Street, Arlington, VA 22202; telephone: (571) 227-2663; e-mail: Dion.Casey@dhs.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

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.

Comments that include trade secrets, confidential commercial or financial information, or SSI should not be submitted to the public regulatory docket. Please submit such comments separately from other comments on the proposed rule. Comments containing this type of information should be appropriately marked and submitted to the address specified in the **ADDRESSES** section. Upon receipt of such

¹ See 49 CFR 1520.5 for a description of SSI material.

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 would 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 FOIA regulation found in 6 Code of Federal Regulation (CFR) part 5.

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 proposal, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, or by mail 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 your comments on this rulemaking, 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.

Except for comments containing confidential information and SSI, we will file in the public docket all comments we receive, as well as a report summarizing each substantive public contact with TSA personnel concerning this rulemaking. The docket is available for public inspection before and after the comment closing date.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late to the extent practicable. We may change this rulemaking in light of the comments we receive.

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.access.gpo.gov/su_docs/aces/aces140.html; or

(3) Visiting TSA's Law and Policy Web page at <http://www.tsa.dot.gov/public/index.jsp>.

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.

Abbreviations and Terms Used in This Document

ATF—Bureau of Alcohol, Tobacco, Firearms, and Explosives
 AAMVA—Association of American Motor Vehicle Administrators
 ATSA—Aviation and Transportation Security Act
 BLS—Bureau of Labor Statistics
 BTS—Bureau of Transportation Statistics
 CDL—commercial drivers license
 CDLIS—Commercial Drivers License Information System
 CFR—Code of Federal Regulations
 CHRC—criminal history records check
 DHS—Department of Homeland Security
 DOT—Department of Transportation
 FBI—Federal Bureau of Investigation
 FMCSA—Federal Motor Carrier Safety Administration
 HME—hazardous materials endorsement
 ICE—Bureau of Immigration and Customs Enforcement
 IFR—interim final rule
 NPRM—notice of proposed rulemaking
 PRA—Paperwork Reduction Act
 SEA—Safe Explosives Act
 TSA—Transportation Security Administration

I. Background

On September 11, 2001, several terrorist attacks were made against the United States. Those attacks resulted in catastrophic human casualties and property damage. In response to those attacks, Congress passed the Aviation and Transportation Security Act (ATSA), which established the Transportation Security Administration (TSA).² TSA was created as an agency within the Department of Transportation (DOT), operating under the direction of the Under Secretary of Transportation for Security. As of March 1, 2003, pursuant to the Homeland Security Act of 2002, TSA became an agency of the Department of Homeland Security (DHS), and the Under Secretary is now the Assistant Secretary of Homeland Security for TSA.³ TSA continues to possess the statutory

authority that ATSA established. ATSA granted to the Assistant Secretary responsibility for security in all modes of transportation.⁴

ATSA authorizes TSA to identify individuals who pose a threat to transportation security.⁵ This authority includes conducting background checks on individuals in the transportation industries. The background checks may include collecting fingerprints to determine if an individual has a criminal conviction or the use of a name and other identifying characteristics to determine whether an individual has committed international criminal offenses or immigration offenses.

Based on his functions, duties, and powers, the Assistant Secretary is situated to determine whether sufficient cause exists to believe that an individual poses a threat to transportation security.

A. USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act was enacted on October 25, 2001.⁶ Section 1012 of the USA PATRIOT Act amended 49 U.S.C. Chapter 51 by adding a new section 5103a titled "Limitation on issuance of hazmat licenses." Section 5103a(a)(1) provides:

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, upon receipt of a notification under subsection (c)(1)(B), that the individual does not pose a security risk warranting denial of the license.

Section 5103a(a)(2) subjects license renewals to the same requirements.

Section 5103a(c) requires the Attorney General, upon the request of a State in connection with issuance of a hazardous materials endorsement (HME) for a commercial drivers license (CDL), to carry out a background records check of the individual applying for the endorsement and, upon completing the check, to notify the Secretary of Transportation of the results. The Secretary of Transportation then determines whether the individual poses a security threat warranting denial of the endorsement. The Secretary of Transportation delegated the authority to carry out the provisions of Section 5103a to the Under Secretary of Transportation for Security (now the

Assistant Secretary of Homeland Security for TSA).⁷

The background records check must consist of: (1) a check of the relevant criminal history databases; (2) in the case of an alien, a check of the relevant databases to determine the status of the alien under U.S. immigration laws; and (3) as appropriate, a check of the relevant international databases through Interpol-U.S. National Central Bureau or other appropriate means.⁸ As explained in further detail below, TSA is performing a more comprehensive check than required by Section 5103a, including a review of pertinent databases to determine whether an individual poses a security threat. TSA has the authority to perform such comprehensive checks under ATSA.⁹

B. Safe Explosives Act

Congress enacted the Safe Explosives Act (SEA) on November 25, 2002.¹⁰ Sections 1121–1123 of the SEA amended section 842(i) of Title 18 of the U.S. Code by adding several categories to the list of persons who may not lawfully "ship or transport any explosive in or affecting interstate or foreign commerce" or "receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce." Prior to the amendment, 18 U.S.C. 842(i) prohibited the transportation of explosives by any person under indictment for or convicted of a felony, a fugitive from justice, an unlawful user or addict of any controlled substance, and any person who had been adjudicated as a mental defective or committed to a mental institution. The amendment added three new categories to the list of prohibited persons: aliens (with certain limited exceptions), persons dishonorably discharged from the armed forces, and former U.S. citizens who have renounced their citizenship. Individuals who violate 18 U.S.C. 842(i) are subject to criminal prosecution.¹¹ These incidents are investigated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives

⁷ 68 FR 10988, March 7, 2003.

⁸ The National Crime Prevention and Privacy Compact (Compact) is authorized under 42 U.S.C. 14616 to establish legal criteria governing criminal history record checks for non-criminal justice purposes. The Compact Council is composed of 15 members, appointed by the Attorney General. As a general rule, the Compact Council requires the submission of fingerprints for purposes of gaining access to criminal history databases for non-criminal justice purposes.

⁹ See 49 U.S.C. 114(f).

¹⁰ Pub. L. 107–296, November 25, 2002, 116 Stat. 2280, codified at 18 U.S.C. 842.

¹¹ The penalty for violation of 18 U.S.C. 842(i) is up to ten years imprisonment and a fine of up to \$250,000.

² Pub. L. 107–71, November 19, 2001, 115 Stat. 597.

³ Section 403 of Pub. L. 107–296, November 25, 2002, 116 Stat. 2135, codified at 6 U.S.C. 203.

⁴ 49 U.S.C. 114(d).

⁵ 49 U.S.C. 114(f)(2).

⁶ Pub. L. 107–56, October 25, 2001, 115 Stat. 272.

(ATF) of the Department of Justice and referred, as appropriate, to the United States Attorneys.

However, 18 U.S.C. 845(a)(1) provides an exception to section 842(i) for "any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertains to safety." Under this exception, if DOT regulations address the transportation security issues of persons engaged in a particular aspect of the safe transportation of explosive materials, 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.¹²

This exception was triggered when TSA issued the May 5 Interim Final Rule, discussed below, in coordination with the Federal Motor Carrier Safety Administration (FMCSA) and Research and Special Programs Administration (RSPA), agencies within the DOT.

C. The May 5, 2003 Interim Final Rule

To comply with the mandates of the USA PATRIOT Act, and to trigger the exception in 18 U.S.C. 845(a)(1) for the transportation of explosives, TSA issued an interim final rule in coordination with FMCSA and RSPA on May 5, 2003 (the May 5 IFR).¹³ The May 5 IFR established security threat assessment standards for determining whether an individual poses a security threat warranting denial of an HME. Under the May 5 IFR, TSA determines that an individual poses a security threat if he or she: (1) Is an alien (unless he or she is a lawful permanent resident) or a U.S. citizen who has renounced his or her U.S. citizenship; (2) is wanted or under indictment for certain felonies; (3) was convicted or found not guilty by reason of insanity of any of certain felonies in military or civilian court within the past 7 years or was released from incarceration for committing any of the specified felonies within the past 5 years; (4) has been adjudicated as a mental defective or involuntarily

committed to a mental institution; or (5) is considered to pose a security threat based on a review of pertinent databases.

The May 5 FIR also established conditions under which an individual who has been determined to be a security threat may appeal the determination, and procedures TSA follows when considering an appeal.¹⁴ In addition, the May 5 IFR provides a waiver process for those individuals who otherwise could not obtain an HME due to a disqualifying felony conviction or mental defect.¹⁵ Finally, the May 5 IFR prohibits an individual from holding, and a State from issuing, renewing, or transferring an HME for a driver unless the individual has met the TSA security threat assessment standards or has been granted a waiver.¹⁶ The May 5 IFR was to take effect in November 2003.¹⁷

In the May 5 IFR, TSA requested and received comments from the States, labor organizations, and representatives of the trucking industry. In addition, TSA held working group sessions with the States to discuss potential fingerprinting systems that would achieve the statutory requirements, but would not adversely impact the States. Based on the comments received and the working sessions with the States, TSA issued a technical amendment in November 2003 to extend the date on which fingerprints and applicant information must be submitted.¹⁸ A

¹⁴ An individual may appeal a determination if the individual believes that he or she does not meet the criteria warranting revocation. For example, an individual may appeal because he or she believes the criminal record to be incorrect, or if the individual's conviction for a disqualifying criminal offense was pardoned, expunged, or overturned on appeal.

¹⁵ Such individuals are permitted to apply for a waiver if they can demonstrate that they are rehabilitated or are no longer a danger to themselves or others.

¹⁶ In the companion Hazmat Program Rule, discussed herein, TSA is amending the May 5 IFR to permit one security threat assessment for a transfer applicant during the period of time required in the driver's original State of issuance. For instance, if the renewal period in Virginia is once every 4 years, a driver who obtains his HME in Virginia in 2005 and moves to West Virginia in 2006, where the renewal period is once every 5 years, is required to undergo a new security threat assessment in 2009 in West Virginia, rather than within 30 days of moving into West Virginia or in 2010. The Federal Motor Carrier Safety Administration's regulations require renewing the HME at least once every five years, so drivers across the country have nearly identical renewal periods. (49 CFR 383.141(d)). Thus, there is no risk that any driver will go more than five years without a security threat assessment.

¹⁷ An exception to this effective date was a provision in the May 5 IFR that required any holder of an HME who had committed a disqualifying offense to surrender the HME to the State by September 2003.

¹⁸ 68 FR 63033 (November 7, 2003).

majority of the States could not implement the program by November, and TSA did not have statutory authority to collect fees to cover TSA's implementation costs. This technical amendment required the States to either submit fingerprints and applicant information by April 1, 2004 or request an extension of time and produce a fingerprint collection plan by April 1, 2004. All States were required to have the fingerprint collection program in place as of December 1, 2004.

In response to the November 2003 technical amendment, a majority of the States asked for an extension of time because they were not ready to begin collecting applicant information or fingerprints by April 1, 2004. Therefore, on April 6, 2004, TSA published a final rule removing the April 1 date and establishing January 31, 2005 as the date on which States must begin complying with the requirements.¹⁹

D. Fee Authority

On October 1, 2003, legislation was enacted authorizing TSA to collect reasonable fees to cover the costs of providing credentialing and background investigations in the transportation field, including implementation of the USA PATRIOT Act requirements.²⁰ Section 520 of the Department of Homeland Security Appropriations Act, 2004 (2004 Appropriations Act) authorizes TSA to collect fees to pay for the following costs: Conducting or obtaining a criminal history records check (CHRC); reviewing available law enforcement databases, commercial databases, and records of other governmental and international agencies; reviewing and adjudicating requests for waivers and appeals of TSA decisions; and any other costs related to performing the background records check or providing the credential.

Section 520 of the 2004 Appropriations Act mandates that any fee collected shall be available for expenditure only to pay for the costs incurred in providing services in connection with performing the background check or providing the credential. The fee shall remain available until expended.

II. Companion Hazmat Program Rule

In a related interim final rule (IFR), titled "Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License" RIN 1652-

¹⁹ 69 FR 17696 (April 6, 2004).

²⁰ Department of Homeland Security Appropriations Act, 2004, Section 520, Pub. L. 108-90, October 1, 2003, 117 Stat. 1137 (2004 Appropriations Act).

¹² Explosives are among the categories of substances that are defined as hazardous materials under DOT regulations. See 49 CFR 383.5 and 173.50.

¹³ 68 FR 23852. The rule was codified at 49 CFR parts 1570 and 1572. On the same date, the FMCSA issued a companion rule prohibiting States from issuing, renewing, transferring, or upgrading a CDL with an HME unless TSA has first determined that the individual applying for the HME does not pose a security threat warranting denial of the HME. 68 FR 23844. Because the FMCSA is a part of DOT, and because the FMCSA and TSA rules regulate the transport of hazardous materials, including explosives, with regard to safety, the exception in 18 U.S.C. 845(a)(1) is triggered.

AA17 (the Hazmat Program Rule), that is to be issued in association with this proposed fee rule (the Fee NPRM), TSA plans to require States to choose between two fingerprint and applicant information collection options. TSA intends to require each State to either: (1) collect and transmit the fingerprints and applicant information of individuals who apply for or renew an HME; or (2) allow an entity approved by TSA (TSA agent) to collect and transmit the fingerprints and applicant information of such individuals. TSA plans to require States to notify TSA in writing of their choice within 30 days of the date the Hazmat Program Rule is published in the **Federal Register**. If a State does not notify TSA in writing of its choice by that date, TSA will assume that the State has chosen the second option and will work with the State to establish a system for a TSA agent to collect fingerprints and applicant information in the State. The State will be required to operate under the option it chooses until at least February 1, 2008.

As discussed in more detail below, the State's fingerprint and applicant information collection choice under the Hazmat Program Rule affects its obligations under the Fee NPRM and affects the fee to be charged.

III. Summary of the Proposed Rule

To comply with the mandates of Section 520 of the 2004 Appropriations Act, as well as the mandates of the USA PATRIOT Act and the SEA, TSA proposes to establish user fees for individuals who apply for or renew an HME, and thus are required to undergo a security threat assessment in accordance with 49 CFR part 1572. TSA proposes to establish two new user fees in addition to the Federal Bureau of Investigation's (FBI) fee²¹ for performing the CHRC on behalf of government agencies for non-governmental applicants: (1) To cover TSA's costs of performing and adjudicating security threat assessments, appeals, and waivers (Threat Assessment Fee), and (2) to cover the costs of collecting and transmitting fingerprints and applicant information (Information Collection Fee).

Under the proposed rule, if a State opts to collect fingerprints and

applicant information itself under the Hazmat Program Rule, the State would be required to (1) collect and remit to TSA the Threat Assessment Fee in accordance with the requirements of the Fee NPRM and (2) collect and remit to the FBI its user fee to perform a CHRC for matches of non-governmental applicant names against certain disqualifying criminal activity (FBI Fee). Nothing in this proposed rule would prohibit the State, under its own fee authority, from collecting a fee determined by the State to cover its costs of collecting and transmitting fingerprints and applicant information. TSA notes that a State may not collect a fee under TSA's fee authority.

If a State opts to permit a TSA agent to collect and transmit fingerprints and applicant information, the State would not be required to collect and remit to TSA *any fees* under the Fee NPRM. Rather, a TSA agent would (1) collect and remit to TSA the Threat Assessment Fee; (2) collect and remit to the FBI the FBI Fee; and (3) collect and keep the Information Collection Fee. The exact amount of the Information Collection Fee will be established by TSA, in accordance with Section 520, once all the States have determined whether to collect and transmit fingerprints and applicant information or allow a TSA agent to perform these services. These State decisions will enable TSA and a TSA agent to determine the final volume, scale, and costs of these services.

Based on the information currently available to the agency, TSA proposes the following fees: Information Collection Fee \$25–\$45, Threat Assessment Fee \$36, and FBI Fee \$22 (if TSA agent collects) or \$24 (if State collects).

Pursuant to the Chief Financial Officers Act of 1990, DHS/TSA is required to review these fees no less than every two years.²² Upon review, if it is found that the fees are either too high (*i.e.*, total fees exceed the total cost to provide the services) or too low (*i.e.*, total fees do not cover the total costs to provide the services), new fees will be proposed.

IV. Hazmat Driver Population

TSA estimates that there are currently 2.7 million HME holders throughout the United States. This estimate is based on the results of the initial name-based terrorist threat assessment recently performed by TSA on the entire current population of HME holders.²³ Each

State and the District of Columbia submitted to TSA the names of all current (not expired) holders of HMEs. This estimate was based on an actual head count, rather than a statistical sampling or other estimate. However, the DOT's Bureau of Transportation Statistics (BTS) and the U.S. Department of Commerce's U.S. Census Bureau have historically estimated the number of drivers carrying hazardous materials (those drivers either carrying primarily hazardous materials or carrying such on a regular basis) to be in the range of 500,000–800,000.²⁴ TSA believes this disparity between the total current number of HME holders and estimated "active" or "dedicated" drivers of hazardous materials suggests that a significant portion of the HME holder population transport hazardous materials rarely or infrequently.

Due to the additional cost, effort, and the prospect of disqualification for certain felony offenses resulting from this security threat assessment, TSA expects that a certain number of current HME holders who do not actively or regularly transport hazardous materials will choose not to renew their HME over the course of the five-year renewal period. TSA bases this assumption on recent discussions with various trucking industry representatives that will be affected by TSA's security threat assessment requirement, including trucking associations, union leaders and individual trucking companies.²⁵ Industry representatives predict at least some decrease in the HME population as a result of TSA's security threat assessment regulation. The same industry representatives further concur that current CDL driver shortages across

on all current HME holders. The threat assessment included entering names and biographical data in the National Crime Information Center (NCIC) database, the Interstate Identification Index (III), and other databases, such as terrorism watch lists. TSA noted its intent to conduct these threat assessments in the May 5 IFR.

²⁴ *Transportation Statistics Annual Reports, 2001*, p.120; *Transportation Statistics Annual Reports, 2003*, p.106; *Commodity Flow Survey: Hazardous Materials*, U.S. Department of Transportation, Bureau of Transportation Statistics, U.S. Census Bureau, Economic Census, 1997, p.9; *Vehicle Inventory and Use Survey*, U.S. Department of Commerce, U.S. Census Bureau, 1997. In reaching this estimate, TSA extrapolated 1997–2003 data and applied it to current hazardous materials volume, driver, and truck estimates.

²⁵ To estimate the volume of HME holders expected to submit to the TSA security threat assessment processes, TSA conducted phone interviews during the months of June and July 2004 with representatives from the following organizations: American Trucking Association; Estes Express Lines; International Brotherhood of Teamsters; Motor Freight Carriers' Associations; National Private Truck Council; National Tank Truck Carriers, Inc.; and the Truckload Carriers Association.

²¹ The FBI is authorized to establish and collect fees to process fingerprint identification records and name checks for non-criminal justice, non-law enforcement employment and licensing purposes that may be used for salaries and other expenses incurred in providing these services. See Title II of Pub. L. 101–515, November 5, 1990, 104 Stat. 2112, codified in a note to 28 U.S.C. 534.

²² 31 U.S.C. 3512.

²³ In July 2004, TSA used HME applicant names and biographical data to conduct threat assessments

the commercial trucking industry, coupled with the fact that drivers are not typically paid any wage premium specifically for carrying hazardous materials, further support TSA's rationale for some reduction of total HME holders due to TSA's security threat assessment process.

Empirical data suggest that there has been a decline in total HME holders over the past year. A recent TSA survey of state motor vehicle administrators, representing approximately 20 percent of the 2.7 million total HME records from the States, revealed a one-year weighted average decline of 17 percent from early 2003 to early 2004.²⁶ TSA believes this decline over the past year is due, at least in part, to TSA's security threat assessment regulation

(announced publicly in the May 5 IFR). With the imposition of the new fees requirement, TSA estimates that there will be a 20 percent decline in the HME holder population resulting from the first year of operations after the Hazmat Program Rule takes effect on January 31, 2005, when the fingerprint and application submission and fees will be newly required of HME holders when their State-issued CDL must be renewed.

Therefore, TSA expects to receive approximately 432,000 new and renewal applications in the first year after January 31, 2005.²⁷ In the second and third years, TSA estimates a 5 percent annual HME population decline, for a total of approximately 410,000 and 390,000 total new and renewal applicants, respectively. After

the third year, TSA estimates that the regulatory-induced adjustment on the HME holder population will have been realized. Thus, in the fourth and fifth years, TSA estimates a modest annual growth in renewals and new applications, in line with that of overall estimated domestic non-farm employment growth, at 1 percent annually. Thus, TSA expects approximately 394,000 and 398,000 total new applicants and renewals, respectively, in the fourth and fifth years. The total five-year new and renewal applicants for whom TSA expects to perform security threat assessments will thus be approximately 2.024 million. TSA requests comment on these assumptions and estimates.

FIGURE 1.—TSA'S FIVE-YEAR ESTIMATES FOR HAZMAT ENDORSEMENT HOLDER POPULATION, GROWTH AND TOTAL NEW APPLICANTS AND RENEWALS

Year	HME holder base population	Annual percentage growth	Total new applicants and renewals
1	2,700,000	(1)	(1)
2	2,160,000	-20	432,000
3	2,052,000	-5	410,000
4	1,949,000	-5	390,000
5	1,969,000	1	394,000
	1,989,000	1	398,000
Totals	(1)	(1)	2,024,000

(1) Not applicable.

V. Fee Program Overview

The fee program for the security threat assessment consists of three parts, discussed below: (A) The Information Collection Fee for the collection and transmission of fingerprints and applicant information; (B) the Threat Assessment Fee for the security threat assessment and associated notification, adjudication, appeal, and waiver processes; and (C) the FBI Fee for checking applicants' fingerprints against the FBI's CHRC database to identify past criminal offenses as reported to FBI. Each of these fees is structured to recover the Federal Government's cost of performing these functions.

TSA notes that some States may opt to collect and transmit fingerprints and applicant information under their own user fee authority. In those States, HME applicants will be required under the Fee NPRM to remit to the Federal Government only the Threat Assessment

Fee and FBI Fee. Nothing in this proposed rule would prohibit the State from collecting a fee determined by the State under the State's own fee authority to cover its costs of collecting and transmitting fingerprints and applicant information. TSA notes that a State may not collect a fee pursuant to TSA's fee authority to reimburse the State's costs.

A discussion of the three fees summarized above follows.

A. Information Collection Fee

As set forth in the Hazmat Program Rule, the security threat assessment process requires all drivers who apply for or renew an HME to submit fingerprints and other biographical information. The Hazmat Program Rule is expected to require States to choose one of the following two options for collection and transmission of fingerprints and applicant information:

(1) A State may choose to collect and transmit fingerprints and applicant

information itself, either through a State agency, such as the State DMV or State law enforcement agencies, or by contracting with a third party; or

(2) A State may choose to allow a TSA agent to collect and transmit fingerprints and applicant information.

1. Cost of Information Collection

As noted above, in those States that choose to allow a TSA agent to collect and transmit fingerprints and applicant information, TSA will hire a contractor agent to provide those services. Based on TSA's informal research of both commercial and government fingerprint and information collection services, TSA estimates that the per applicant fee to collect and transmit fingerprints and other required applicant data electronically will range from \$25 to \$45 per applicant. This range will vary based on economies of scale which depend primarily on the number of States (and thus number of annual HME

²⁶ This sample survey decline in total HME holders from 2003 to 2004 is also supported by the decrease in total HME records in the Federal Motor Carrier Safety Administration's (FMCSA) Commercial Drivers License Information System (CDLIS) database. In early 2003, FMCSA reported

to TSA that the CDLIS contained approximately 3.5 million total HME holders. TSA published this earlier estimate of 3.5 million total HME holders in the May 5 IFR.

²⁷ 432,000 is calculated by reducing 2.7 million HMEs by 20 percent, for a total of 2,160,000, and

then dividing by 5 to calculate an even distribution of TSA's five-year renewal cycle requirement. HME estimates for subsequent recurring years are calculated accordingly.

new applicants and renewals) that can be serviced by one or more agents (*i.e.*, TSA's agent(s) and any agents that the States may assign on their behalf to perform such services), as well as the existing infrastructure that States currently have to process fingerprint-based background checks.²⁸ Also included in this estimated fee range are the costs for required administrative support such as providing application status to applicants. TSA requests comment on these estimates.

2. Information Collection Fee

Based on the above cost estimate, TSA anticipates a per applicant fee for information collection and transmission to range from \$25 to \$45. This fee will only apply to those HME applicants in States that have chosen to have a TSA agent perform information collection and transmission, as well as related administrative support. States that choose to perform the information collection and transmission functions themselves and charge a fee under their own user fee authority are responsible for establishing their own State fee, in accordance with their user fee criteria and requirements, to recover the costs of performing these services. TSA's final Information Collection Fee may not be the same as the fees States may establish for performing these services. The Information Collection Fee will not include the fee charged by FBI to process fingerprint identification records.

B. Threat Assessment Fee

For the TSA security threat assessment process, each applicant's information will be checked against multiple databases and other information sources so TSA can determine whether the applicant poses a security threat that warrants denial of the HME. This check searches for potential security threats, immigration status, past criminal activity and mental incompetence. The threat assessment includes an appeal process for individuals who believe the records on which TSA bases its determination are incorrect. TSA will perform all of the threat assessment functions. In addition, TSA will administer a waiver process for applicants who seek a waiver of disqualification. Individuals whom TSA has determined to pose a security threat based on reviews of pertinent databases,

or who are not in the U.S. lawfully, are not eligible for a waiver.²⁹

TSA requests comments on the estimated costs discussed below.

1. Start-Up Costs

TSA's effort to conduct security threat assessments on drivers with an HME will require "start-up" costs that TSA will incur before January 31, 2005, when the Hazmat Program Rule will take effect, as well as annual "recurring," costs for checks conducted in years after January 31, 2005. The start-up costs will consist of all the costs associated with start-up activities necessary to implement the program, including costs associated with the initial name-based background checks performed on the entire population of drivers that currently hold an HME. The start-up costs also will include the systems, personnel, and resources TSA will be required to bring on-line to conduct security threat assessments on applicants renewing or newly applying for a CDL with an HME.

Regardless of whether a State or a TSA agent collects and transmits fingerprints and applicant information, TSA must implement and maintain the appropriate systems, resources, and personnel to ensure that fingerprints and applicant information are "linked," and that TSA can receive and act on the results of the security threat assessment. TSA will be required to have the necessary resources to perform the security threat assessments and process appeals, requests for waivers, and notification (to the driver and the appropriate State) of all results. In addition, TSA must also be capable of archiving the results of these actions for the purpose of drivers newly applying or renewing their HME application in future years (in the case of drivers who successfully appealed a TSA background check or were granted a waiver).

TSA estimates that the total start-up cost for the Hazmat Program will be \$4.76 million. This estimate includes: (i) \$2.67 million for all information systems costs, including the development and deployment of TSA's Hazardous Materials Endorsement Screening Gateway (HME SG)—an information system platform that allows TSA to submit, receive, and integrate security threat assessment information from a variety of Federal, State and other sources in order to help make security threat assessment determinations, and related network and communication support costs,

including access to information systems from the Association of American Motor Vehicle Administrators (AAMVA), the Law Enforcement Management System (LEMS), Interpol and required disaster recovery infrastructure; (ii) \$1.89 million for Federal and contract personnel to perform various program management functions in support of program operations, including support and compliance assurance teams for the States; and (iii) \$197,000 for office costs, including mailing costs and program travel. See Figure 2 below for additional details.

2. Recurring Costs

This section summarizes TSA's estimated costs of completing security threat assessments on individuals who apply for or renew an HME for each year after January 31, 2005. Recurring costs represent the resources necessary for TSA to perform ongoing security threat assessments on drivers applying for or renewing an HME as well as to maintain program infrastructure (*e.g.* technical systems). As previously stated, TSA estimates that the population of drivers who apply for or renew an HME will be 432,000 drivers for the first year. Pursuant to the Hazmat Program Rule, State DMVs will be prohibited from issuing or renewing an HME until TSA has notified the State that the driver (based on a security threat assessment) does not pose a security threat.

TSA estimates that the total annual recurring costs will be \$14.19 million for the first year (*i.e.*, from January 31, 2005 to January 30, 2006) and between \$13.23 million and \$13.58 million per year for the second through fifth years.³⁰ Recurring costs will include the costs of: continued development and lifecycle maintenance of information systems; digitization of applicant biographical data; the use of databases containing citizenship, international criminal history, and other data necessary to perform a security threat assessment; Federal and contractor personnel to perform all program office functions, including support of State's activities in the program along with compliance assurance; Federal and contractor support to perform security threat assessments, and to administer and document adjudications, appeals, waivers, and compliance assurance;³¹

³⁰ All cost and fee estimates in recurring years are not adjusted for inflation.

³¹ TSA notes that as the Hazmat Program matures, and TSA gains experience with the appeals and waiver processes, the agency may need to adjust these processes. If TSA adjusts the appeals or waiver process, the agency's costs may increase, which would necessitate an increase in the Threat Assessment Fee.

²⁸ For example, if 40 States choose to allow a TSA agent to collect fingerprints and applicant information, the TSA agent's economies of scale would be greater, and thus the Information Collection Fee would be less, than if 15 States choose this option.

²⁹ These threat assessment standards are contained at 49 CFR part 1572.

and office costs, including office space, notification mailing costs, and required program travel. See Figure 2 below for additional cost details.	<div>3. Threat Assessment Total Costs</div> <div>Based on its population and cost estimates assumptions, TSA estimates that the sum total of the start-up and first five-years' recurring costs will be \$72.42 million. TSA notes that these are</div>	<div>preliminary estimates that will continue to be refined. TSA requests comment on these estimates. Recurring years' costs are not adjusted for inflation. All figures rounded to the nearest thousand.</div> <div>BILLING CODE 4910-62-P</div>
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Figure 2: TSA Security Threat Assessment Start-Up and Recurring Cost Estimates**All figures in thousands (000)**

	Start-Up Year	1st Year	2nd Year	3rd Year	4th Year	5th Year	Total
Estimated Annual Renewals, and New Applicants	NA	432	410	390	394	398	2,024
COST COMPONENTS							
Personnel-Federal & Contractor							
Personnel to staff program office	\$1,858	\$3,348	\$3,348	\$3,348	\$3,348	\$3,348	\$18,598
Personnel to staff compliance teams	NA	\$1,248	\$1,248	\$1,248	\$1,248	\$1,248	\$6,240
Personnel to complete threat assessments	NA	\$1,602	\$1,522	\$1,446	\$1,461	\$1,475	\$7,506
Personnel to complete waivers & appeals processes	NA	\$2,422	\$2,302	\$2,187	\$2,209	\$2,231	\$11,351
Fee processing & analysis	NA	\$132	\$132	\$132	\$132	\$132	\$660
Legal support	NA	\$132	\$132	\$132	\$132	\$132	\$660
Interpol liaison	\$33	\$66	\$66	\$66	\$66	\$66	\$363
Personnel - Federal & Contractor Subtotal	\$1,891	\$8,950	\$8,750	\$8,559	\$8,596	\$8,632	\$45,378
Information Systems							
Hazardous Materials Endorsement Gateway (HMESG) Development	\$1,685	\$421	\$169	\$169	\$169	\$169	\$2,782
Disaster recovery site	\$600	\$500	\$500	\$500	\$500	\$500	\$3,100
HMESG operations & maintenance	NA	\$421	\$421	\$421	\$421	\$421	\$2,105
Digitization of applicant data	NA	\$324	\$308	\$292	\$295	\$298	\$1,517
Law Enforcement Mgmt. System (LEMS) access and support	\$80	\$80	\$80	\$80	\$80	\$80	\$480
AAMVA system access, connectivity & maintenance	\$29	\$44	\$44	\$44	\$44	\$44	\$249
Systems testing environment	\$150	\$15	\$15	\$15	\$15	\$15	\$225
Access to Interpol	\$125	\$13	\$13	\$13	\$13	\$13	\$190
TSA network hardware and software operational support	NA	\$25	\$25	\$25	\$25	\$25	\$125
Information Systems Subtotal	\$2,669	\$1,843	\$1,575	\$1,559	\$1,562	\$1,565	\$10,773
Terrorist & Intel Analyses							
Terrorist threat analysis databases	NA	\$1,836	\$1,744	\$1,657	\$1,674	\$1,690	\$8,601
Intelligence analysis services	NA	\$393	\$373	\$355	\$358	\$362	\$1,841
Terrorist & Intel Analyses Subtotal	NA	\$2,229	\$2,117	\$2,012	\$2,032	\$2,052	\$10,442
Office							
Communications (mailings)	NA	\$714	\$678	\$644	\$650	\$657	\$3,343
Office facilities (space)	\$137	\$273	\$273	\$273	\$273	\$273	\$1,502
Travel	\$60	\$184	\$184	\$184	\$184	\$184	\$980
Office Subtotal	\$197	\$1,171	\$1,135	\$1,101	\$1,107	\$1,114	\$5,825
Grand Totals	\$4,757	\$14,193	\$13,577	\$13,231	\$13,297	\$13,363	\$72,418

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4. Threat Assessment Fee Calculation

TSA is proposing to charge a fee to recover its security threat assessment start-up costs as well as recurring costs. The start-up costs include costs related to the name check security threat assessments performed prior to January 31, 2005, for individuals who currently hold an HME as well as other non-recurring costs required to perform the recurring years' security threat assessments that include fingerprint submission. Because these costs cannot be recovered prior to the full implementation of the Hazmat Program, and because all HME recipients benefit from the services provided as a result of the infrastructure and capabilities that TSA must develop to implement the Hazmat Program, TSA proposes to amortize the start-up costs over a 5-year period to equitably recover these one-time costs.

This amortization period coincides with the requirement in the FMCSA companion rule³² to the May 5 IFR³³ that States mandate a 5-year maximum renewal period for the HMEs. Thus, a 5-year amortization period would mean the start-up costs would be borne by all individuals who either currently hold an HME or who apply for an HME in that 5-year period. TSA notes that the amortization is done by totaling all start-up costs and the 5-year annual recurring costs and dividing by 2.024 million requests for a new or renewed HME—the total number expected in the first 5 years. (See Figure 1).

Based on the estimated costs in Figure 2, TSA has calculated the per applicant Threat Assessment Fee as follows: TSA's estimated start-up costs of \$4.76 million, added to the estimated sum of the first five years' annual recurring costs of \$67.66 million, equal a total of \$72.42 million. These total costs are then divided by the 2.024 million total estimated number of applicants for a new or renewed HME over the first five years after January 31, 2005. This calculation results in an estimated cost to each applicant of \$35.78, which is rounded to \$36 per applicant.

As noted above, if a State chooses to collect and transmit fingerprints and applicant information under the Hazmat Program Rule, the State would still be required to collect the Threat Assessment Fee on behalf of TSA and remit it to TSA in accordance with the Fee NPRM. If a State chooses to allow a TSA agent to collect and transmit fingerprints and applicant information

under the Hazmat Program Rule, the TSA agent would be required to collect this fee on behalf of TSA and remit it to TSA in accordance with the Fee NPRM.

C. FBI Fee

As part of the security threat assessment, TSA will use FBI's CHRC process. The FBI is authorized to establish and collect fees to process fingerprint identification records and name checks for non-criminal justice, non-law enforcement employment and licensing purposes that may be used for salaries and other expenses incurred in providing these services.³⁴ Pursuant to Criminal Justice Information Services (CJIS) Information Letter 93-3 (October 8, 1993), this fee is currently set at \$24. CJIS Information Letter 93-3 provides that "State Identification Bureaus and other agencies that channel user-fee fingerprint cards to the FBI and account for the fees on a monthly basis will continue to retain \$2 of the payment to help offset handling costs." Thus, in those States that opt to allow a TSA agent to collect and transmit fingerprints and applicant information, the FBI fingerprint processing charge (FBI Fee) will be \$22. States that choose to collect and transmit fingerprints and applicant information on their own may charge \$24 (the \$22 FBI Fee plus the \$2 handling costs), as long as it is consistent with CJIS Information Letter 93-3. The fingerprint processing user fee is set by the FBI, and the amount is subject to change.

VI. Total Fees

TSA proposes the following fees for HME applicants who submit fingerprints and applicant information to a TSA agent:

- (1) Information Collection and Transmission Fee: \$25-\$45.
- (2) Threat Assessment Fee: \$36.
- (3) FBI Fee: \$22.

Thus, the total fees for such applicants would be \$83-\$103.

Under the Fee NPRM, in States that opt to collect and transmit fingerprints and applicant information on their own HME applicants would be required to pay the \$36 Threat Assessment Fee and an FBI Fee of \$22 or \$24, depending on the amount charged by the State. TSA assumes that such applicants also would be required under State user fee authority to pay to the State a fee to cover the State's costs of collecting and transmitting fingerprints and applicant information. That fee should vary from

State to State. Thus, TSA cannot estimate the total fees for such applicants.

VII. Section by Section Analysis

Section 1522.1 would establish the applicability of this part and definitions of terms used in this part. This part would apply to States that issue an HME, individuals who apply for a new or renewed HME, and entities that collect fees from such individuals on behalf of TSA.

The terms "commercial drivers license," "endorsement," and "hazardous materials" would be used as defined in FMCSA regulations.

The term "day" would be defined as a calendar day.

The term "FBI Fee" would be defined as the fee required for the cost of the FBI to process fingerprint identification records and name checks.

The term "hazardous materials endorsement" would be defined as the authorization for an individual to transport hazardous materials in commerce, which must be issued on the individual's commercial driver's license.

The term "Information Collection Fee" would be defined as the fee required for the cost of collecting and transmitting fingerprints and other applicant information under 49 CFR part 1572.

The term "State" would be defined as a U.S. State or the District of Columbia.

The term "Threat Assessment Fee" would be defined as the fee required for the cost of TSA adjudicating security threat assessments, appeals, and waivers under 49 CFR part 1572.

The term "TSA agent" would be defined as an entity approved by TSA to collect fingerprints in accordance with 49 CFR part 1572 and fees in accordance with this subpart.

Sections 1522.3 through 1522.9 would be reserved.

Section 1522.11 would require a State that collects fingerprints and applicant information under 49 CFR part 1572 to collect, handle, and remit to TSA the Threat Assessment Fee in accordance with the procedures in § 1522.13. Section 1522.11 would require a TSA agent that collects fingerprints and applicant information under 49 CFR part 1572 to collect the Information Collection Fee, Threat Assessment Fee, and FBI Fee in accordance with the procedures in § 1522.15. A TSA agent also would be required to remit to TSA the Threat Assessment Fee and remit to the FBI the FBI Fee in accordance with that section.

Section 1522.13 describes the procedures a State would be required to

³² 68 FR 23843, May 5, 2003.

³³ 68 FR 23852, May 5, 2003.

³⁴ See Title II of Pub. L. 101-515, November 5, 1990, 104 Stat. 2112, codified in a note to 28 U.S.C. 534.

follow if the State chooses to collect and transmit fingerprints under the Hazmat Program Rule. Section 1522.13 would pertain only to the collection of Threat Assessment Fees to cover TSA's costs. Nothing in this regulation would prohibit a State from collecting additional fees, under its own user fee authority, to cover its costs of collecting and transmitting fingerprints and applicant information or the costs associated with collecting and remitting the FBI's CHRC fee at the time the State collects the TSA Threat Assessment Fee from HME applicants.

Paragraph 1522.13(a) would require States to impose the Threat Assessment Fee when an individual submits an application to the State for a new or renewed HME in compliance with 49 CFR part 1572. It also would establish the TSA Threat Assessment Fee at \$36. Finally, it would require the individual applying for the HME to remit the Threat Assessment Fee to the State in which the individual is applying for the HME, in a form and manner approved by TSA and the State.

Paragraph 1522.13(b) would require each State to collect the Threat Assessment Fee from an individual at the time the individual submits an application for a new or renewed HME. TSA expects that as States become fully operational for purposes of this part, TSA will be receiving names frequently and far in advance of the States remitting the Threat Assessment Fee. Therefore, it is vital that the States collect the Threat Assessment Fee under this part from the applicant as the application is submitted. In addition, paragraph 1522.13(d)(8) provides that TSA does not envision issuing any refunds. Once the application is received by TSA, analysis of the application would commence immediately. Therefore, TSA incurs the costs of performing the analysis immediately. Paragraph 1522.13(b)(2) clarifies that once TSA receives an application from a State for a security threat assessment in accordance with 49 CFR part 1572, the State is liable for the Threat Assessment Fee.

Paragraph 1522.13(c) would establish requirements for the handling of Threat Assessment Fees collected by the States prior to remittance to TSA. Because the States are collecting the Threat Assessment Fees on behalf of TSA, the fees would be considered to be held in trust for the beneficial interest of the United States. Thus, States would be required to safeguard all Threat Assessment Fees collected until they are remitted to TSA. In addition, States would be required to account for Threat Assessment Fees separately. However

States would be permitted to commingle such fees with other sources of revenue.

Paragraph 1522.13(d) would establish procedures for the remittance of Threat Assessment Fees to TSA. States would be required to remit all Threat Assessment Fees collected under this part to TSA on a monthly basis. Every month, TSA would issue an invoice to each State based on the number of HME applications the State has sent to TSA. For example, if a State sends TSA 100 HME applications during the month of February, TSA would bill the State \$3600 (100 × \$36). The State would be required to pay the invoice in full within 30 days of the date that TSA sends the invoice to the State.

The payments would be required to be remitted to TSA by electronic funds transfer, check, money order, wire, or draft, payable to the "Transportation Security Administration" in U.S. currency and drawn on a U.S. bank. States would be allowed to retain any interest that accrues on the principal amounts of the Threat Assessment Fees between the date of collection and the date the fees are remitted to TSA, not to exceed 30 days from the date that TSA sends the invoice to the State.

Paragraph (d) also would specify that TSA accept fees only from a State, not from an individual HME applicant. TSA would not issue any fee refunds, and, if a State does not remit the Threat Assessment Fees, TSA could decline to process any HME applications from that State. TSA would reserve the right to take any other appropriate action against delinquent States, as necessary.

TSA requests comments on all aspects of these proposed procedures for States.

Section 1522.15 describes the procedures that a TSA agent and an HME applicant would be required to follow if a State chooses to permit a TSA agent to collect fingerprints and applicant information under the Hazmat Program Rule. Paragraph 1522.15(a) would require an individual applying for an HME to remit the Threat Assessment Fee, FBI Fee, and Information Collection Fee to the TSA agent, in a form and manner approved by TSA, when the individual submits an application pursuant to part 1572 to the TSA agent. It also would establish the Threat Assessment Fee at \$36, the FBI Fee at \$22, and the Information Collection Fee at \$25–\$45.

Paragraph 1522.15(b) states that a TSA agent will collect the fees required under this section when an individual submits an application pursuant to 49 CFR part 1572.

Paragraph 1522.15(c) would require that fees remitted under this section be remitted to TSA by electronic funds

transfer, check, money order, wire, or draft, payable to the "Transportation Security Administration" in U.S. currency and drawn on a U.S. bank. It also would specify that TSA will not issue any refunds of fees submitted under this section. Finally, it would specify that applications submitted under 49 CFR part 1572 would be processed only upon receipt of all applicable fees.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), as amended, requires consideration of the impact of paperwork and other information collection burdens imposed on the public. As provided by the PRA, 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 Office of Management and Budget (OMB) control number. TSA has determined that there are no new information collection requirements associated with this proposed rule.

TSA notes that the Hazmat Program Rule requires drivers to submit their fingerprints and other biographical information. Those requirements may be considered an information collection burden under the PRA. Since they are imposed under the Hazmat Program Rule, they will be discussed in that rulemaking.

Regulatory Analyses

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only if the agency makes a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)) 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. In developing U.S. standards, the Trade Agreement Act requires agencies to consider international standards, where appropriate, as the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) 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).

In conducting these analyses, TSA has determined:

1. This proposed rule is a "significant regulatory action" as defined in the Executive Order because there is significant public interest in security issues since September 11, 2001. However, TSA estimates that the proposed rule would not exceed the \$100 million annual threshold that would cause it to be economically significant.

2. An initial Regulatory Flexibility Analysis suggests the proposed rule would not have a significant impact on a substantial number of small entities;

3. The proposed rule would impose no significant barriers to international trade; and

4. The proposed rule would not impose an unfunded mandate on State, local, or tribal governments, or on the private sector in excess of \$100 million annually.

Below is a summary of each section of the Fee NPRM and its respective cost impact.

Executive Order 12866 Assessment

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and therefore subject to 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 since September 11, 2001, as well as the background check requirements in the Hazmat Program Rule.

This proposed rule responds to the requirements of Section 520 of the 2004 Appropriations Act by establishing fees for the background checks TSA is required to perform by Section 1012 of the USA PATRIOT Act and Sections 1121–1123 of the SEA. The Fee NPRM would establish two fees: a user fee to cover the HME security threat assessment program and associated costs (Threat Assessment Fee) and a user fee to cover the costs of collecting and transmitting fingerprints and applicant information (Information Collection Fee). The amount of the proposed fees are \$36 (Threat Assessment Fee) and \$25–\$45 (Information Collection and Transmission Fee) per HME applicant. There will also be a \$22 fee to cover FBI's CHRC.

TSA has prepared a full regulatory evaluation for this notice of proposed

rulemaking (NPRM), which is available for review in the docket of this matter. The regulatory evaluation examines the costs and benefits of the proposed rule to establish fees for security threat assessments that TSA is required to perform on individuals who apply for or renew an HME for a CDL. The results of the evaluation are summarized below.

Costs

The following sections summarize the estimated costs of the Fee NPRM. Under the Hazmat Program Rule, as described above, each State will be required to choose between two fingerprint and applicant information collection and transmission options. Each State will be required to either: (1) Collect and transmit the fingerprints and applicant information of individuals who apply for or renew an HME; or (2) allow an entity approved by TSA to complete these tasks. States will be required to notify TSA in writing of their choice within 30 days of the date the Hazmat Program Rule is published in the **Federal Register**. Because these different options have different cost impacts under the Fee NPRM—and because TSA cannot predict which option each State will choose—it is impossible to produce one accurate cost estimate for the Fee NPRM.

For the purposes of the regulatory evaluation, therefore, three scenarios will be evaluated: (1) All States decide to collect and transmit the fingerprints and applicant information of individuals who apply for or renew an HME; (2) twenty-five States choose to collect and transmit all required fingerprints and applicant information to TSA, while the remainder allows an approved TSA agent to complete the work; and (3) all States decide to allow an approved TSA agent to collect all required fingerprints and applicant information. The second scenario represents TSA's best estimate for what will happen once the Fee NPRM becomes effective and is based on communications with the States.

It is important to note that the figures detailed in this evaluation reflect only the estimated cost of determining, administering, and remitting fees associated with collecting and transmitting fingerprints and applicant information. A detailed discussion of the cost estimates can be found in the Regulatory Evaluation.

(1) State Option

If all States opt to collect fingerprints and applicant information to comply with the Hazmat Program Rule, the States would be required to (1) collect and remit to TSA the Threat Assessment

Fee in accordance with the requirements of the Fee NPRM and (2) collect and remit to the FBI its user fee to perform a CHRC for matches of non-governmental applicant names against certain disqualifying criminal activity (FBI Fee). If this alternative is adopted, the total ten-year cost of the Fee NPRM in constant 2004 U.S. Dollars is estimated to be \$5.3 million, and \$4.0 million discounted.

(2) Best Estimate

In this estimate, it is assumed that twenty-five States will choose to comply with the Hazmat Program Rule by collecting fingerprints, fees, and applicant information themselves; the remainder of the States will allow an approved TSA agent to collect and transmit fingerprints and applicant information as well as all fees. Under these assumptions, the ten-year cost of the Fee NPRM is estimated to be \$4.6 million, and \$3.5 million discounted.

(3) TSA Option

If all States opt to permit a TSA agent to collect and transmit fingerprints, fees, and applicant information, the States would not be required to collect and remit to TSA any fees under the Fee NPRM. Rather, a TSA agent would collect and remit all required fingerprints, information, and fees. If all States choose this option, the ten-year cost of the Fee NPRM falls to \$3.9 million, and \$3.0 million discounted.

In all of these estimates, the costs of the Fee NPRM are well below the annual \$100 million threshold established by EO 12866 that would cause the Fee NPRM to be identified as a major rule. A further discussion of these costs is contained in the Regulatory Evaluation.

Benefits

There are several qualitative benefits realized from the implementation of the Fee NPRM. Primarily, the Fee NPRM provides a funding mechanism for the Hazmat Program Rule, which regulates the population of hazardous materials drivers. In essence, the Fee NPRM would allow TSA to spread the costs associated with processing threat assessments in an equitable manner among the affected parties. TSA determined that creating a Fee NPRM was the most equitable, efficient, and cost effective way to fund the aforementioned Hazmat Program Rule.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA), as amended, was enacted by Congress to ensure that small entities

(small businesses, small not-for-profit organizations, and small governmental jurisdictions) are not unnecessarily or disproportionately burdened by Federal regulations. The RFA requires agencies to review rules to determine if they have "a significant economic impact on a substantial number of small entities." TSA has tentatively determined that the proposed rule would not have a significant economic impact on a substantial number of small entities.

This proposal would affect the States and individuals. However, States are not considered "small governmental jurisdictions," such as small towns or boroughs, and individuals are not considered "small entities" under the RFA.

Small businesses are identified as small entities under the RFA. For the purpose of this analysis, it will be assumed that the total fees associated with obtaining an HME would not exceed \$100. Businesses transporting hazardous materials often incur high fixed and sunk costs. The approximately \$100 in fees, therefore, measured as a percentage of the total operating costs of a typical small business working in the hazardous materials transportation industry, would not represent a significant economic burden.

TSA has tentatively determined that this proposed rule would not have a significant impact on a substantial number of small entities. TSA requests comment on this issue.

Unfunded Mandates Assessment

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal 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 more than \$100 million in any one year (adjusted for inflation with base year of 1995). Before promulgating a rule for which a written assessment is needed, section 205 of the UMRA generally requires TSA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows TSA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation of the reasons that alternative was not adopted.

TSA has determined that this proposed rule would not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually. As noted above in the Executive Order 12866 analysis, the costs of the Fee NPRM would be well below the \$100 million annually in each of the three scenarios analyzed.

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 would have only a domestic impact and therefore no effect on any trade-sensitive activity. This proposed rule would impact only individuals applying for a State-issued HME, not individuals with an HME issued by Canada or Mexico. TSA will continue to consult with Canada and Mexico to ensure that any adverse impacts on trade are minimized.

Executive Order 13132 (Federalism)

Executive Order 13132 requires TSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "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."

TSA has analyzed this proposed rule under the principles and criteria of Executive Order 13132. TSA notes that the requirements of this proposed rule are mandated by various statutes, including the USA PATRIOT Act, SEA, and section 520 of the Homeland Security Appropriations Act of 2004. Moreover, the Federal government, primarily through the Federal Motor Carrier Safety Administration, is already substantially involved in establishing conditions for the issuance of an HME. Accordingly, TSA has determined that this action would not have a substantial direct effect 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, and therefore would not have federalism implications.

Environmental Analysis

TSA has reviewed this proposal for purposes of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) and has determined that this action would not have a significant effect on the human environment. The proposed rule would only implement a fee structure for commercial drivers who transport hazardous materials, and thus would have no environmental consequences.

Energy Impact

TSA has assessed the energy impact of this proposal in accordance with the Energy Policy and Conservation Act (EPCA) Public Law 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 1522

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

The Proposed Amendments

For the reasons set forth in the preamble, the Transportation Security Administration proposes to amend 49 CFR Chapter XII, Subchapter B as follows:

1. Add part 1522 to read as follows:

PART 1522—FEES FOR CREDENTIALING AND SECURITY THREAT ASSESSMENTS

Subpart A—Fees for Security Threat Assessments for Individuals

Sec.

1522.1 Scope and definitions.

1522.3–1522.9 [Reserved]

Subpart B—Fees for Security Threat Assessments for Hazmat Drivers

1522.11 Fee collection options.

1522.13 Fee procedures for collection by States.

1522.15 Fee procedures for collection by TSA agents.

Authority: 49 U.S.C. 114, 5103a, 40113, and 46105; Pub. L. 108–90, 117 Stat. 1137.

Subpart A—Fees for Security Threat Assessments for Individuals

§ 1522.1 Scope and definitions.

(a) *Scope.* This part applies to States that issue a hazardous materials

endorsement for a commercial drivers license; to individuals who apply for or renew a hazardous materials endorsement for a commercial drivers license and must undergo a security threat assessment under 49 CFR part 1572; and to entities who collect fees from such individuals on behalf of TSA.

(b) *Terms.* As used in this part:

Commercial drivers license (CDL) is used as defined in 49 CFR 383.5.

Day means calendar day.

Endorsement is used as defined in 49 CFR 383.5.

FBI Fee means the fee required for the cost of the Federal Bureau of Investigation to process fingerprint identification records and name checks.

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.

Hazardous materials endorsement (HME) means the authorization for an individual to transport hazardous materials in commerce, which must be issued on the individual's commercial drivers license.

Information Collection Fee means the fee required in this part for the cost of collecting and transmitting fingerprints and other applicant information under 49 CFR part 1572.

State means a State of the United States or the District of Columbia.

Threat Assessment Fee means the fee required in this part for the cost of TSA adjudicating security threat assessments, appeals, and waivers under 49 CFR part 1572.

TSA agent means an entity approved by TSA to collect and transmit fingerprints and applicant information in accordance with 49 CFR part 1572 and fees in accordance with this part.

§§ 1522.3–1522.9 [Reserved]

Subpart B—Fees for Security Threat Assessments for Hazmat Drivers

§ 1522.11 Fee collection options.

(a) *State collection and transmission.* If a State collects fingerprints and applicant information under 49 CFR part 1572, the State must collect and transmit to TSA the Threat Assessment Fee in accordance with the requirements of § 1522.13.

(b) *TSA agent collection and transmission.* If a TSA agent collects fingerprints and applicant information under 49 CFR part 1572, the agent must—

(1) Collect the Information Collection Fee, Threat Assessment Fee, and FBI

Fee in accordance with the requirements of § 1522.15;

(2) Transmit to TSA the Threat Assessment Fee in accordance with the requirements of § 1522.15 and any other procedures approved by TSA; and

(3) Transmit to the Federal Bureau of Investigation the FBI Fee in accordance with procedures approved by TSA.

§ 1522.13 Fee procedures for collection by States.

This section describes the procedures that a State that collects fingerprints and applicant information under 49 CFR part 1572, and the procedures an individual who applies for or renews an HME for a CDL in that State, must follow for collection and transmission of the Threat Assessment Fee.

(a) *Imposition of fee.* (1) The following Threat Assessment Fee is required for TSA to conduct a security threat assessment under 49 CFR part 1572 for an individual who applies for or renews an HME: \$36.

(2) An individual who applies for a new or renewed HME must remit to the State the Threat Assessment Fee, in a form and manner approved by TSA and the State, when the individual submits the application for the HME to the State.

(b) *Collection of fees.* (1) A State must collect the Threat Assessment Fee when an individual submits an application to the State for a new or renewed HME.

(2) Once TSA receives an application from a State for a security threat assessment under 49 CFR part 1572, the State is liable for the Threat Assessment Fee.

(3) Nothing in this subpart prevents a State from collecting any other fees that a State may impose on an individual who applies for or renews an HME.

(c) *Handling of fees.* (1) A State must safeguard all Threat Assessment Fees from the time of collection until remittance to TSA.

(2) All Threat Assessment Fees are held in trust by a State for the beneficial interest of the United States in paying for the costs of conducting the security threat assessment required by 49 U.S.C. 5103a and 49 CFR part 1572. A State holds neither legal nor equitable interest in the Threat Assessment Fees except for the right to retain any accrued interest on the principal amounts collected pursuant to this section.

(3) A State must account for Threat Assessment Fees separately, but may commingle such fees with other sources of revenue.

(d) *Remittance of fees.* (1) TSA will generate and provide an invoice to a State on a monthly basis. The invoice will indicate the total fee dollars (number of applicants times the Threat

Assessment Fee) that are due for the month.

(2) A State must remit to TSA full payment for the invoice within 30 days after TSA sends the invoice.

(3) TSA accepts Threat Assessment Fees only from a State, not from an individual applicant for an HME.

(4) A State may retain any interest that accrues on the principal amounts collected between the date of collection and the date the Threat Assessment Fee is remitted to TSA in accordance with paragraph (d)(2) of this section.

(5) A State may not retain any portion of the Threat Assessment Fee to offset the costs of collecting, handling, or remitting Threat Assessment Fees.

(6) Threat Assessment Fees remitted to TSA by a State must be payable to the "Transportation Security Administration" in United States currency and drawn on a United States bank.

(7) Threat Assessment Fees may be remitted by electronic funds transfer, check, money order, wire transfer, or draft.

(8) TSA will not issue any refunds of Threat Assessment Fees.

(9) If a State does not remit the Threat Assessment Fees for any month, TSA may decline to process any HME applications from that State.

§ 1522.15 Fee procedures for collection by TSA agents.

This section describes the procedures that a TSA agent that collects fingerprints and applicant information under 49 CFR part 1572 in a State, and the procedures an individual who applies for or renews an HME for a CDL in that State, must follow for collection and transmission of the Information Collection, Threat Assessment Fee, and FBI Fee.

(a) *Imposition of fees.* (1) The following Information Collection Fee is required for a TSA agent to collect and transmit fingerprints and applicant information in accordance with 49 CFR part 1572: \$25–45.

(2) The following Threat Assessment Fee is required for TSA to conduct a security threat assessment under 49 CFR part 1572 for an individual who applies for or renews an HME: \$36.

(3) The following FBI Fee is required for the FBI to process fingerprint identification records and name checks required under 49 CFR part 1572: the fee collected by the FBI under 28 U.S.C. 534.

(4) An individual who applies for a new or renewed HME must remit to the TSA agent the Information Collection Fee, Threat Assessment Fee, and FBI Fee, in a form and manner approved by

TSA, when the individual submits the application required under 49 CFR part 1572.

(b) *Collection of fees.* A TSA agent will collect the fees required under this section when an individual submits an application to the TSA agent in accordance with 49 CFR part 1572.

(c) *Remittance of fees.* (1) Fees required under this section that are remitted to a TSA agent must be payable

to the "Transportation Security Administration" in United States currency and drawn on a United States bank.

(2) Fees required under this section may be remitted by electronic funds transfer, check, money order, wire transfer, or draft.

(3) TSA will not issue any refunds of fees required under this section.

(4) Applications submitted in accordance with 49 CFR part 1572 will be processed only upon receipt of all applicable fees under this section.

Issued in Arlington, VA, on November 5, 2004.

David M. Stone,

Assistant Secretary.

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