

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

#### 49 CFR Part 1572

[Docket No. TSA-2004-19605; Amendment No. 1572-5]

RIN 1652-AA33

#### Hazmat Fee Rule: Fees for Security Threat Assessments for Hazmat Drivers

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

**ACTION:** Final rule.

**SUMMARY:** In response to recent statutory requirements, the Transportation Security Administration (TSA) is establishing 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 is establishing a fee for collection and transmission of fingerprints and biographical information, which is necessary to perform the security threat assessments. TSA intends to use fees collected under this rule to pay for the costs of the security threat assessments and the costs of collection and transmission of fingerprints and biographical information.

**DATES:** This rule is effective January 31, 2005.

**ADDRESSES:** You may obtain an electronic copy of this final rule 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](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.

You may also review the public docket in person in the Docket Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office is on the plaza level of the Department of Transportation.

**FOR FURTHER INFORMATION CONTACT:** For payment eligibility questions, such as who is required to pay the fees: George

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For billing questions: Randall Fiertz, Office of Revenue, TSA-14, Transportation Security Administration Headquarters, 601 South 12th Street, Arlington, VA 22202; telephone: (571) 227-2323; e-mail: [TSA-Fees@dhs.gov](mailto:TSA-Fees@dhs.gov).

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

#### SUPPLEMENTARY INFORMATION:

##### 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 driver's license  
 CDLIS—Commercial Drivers License Information System  
 CFR—Code of Federal Regulations  
 CHRC—criminal history records check  
 DHS—Department of Homeland Security  
 DMV—Department of Motor Vehicles  
 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 perpetrated 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).<sup>1</sup> 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 functions of the Under Secretary were ultimately assigned to the Assistant Secretary of Homeland Security for TSA.<sup>2</sup> TSA continues to possess the statutory authority that ATSA established. ATSA granted to the Assistant Secretary responsibility for security in all modes of transportation.<sup>3</sup>

ATSA authorizes TSA to identify individuals who pose a threat to transportation security.<sup>4</sup> 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.<sup>5</sup> 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 driver's license (CDL), to carry out a background records check of the individual applying for the

<sup>2</sup> Section 403 of Pub. L. 107-296, November 25, 2002, 116 Stat. 2135, codified at 6 U.S.C. 203.

<sup>3</sup> 49 U.S.C. 114(d).

<sup>4</sup> 49 U.S.C. 114(f)(2).

<sup>5</sup> Pub. L. 107-56, October 25, 2001, 115 Stat. 272.

<sup>1</sup> Pub. L. 107-71, November 19, 2001, 115 Stat. 597.

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 responsibilities of Section 5103a to the Under Secretary of Transportation for Security.<sup>6</sup> Pursuant to section 403 of the Homeland Security Act of 2002, these responsibilities transferred to the Secretary of Homeland Security.<sup>7</sup> The Secretary then delegated these responsibilities to the Assistant Secretary of Homeland Security for TSA.

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.<sup>8</sup> 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.<sup>9</sup>

#### B. Safe Explosives Act

Congress enacted the Safe Explosives Act (SEA) on November 25, 2002.<sup>10</sup> Sections 1121–1123 of the SEA amended section 842(i) of title 18,

United States 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.<sup>11</sup> These incidents are investigated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (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.<sup>12</sup>

This exception was triggered when TSA issued an interim final rule on May

5, 2003 (May 5 IFR), 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.<sup>13</sup> 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 determined 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 IFR also established conditions under which an individual who has been determined to be a security threat may appeal the determination, and the procedures that TSA follows when considering an

<sup>6</sup> 68 FR 10988 (March 7, 2003).

<sup>7</sup> Pub. L. 107–296, November 25, 2002.

<sup>8</sup> The National Crime Prevention and Privacy Compact (Compact), codified at 42 U.S.C. 14616, establishes the Compact Council, which is authorized 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 requires the submission of fingerprints for purposes of gaining access to criminal history databases for non-criminal justice purposes.

<sup>9</sup> See 49 U.S.C. 114(f).

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

<sup>11</sup> 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.

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

<sup>13</sup> 68 FR 23852. The rule was codified at 49 CFR parts 1570 and 1572. On the same date, 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 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) was triggered.

appeal.<sup>14</sup> In addition, the May 5 IFR provided a waiver process for those individuals who otherwise could not obtain an HME due to a disqualifying felony conviction or mental defect.<sup>15</sup> Finally, the May 5 IFR prohibited 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.<sup>16</sup> The May 5 IFR was to take effect in November 2003.<sup>17</sup>

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.<sup>18</sup> A majority of the States could not implement the program by November, and TSA was not able to set the fee levels through rulemaking to cover TSA's implementation costs.<sup>19</sup> This

<sup>14</sup> Under the May 5 IFR, an individual could appeal a determination if the individual believes that he or she does not meet the criteria warranting revocation. For example, an individual could 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.

<sup>15</sup> Such individuals were permitted to apply for a waiver if they could demonstrate that they are rehabilitated or are no longer a danger to themselves or others.

<sup>16</sup> In the interim final rule issued on November 24, 2004 (Hazmat Program Rule), discussed herein, TSA amended the May 5 IFR to permit a driver who successfully completes the TSA security threat assessment and receives an HME in one State to transfer the HME to another State without undergoing another TSA security threat assessment until the date the HME would expire in the issuing State. 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. FMCSA'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.

<sup>17</sup> 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.

<sup>18</sup> 68 FR 63033 (November 7, 2003).

<sup>19</sup> Congress did not grant TSA the statutory authority required for rulemaking to set and collect fees for costs related to background checks and

technical amendment required the States either to 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.<sup>20</sup>

#### D. Hazmat Program Rule

On November 24, 2004, TSA issued an interim final rule, titled "Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License" RIN 1652-AA17 (the Hazmat Program Rule).<sup>21</sup> In the Hazmat Program Rule, TSA made several amendments to the May 5 IFR. TSA also required States to choose between the following two fingerprint and applicant information collection options: (1) The State collects and transmits the fingerprints and applicant information of individuals who apply for or renew an HME; or (2) the State allows an entity approved by TSA (TSA agent) to collect and transmit the fingerprints and applicant information of such individuals. TSA required States to notify TSA in writing of their choice by December 27, 2004. TSA noted that if a State did not notify TSA in writing of its choice by that date, TSA would assume that the State had chosen the second option and would work with the State to establish a system for a TSA agent to collect fingerprints and applicant information in the State. The Hazmat Program Rule requires a State to operate under the option it chooses until at least February 1, 2008.

Seventeen States opted to collect and transmit fingerprints and applicant information. The remaining 34 States opted to allow a TSA agent to perform those services.<sup>22</sup> Information on which States have chosen which option is

credentialing until October 1, 2003, per section 520 of the 2004 Homeland Security Appropriations Act (Pub. L. 108-90, October 1, 2003, 117 Stat. 1137).

<sup>20</sup> 69 FR 17969 (April 6, 2004).

<sup>21</sup> 69 FR 68720 (November 24, 2004).

<sup>22</sup> TSA notes that as defined in the Hazmat Program Rule, the term "State" includes the District of Columbia. Thus, for purposes of the hazmat program there are 51 States.

available on the TSA Web site at [http://www.tsa.gov/public/interapp/editorial/editorial\\_1735.xml](http://www.tsa.gov/public/interapp/editorial/editorial_1735.xml).

#### E. Fee Authority

On October 1, 2003, Congress enacted legislation directing 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.<sup>23</sup> 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 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 must remain available until expended.

#### F. Fee NPRM

On November 10, 2004, TSA issued a notice of proposed rulemaking (Fee NPRM) to propose a fee for the security threat assessments that TSA is required to perform on individuals who apply for or renew an HME for a CDL (Threat Assessment Fee).<sup>24</sup> The Fee NPRM also proposed a fee for the collection and transmission of fingerprints and other HME applicant information necessary to perform the security threat assessments (Information Collection Fee). The Fee NPRM also proposed that HME applicants remit the fee required by the Federal Bureau of Investigation (FBI) for performing the CHRC on behalf of government agencies for non-government applicants. In addition, the Fee NPRM proposed procedures for States and entities approved by TSA to collect, handle, and remit to TSA those fees. TSA requested public comment on all aspects of the Fee NPRM.

<sup>23</sup> Department of Homeland Security Appropriations Act, 2004, Section 520, Pub. L. 108-90, October 1, 2003, 117 Stat. 1156 (6 U.S.C. 469) (2004 Appropriations Act).

<sup>24</sup> 69 FR 65332, November 10, 2004.

## II. Response to Public Comments

TSA received approximately 25 comments on the Fee NPRM from individual commercial drivers, labor organizations, trucking industry associations, State Departments of Motor Vehicles, associations representing the agricultural, chemical, explosives, and petroleum industries, and associations representing State governments. The discussion below groups the comments by issue.

### A. Responsibility for the Fees

Labor organizations and individual drivers commented that drivers should not bear the full cost of the threat assessments conducted under the Hazmat Program Rule. They noted that the statute authorizing TSA to collect fees for threat assessments (Section 520 of the 2004 Appropriations Act) does not require TSA to collect the fees from the driver. They argued that the fees should be divided among all of the affected parties, including employers and the Federal Government.

TSA notes that the May 5 IFR specified that the driver or the driver's employer was responsible for paying the fee charged by the entity that collected the driver's fingerprints and generated the driver's criminal history.<sup>25</sup> The Hazmat Program Rule contains a similar provision specifying that the HME applicant or the applicant's employer is responsible for the TSA and FBI fees.<sup>26</sup> The Hazmat Program Rule provides that the driver or the driver's employer is responsible for paying the required fees. Some commenters noted that a commercial driver's employer typically pays the commercial driver's licensing fees. Whether the driver or the driver's employer pays the fees is a matter that must be resolved between drivers and their employers.

As for the Federal Government subsidizing the fees, when Congress enacted Sec. 520 of the 2004 Appropriations Act it expressed its intent that TSA seek user fee funding to cover the costs of providing credentialing and background investigations in the transportation field. The hazmat program is an example of a credentialing and background investigation program that was intended to be supported by user fees. That said, TSA has subsidized the program to some extent by bearing the costs of the name-based threat

assessments for hazmat drivers that TSA performed prior to full implementation of the hazmat program. Moreover, TSA notes that certain overhead costs that directly support the program, such as those for human resources, financial reporting and accounting, and TSA executive management support, have not been included in the user fees.

### B. Amount of the Fees

Several commenters stated that the estimated total fee range of \$83–\$103 is unreasonable. They noted that the proposed fees are significantly higher than fees for security threat assessments in other transportation-related programs, such as the security threat assessments TSA proposed for individuals requiring unescorted access to air cargo (air cargo handlers) (\$39)<sup>27</sup> and drivers seeking certification under the Free and Secure Trade (FAST) program (\$50). They questioned why TSA is requiring the trucking industry to absorb higher fees.

TSA notes that while there are some similarities to other Federal Government background check programs, each program is unique. Differences in cost arise due to the legal requirements associated with certain background checks as well as the differences in how the agency requiring the background check is able to collect fingerprints and other information needed from the population being checked. There are also differences in the legislative authorities and appropriations allocated to agencies for supporting the programs. These differences determine whether the programs are totally funded through appropriated funding, partially funded through user fees, or fully funded through user fees.

As noted in the Fee NPRM, the total proposed fee range of \$83 to \$103 per applicant for the hazmat driver threat assessment included three parts. Part one was for the collection and transmission of fingerprints and other applicant information (Information Collection Fee). This service will either be provided directly by individual States or by a TSA agent who will be located at various sites within each State. If a TSA agent provided this service, the proposed Information Collection Fee was estimated at \$25–\$45. The Fee NPRM explained that if a State provides this service, the fee for this service could be higher or lower than the proposed \$25–\$45 range. The Fee NPRM explained that the final fee level for information collection and transmission would depend primarily

on the volume of applicants that the TSA agent serves.

Part two of the proposed fee range was \$36 for the threat assessment (Threat Assessment Fee). In accordance with the mandates of the USA PATRIOT Act and the SEA, the threat assessment consists of TSA reviewing the information collected and determining whether the individual poses a security threat. The Threat Assessment Fee also included costs associated with appeals and waivers.

Part three of the proposed fee range was the FBI fee for conducting a fingerprint-based criminal history records check (FBI Fee). This fee is set by the FBI and is currently at \$22, or \$24 if a State submits the fingerprints to the FBI.

As noted earlier, other background check programs have different Congressionally-mandated requirements and thus have different costs. For example, the proposed air cargo program would require air cargo handlers to undergo one of the following: A name-based security threat assessment; or, if otherwise required, a fingerprint-based CHRC or another TSA-approved security threat assessment.<sup>28</sup> The hazmat program requires drivers to undergo *both* a fingerprint-based CHRC *and* a name-based security threat assessment, as well as checks of their mental capacity and citizenship or immigration status (emphasis added).<sup>29</sup> These additional checks were required under the USA PATRIOT Act and the SEA. In addition, the proposed air cargo program does not contain waiver provisions, while the hazmat program does. TSA believes that the waiver procedures are an important part of the hazmat program; these procedures recognize that individuals who have committed a disqualifying crime may be rehabilitated to the point that they may be trusted to transport hazmat. The costs associated with adjudicating waiver requests are a large part of the costs of the hazmat program. For these reasons, the costs associated with the hazmat program are significantly higher than the costs associated with the proposed security threat assessments for air cargo handlers.

One commenter suggested that TSA charge separate fees to HME applicants

<sup>25</sup> 49 CFR 1572.5(b)(2)(iii). See also the discussion in the preamble of the May 5 IFR. 68 FR at 23859 (May 5, 2003).

<sup>26</sup> 49 CFR 1572.11(d)(3). See also the discussion in the preamble of the Hazmat Program Rule. 69 FR at 68732 (November 24, 2004).

<sup>27</sup> 69 FR 65258 (November 10, 2004).

<sup>28</sup> See 49 CFR 1544.228(a), 1546.213(a), and 1548.15(a). Under the proposed air cargo program an air cargo handler would have to undergo the name-based threat assessment, and pay the proposed \$39 fee, only if he or she was not required to undergo a fingerprint-based CHRC or another security threat assessment approved by TSA. The proposed \$39 fee would cover only the cost of the name-based security threat assessment.

<sup>29</sup> See 49 CFR 1572.5(c).

who use the appeal or waiver procedures. Making this change would require creating a new process. TSA is not establishing a separate fee collection process for appeals and waivers at this time. TSA may do so in the future, if experience with the hazmat program suggests that separating these fees would be appropriate.

Another example is the FAST program, which involves efforts by the United States, Canada, and Mexico to improve the efficiency of screening and clearing commercial traffic at the shared borders. The FAST program is a voluntary initiative operated by U.S. Customs and Border Protection (CBP) that provides an expedited customs and immigration process at the borders for approved truck drivers. To be approved for the FAST program, a driver must be admissible to the U.S. and must not have been convicted of a criminal offense or been found in violation of customs or immigration law. The driver must submit fingerprints and other information, such as proof of citizenship and work history. Drivers who are not approved for the FAST program are required to follow normal CBP procedures at the borders.

The \$50 fee for the FAST program is an application fee, rather than a threat assessment fee. Drivers must also pay the FAST fee each time any information on the FAST card must be changed, or if the driver loses the card and requires a replacement. In addition, CBP uses appropriated funding to subsidize the costs of conducting the required background checks. As noted above, in section 520 of the 2004 Appropriations Act, Congress directed TSA to fund credentialing and background investigation programs, such as the hazmat program, with user fees.

#### C. Infrastructure Costs

Labor organization and trucking industry associations objected to the inclusion of infrastructure costs in the fee structure. They noted that the Threat Assessment Fee structure includes the costs of creating and maintaining databases, disaster recovery, and other start-up costs. They argued that these costs should not be passed along to drivers because they are not part of performing the security threat assessment or providing the HME. They suggested that the Federal Government should absorb these costs. Finally, some commenters objected to paying for infrastructure that TSA has stated may be used for other programs.

Section 520 of the 2004 Homeland Security Appropriations Act grants TSA the authority to recover infrastructure and other start-up costs necessary to

perform background checks and provide credentialing-related services. Section 520 further directs that fees must be "reasonably related to the costs of providing services in connection with the activity or item for which the fee is charged."<sup>30</sup> Recoverable costs via user fees costs may include both the costs of accessing various law enforcement, governmental and commercial databases, adjudication costs and "any other costs related to providing the credential or performing the background record check."<sup>31</sup> Thus, TSA's user fee may include infrastructure and other start-up costs required to implement TSA's hazmat driver security threat assessment program. TSA has chosen not to include certain general overhead costs that could be applied to calculate the agency's full costs of implementing the program. As previously stated, these costs include costs associated with human resources, financial reporting and accounting, and TSA executive management support.

With respect to the possible future use of the hazmat driver program infrastructure for other programs, if TSA implements other background check programs that leverage the infrastructure that was created for the hazmat program, TSA will re-evaluate its hazmat user fees and adjust them accordingly.

#### D. Cost Estimates

Several commenters stated that TSA likely underestimated the threat assessment costs because the agency did not include costs associated with appeals and waivers. They also noted that allowing a private entity to collect fingerprints and applicant information on behalf of TSA (TSA agent) or the States (an entity that contracts with a State that chooses to collect fingerprints and applicant information) necessarily implies that the agent will make a profit. They argued that Section 520 of the 2004 Appropriations Act does not permit TSA to include private profit costs as part of the costs recoverable by fees.

TSA notes that the threat assessment costs estimated in the Fee NPRM did include the estimated costs to TSA associated with handling appeals and requests for a waiver. Moreover, in the Regulatory Evaluation for the Hazmat Program Rule, TSA estimated the likely cost to drivers in terms of time for both the HME threat assessment process and the appeal/waiver process for those

drivers who receive notification of disqualification. Thus, the threat assessment costs estimated in the Fee NPRM were not understated.

With regard to the legality and appropriateness of including contractor profits as part of TSA's costs for fee recovery, TSA notes that § 15.404-4 of title 48 of the Federal Acquisition Regulation (FAR) specifically allows profit for contractors providing goods and services to the Government, subject to Federal cost accounting standards. As such, contractor cost proposals usually contain a profit component in the rates or a fee, and the Government contracting officer must determine that all the cost elements, including fee, in the proposal are fair and reasonable before awarding a contract. In TSA's contract award process to the TSA agent for the Information Collection Fee, TSA has determined the contractor's charges to be fair and reasonable. Costs are determined to be fair and reasonable by evaluating several factors such as the Government's Independent Cost Estimate (ICE) developed for evaluating this activity, the costs for similar services, including historical costs, and the comparison of costs in various proposals under a competitive procurement award process. Thus, it is appropriate that TSA's costs to provide background check related services under Sec. 520 of the 2004 Homeland Security Appropriations Act (Pub. L. 108-90), include contractor profit/fee as provided under both the FAR and the Transportation Security Administration's Acquisition Management System.

#### E. Missing Criminal Prosecution Disposition Information

States and State associations commented that States will have to play a role in providing to TSA information regarding the disposition of criminal prosecutions that may be missing from FBI records. They noted that FBI records of State criminal offenders are often incomplete, particularly with regards to disposition information. They stated that as a result, TSA will need to call upon State courts and criminal justice agencies to provide that information, which could impose considerable burdens on States. They argued that TSA should compensate States for providing this information.

The Hazmat Program Rule provides HME applicants an opportunity to submit evidence of the final disposition of a criminal case in those instances where disposition information is missing or unresolved. Thus, the burden of demonstrating that an open offense or warrant is not disqualifying is placed on

<sup>30</sup> Department of Homeland Security Appropriations Act, 2004, section 520, Pub. L. 108-90, October 1, 2003, 117 Stat. 1156 (6 U.S.C. 469) (2004 Appropriations Act).

<sup>31</sup> *Id.*

the HME applicant rather than State authorities. TSA recognizes there may be instances in which an applicant may seek information on an open disposition by turning to State agencies for assistance, and that this may result in costs to State agencies in looking up old records for missing dispositions. Nothing in the Hazmat Program Rule or this final rule prevents States from recovering those costs from HME applicants, if they are authorized to do so under their own State law.

#### *F. Impact of Fees on Drivers and Small Businesses*

Several commenters stated that the total amount of the fees would have a substantial negative impact on the availability of drivers qualified to transport hazardous materials. They argued that the trucking industry is already experiencing a shortage of qualified drivers, and that the proposed fees would exacerbate that problem. They also argued that any substantial reduction in the number of qualified drivers will have a detrimental impact on the trucking industry as a whole, and an even more pronounced impact on small businesses (especially small rural businesses) because small businesses are less able to reimburse drivers for the cost of obtaining an HME. They believe that TSA has failed to meet its obligation under the Regulatory Flexibility Act (RFA) to ensure that small businesses are not substantially burdened by Federal regulations.

TSA considered all of the requirements of the RFA in this rulemaking. TSA responds to comments on compliance with the RFA in the Regulatory Flexibility Determination section below and in the separate Regulatory Analysis document provided to the docket. With respect to this specific comment, TSA notes that the expected reduction in HME holders is not likely to have a significant impact on businesses that depend on qualified hazmat drivers. It is anticipated that most of the drivers who will allow their HME to lapse as a result of this final rule rarely transport hazmat. See Section V. "Hazmat Driver Population" of the final rule for more discussion of the anticipated reduction in HME holders.

#### *G. Allowing States To Collect Fingerprints and Applicant Information*

Industry associations requested that TSA reconsider its decision to allow States to collect fingerprints and applicant information, and to charge a fee for those services. They noted that States, under State fee authority, could charge higher fees for those services than the Information Collection Fee

proposed in the Fee NPRM. They argued that there is no security reason to allow for such State participation in a Federal program. They also claimed that a nationwide Federal fingerprint and applicant information collection system would be less expensive than the proposed joint Federal-State collection system because a higher volume of applicants would reduce costs. They suggested that TSA establish only one fee for fingerprint and information collection nationwide.

TSA notes that although the hazmat program is mandated by Federal law, the State is the licensing body for drivers who are State residents, and the State has both authority and a clear interest in licensing standards. Regulation of commercial drivers has traditionally been a combined State-Federal effort. While the Federal Government sets minimum standards, including through Federal Motor Carrier Safety Administration (FMCSA) and TSA rules, States are responsible for most activities in determining that applicants qualify, and for issuing licenses.

TSA considers States to be essential partners in the hazmat program, and some States have infrastructure in place that can help implement the hazmat program and a desire to do so. Because States want to perform this function, and to preserve strong State-Federal relationships in this area, TSA will not prevent States from choosing to collect fingerprints and applicant information in accordance with the Hazmat Program Rule.

#### *H. Performance Standards for TSA Agents*

Industry associations commented that an HME applicant's costs of providing information and fingerprints to a TSA agent could vary depending on the proximity of the agent to the applicants, the agent's hours of operation, and the tolerance allowed for agent error. They argued that this could cause delays in the HME application approval process, which would negatively impact the trucking industry as well as industries that rely on the trucking industry to supply their customers. They suggested that TSA establish performance standards for TSA agents collecting fingerprints and applicant information.

TSA is mindful of the need to ensure adequate performance standards and oversight in selecting appropriate locations to provide, to the extent possible, a consistent application of service in rural and urban areas. In order to establish the number and type of sites, TSA will take into consideration the overall population,

density of the HME applicant population, geographic dispersion throughout the State, and the urban-rural mix in the State. TSA has developed performance standards for the TSA agent that will collect fingerprints and applicant information in those States that opt for a TSA agent to provide those services, and those performance standards are incorporated into the contract between TSA and the agent. TSA will monitor the program throughout the duration of the contract and determine the need for additional or varied collection sites should the need for service improvement be identified.

#### *I. Hazmat Program Rule*

Many of the comments to the Fee NPRM discussed aspects of the Hazmat Program Rule. For example, trucking industry associations encouraged TSA to ensure that hazmat drivers not be required to undergo multiple threat assessments for different programs, such as the Transportation Worker Identification Credential (TWIC). Labor organizations commented that TSA should require Mexican and Canadian drivers to undergo the same security threat assessments as U.S. drivers. State associations recommended that the security threat assessment include a check of State criminal history records.

Although these comments are directed at aspects of the Hazmat Program Rule, TSA is providing preliminary responses in this final rule. TSA may reexamine these issues when promulgating the final Hazmat Program Rule.

With respect to the concern that hazmat drivers may be subjected to multiple threat assessments, TSA recognizes that there may be overlapping security threat assessment and identification verification requirements for certain transportation workers and is making every effort to minimize duplication. TSA noted this in the preamble of the Hazmat Program Rule, particularly concerning drivers who transport hazardous material for the defense and nuclear industries. TSA invited comment on the issue in the Hazmat Program Rule, and stated that the agency plans to implement an acceptance process for comparable threat assessments that are completed by other agencies or for other purposes. TSA notes that the TWIC program is intended to implement the threat assessment process for workers in all modes of transportation who need unescorted access to secure areas of transportation facilities. TSA plans that once a driver has successfully completed the TSA security threat assessment for an HME, and holds a

current HME, the driver will not be required to undergo a new security threat assessment if TSA requires drivers to obtain a TWIC. TSA will, as appropriate, coordinate with other programs that may affect hazmat drivers to minimize the duplication of threat assessments.

With respect to the suggestion that TSA require foreign drivers to undergo the same security threat assessments as U.S. drivers, TSA regulations at 49 CFR 1572.201 require Canadian drivers who transport explosives from Canada to the U.S. to submit certain information to Transport Canada, which conducts a background check and determines whether the drivers are properly licensed. Drivers who are not listed by Transport Canada as completing these steps are not authorized to enter the U.S. with explosives shipments. Also, TSA checks these names against certain watch lists to determine whether they may pose a threat to security.

TSA will address threat assessments for hazmat drivers from Canada and Mexico in the future. Consultations are ongoing between U.S. and Canadian officials, and DHS intends to begin discussions on this issue with the appropriate agencies in Mexico.

With respect to the suggestion that the TSA threat assessment include a check of State criminal history records, TSA notes that it would be difficult and costly for TSA to conduct an effective search of State criminal history records. Commercial drivers often travel from State to State, making it difficult for TSA to know which State criminal history records to search. TSA also notes that searching State records would add significantly to the cost of the program, which would necessitate an increase in the Threat Assessment Fee. However, TSA notes that the Hazmat Program Rule does not prevent a State from searching its own criminal history records. If a State checks its criminal history records and forward any pertinent information to TSA during an applicant's security threat assessment, TSA will use the information. TSA encourages States to provide such information.

#### *J. Relationship to the TWIC Program*

Industry associations and labor organizations suggested that TSA conduct only name-based security threat assessments without fingerprint-based CHRCs, or defer CHRCs until the TWIC requirements are implemented.

TSA considered conducting only name-based threat assessments. However, the USA PATRIOT Act mandates that TSA conduct a check of relevant criminal history databases, and

TSA believes that a CHRC adds value to a security threat assessment. Thus, TSA believes that it is important to conduct CHRCs as part of the hazmat program security threat assessment.

TSA must require drivers to submit their fingerprints, because, as noted above, the Compact generally requires fingerprints for the purpose of gaining access to criminal history databases for non-criminal justice purposes. However, as the security programs administered by TSA mature, TSA intends to leverage resources and take other steps in an effort to ease the costs and burdens of the programs while maintaining a high level of security.

Commenters were concerned that the TWIC requirements would be duplicative, that is, that drivers who were approved under the hazmat program would need to undergo another threat assessment under the TWIC program. TSA has determined that drivers who are approved under the hazmat program will not have to submit to another threat assessment under the TWIC program. TSA is also considering other alternatives to reduce the time and/or cost of the hazmat threat assessment.

### **III. Summary of the Final 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, in this final rule (final rule or Hazmat Fee Rule) TSA is establishing 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 is establishing the following two new user fees, in addition to the FBI Fee<sup>32</sup> for performing the CHRC on behalf of government agencies for non-governmental applicants: (1) A fee to cover TSA's costs of performing and adjudicating security threat assessments, appeals, and waivers (Threat Assessment Fee); and (2) a fee to cover the costs of collecting and transmitting fingerprints and applicant information (Information Collection Fee).

Under the final rule, a State that opts to collect fingerprints and applicant information itself in accordance with the Hazmat Program Rule is required to: (1) Collect and remit to TSA the Threat Assessment Fee in accordance with the

<sup>32</sup> 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.

requirements of the final rule; and (2) collect and remit to the FBI its user fee (FBI Fee) to perform a CHRC in accordance with established FBI procedures. Nothing in the final rule prohibits 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 for its own costs under TSA's fee authority.

A State that opts to permit a TSA agent to collect and transmit fingerprints and applicant information is not required to collect and remit to TSA *any fees* under this final rule (emphasis added). Rather, a TSA agent will: (1) Collect and remit to TSA the Threat Assessment Fee; (2) collect and keep the Information Collection Fee; and (3) collect and remit to TSA the FBI Fee for forwarding to the FBI. After discussions with the FBI, TSA decided to add a requirement that the TSA agent remit the FBI fee to TSA for forwarding to the FBI, as the FBI intends to bill TSA for the CHRCs the FBI will perform for TSA.

The fees are as follows: Information Collection Fee \$38 (in States where a TSA agent collects fingerprints and applicant information), Threat Assessment Fee \$34, 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.<sup>33</sup> Upon review, if it is found that the fees are either too high (that is, total fees exceed the total cost to provide the services) or too low (that is, total fees do not cover the total costs to provide the services), TSA may propose changes to the fees. In addition, as DHS and TSA identify and implement additional efficiencies across numerous threat assessment and credentialing programs, any resulting cost savings will be incorporated into the fee levels accordingly.

In this final rule, TSA is making the following changes to the Fee NPRM:

- TSA is placing the fee procedures and requirements in 49 CFR part 1572, rather than 49 CFR part 1522. TSA initially intended to have a separate part for fee rules, but has since determined that placing fee rules in the same part as the rules governing the programs that the fees support is easier for stakeholders to locate. Thus, TSA decided to place the Hazmat Fee Rule in the same part as the Hazmat Program Rule.

<sup>33</sup> 31 U.S.C. 3512.

- As noted above in the response to comments, TSA is specifying in the final rule that the driver or the driver's employer is responsible for paying the required fees.

- TSA is changing the name of the main infrastructure support system from the Hazardous Materials Endorsement Screening Gateway (HMESG) to the Screening Gateway. The Screening Gateway is the information system platform that will allow 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. The new name better reflects the mission of this information system platform, which TSA expects may include security threat assessment processing for a variety of threat assessment and credentialing programs in the future, including TWIC, Air Cargo, and Registered Traveler.

- TSA is reducing the estimated number of applicants expected to be processed in the first year by 70,000 to compensate for the effect the of program's phased-in approach. As a result of a population reduction, and without any other changes to the costs, the fee generally would have increased because the costs would have been shared among a smaller population. However, TSA has reduced other expected program costs, and thus various components of the fee, and as a result is able to reduce the total Threat Assessment fee from \$36 to \$34 (despite the decrease in estimated population).

- TSA is removing the costs associated with the use of commercial data sources for terrorist threat analysis. At present, TSA has decided not to employ commercial data sources in the terrorist threat analysis because TSA has not yet concluded that these data sources would significantly augment the threat analysis process. If TSA's experience with the hazmat program indicates that the use of commercial data sources would enhance the security threat assessment, TSA will review the cost implications of adding such data sources. In the Fee NPRM, TSA estimated the cost of using commercial data sources to be \$1.7 million per year (depending on annual applicant volume) for a five-year program lifecycle cost total of \$8.6 million.

- TSA is adding \$1.35 million in start-up costs and approximately \$3 million in costs for years 1 through 5 for system and infrastructure costs and system programming costs. These increased costs include programming modifications to the Screening Gateway that add significant enhancements in adjudication, appeal, and waiver

processing, reduce processing time, and increase flexibility in the workflow.

Thus, the total five-year lifecycle program costs for the information systems cost component category has risen from total five-year cost estimates of \$10.8 million to \$15.1 million (see Figure 2 for a complete listing of cost estimates). Some of these cost adjustments include the following:

- \$400,000 was invested to provide the Screening Gateway the capability to “translate” or read certain State criminal history records.

Additionally, \$75,000 in recurring costs will be required to maintain and support this capability. This will allow the Screening Gateway to more efficiently interpret the results of certain criminal history records and complete a cursory automated screening of information on the applicant. This is a cost-effective solution to translating criminal history records into a format that can be more expeditiously read and processed by the Screening Gateway.

- \$5.9 million was added over the five-year program lifecycle for applicant help desk support services. This will ensure that drivers applying for the TSA threat assessment will be able to check the status of their application, as well as provide information and support during the waiver and/or appeals process.

- Other information system cost estimates have decreased since the Fee NPRM was published. For example, cost estimates have decreased from \$3.1 million to \$1.6 million over five years for the disaster recovery system. TSA has identified existing resources since publishing the Fee NPRM and intends to leverage this advantage to reduce the costs of the disaster recovery system.

- TSA is increasing office-related costs by \$3.9 million over the five-year program. Costs were driven up primarily by a \$3.2 million increase for off-site mail and digitized processing after receiving updated cost estimates, adjusting for a significant increase in anticipated appeals, and a new requirement to notify drivers of a Determination of No Security Threat. In the Fee NPRM, TSA proposed to notify drivers only of negative adjudication results (*i.e.*, determination of threat warranting disqualification). However, in response to States' comments, TSA has decided to notify drivers of all threat determinations (see Figure 2 for a complete listing of cost estimates).

- TSA is decreasing Federal and contractor labor costs by \$6.2 million over the five-year program lifecycle after

receiving more current cost estimates for manpower and off-site processing, additional notifications, and related threat assessment applicant support services. Increases in adjudication costs for increased labor costs of contract and Federal adjudicators and Federal legal support were offset by decreases in Federal and contracting program support (please see Figure 2 for a complete listing of cost estimates). Some of these cost adjustments include the following:

- TSA is adding \$750,000 in costs to pay for interim data entry and communication of adjudication results for those States that did not choose the TSA Agent for the period of February 2005 through July 2005.

To allow sufficient time for States to implement system upgrades, TSA will provide these temporary alternative methods for data transfer to help ensure the volume of applicants can be processed quickly and efficiently.

- TSA is also removing the costs for an Interpol connection and an Interpol Liaison Officer. TSA intends to use Interpol information when appropriate, but at present, TSA has decided to not seek a direct connection to Interpol. If TSA's experience with the hazmat program indicates that a direct Interpol connection with liaison support would enhance the security threat assessment, TSA will review the cost implications of adding such services.

In sum, TSA has reduced the total estimated five-year program lifecycle costs from \$72.42 million to \$65.76 million, a decrease of \$6.66 million. As a result, based on the total estimated costs divided by the total estimated five-year population of HME new applicants, renewals, and transfers, TSA has reduced the Threat Assessment Fee from \$36 to \$34 (\$65.76 million divided by 1,952,000 = \$34).

#### 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.<sup>34</sup> Each State and the District of Columbia submitted to TSA the names of all current (not expired) holders of HMEs.

<sup>34</sup> In July 2004, TSA used HME applicant names and biographical data to conduct threat assessments on all current HME holders. The threat assessment included entering names and biographical data in the National Crime Information Center (NCIC) database and other databases, such as terrorism watch lists. TSA noted its intent to conduct these threat assessments in the May 5 IFR.



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.<sup>35</sup> 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 rarely, if ever, transports hazardous materials.

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 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.<sup>36</sup>

<sup>35</sup> “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.

<sup>36</sup> 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

Industry representatives that TSA contacted 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 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 prediction that there will be 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 since early 2003. A recent TSA survey of certain 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.<sup>37</sup> TSA believes this decline is due, at least in part, to the prospect of 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 further 20 percent decline in the HME

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.

<sup>37</sup> 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. In May 2004, FMCSA reported approximately 2.7 million HME holders in the CDLIS.

holder population resulting from the first year of operations after the Hazmat Program Rule takes effect on January 31, 2005. This is the date when new HME applicants will be required to submit fingerprints, biographical information, and fees. Applicants seeking to renew expiring HMEs will be subject to the fingerprint, biographical information, and fee submission requirements beginning May 31, 2005.

TSA expects to receive a prorated total of 360,000 new and renewal applications in the first year after January 31, 2005.<sup>38</sup> In the second and third years, TSA estimates a 5 percent annual HME population decline each year, 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 fully 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 1.952 million.

<sup>38</sup> Due to the Hazmat Program Rule's May 31, 2005, compliance date for renewals and transfers, 360,000 is the prorated portion of TSA's annual estimation of 432,000 applicants in the first program year. The 432,000-applicant estimate 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.

**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 & Renewals
	2,700,000	NA	NA
1	2,160,000	-20%	360,000*
2	2,052,000	-5%	410,000
3	1,949,000	-5%	390,000
4	1,969,000	1%	394,000
5	1,989,000	1%	398,000
<b>Totals</b>	<b>NA</b>	<b>NA</b>	<b>1,952,000</b>

\* Prorated figure for estimated 432,000 annualized total applicants and renewals, based on May 31, 2005, compliance date for renewal applicants, as detailed in the Hazmat Program Rule.

## 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 have opted to collect and transmit fingerprints and applicant information, and charge a user fee for those services under their own user fee authority. In those States, HME applicants will be required under the final rule to remit to the State, for transmission to the Federal Government, only the Threat Assessment Fee and FBI Fee. Nothing in this final rule prohibits 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 own costs.

A discussion of the three fees 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

required States to choose one of the following two options for collection and transmission of fingerprints and applicant information:

- (1) 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) Allow a TSA agent to collect and transmit fingerprints and applicant information.

#### 1. Cost of Information Collection

As noted above, in those States that have chosen 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 research of both commercial and Government fingerprint and information collection services, as well as a competitive bidding and acquisition process, TSA has concluded that the per applicant cost to collect and transmit fingerprints and other required applicant data electronically is \$38. This also includes the costs for required administrative support, quality control, and chain of custody assurance.

#### 2. Information Collection Fee

Based on the above costs, TSA concludes that the per applicant fee for information collection and transmission will be \$38. 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 to recover the costs of performing these services,

are responsible for establishing their own State fee, in accordance with their State user fee authority and requirements. TSA's 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. TSA will perform all of the threat assessment functions. The threat assessment includes an appeal process for individuals who believe the records on which TSA bases its determination are incorrect. In addition, TSA will administer a waiver process for applicants who seek a waiver of disqualification. Individuals whom TSA has determined 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.<sup>39</sup>

#### 1. Start-Up Costs

TSA's effort to conduct security threat assessments on drivers with an HME will require "start-up" costs and annual "recurring" costs for checks conducted in years after January 31, 2005. The

<sup>39</sup> These threat assessment standards are contained at 49 CFR part 1572.

start-up costs will consist of all the costs associated with start-up activities necessary to implement the program. The start-up costs 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 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 \$4.44 million. This estimate includes: (i) \$4.02 million for all information systems costs, including the development and deployment of TSA's Screening Gateway—an information system platform that will allow 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—as well as related network and communication support costs, including

access to information systems from AAMVA, an adjudication helpdesk system, and support capability to keep applicants informed on the status of their threat assessments; (ii) \$360,000 for contract personnel to perform various program management functions in support of program operations; and (iii) \$60,000 for office costs, including program travel. TSA notes that certain start-up overhead costs that directly support the program, such as those for human resources, most financial systems, accounting and budgeting support costs and TSA executive management time, have not been included in the user fees. 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 360,000 drivers for the prorated first year (due to the phased in approach whereby HME renewal and transfer applicants must comply with TSA's program requirements beginning May 31, 2005). Pursuant to the Hazmat Program Rule, State Departments of Motor Vehicles (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 for performing threat assessments will be \$14.35 million for the first year (*i.e.*, from January 31, 2005 to January 30, 2006) and between \$11.62 million and \$11.86 million per year for the second through fifth years.<sup>40</sup> Recurring costs will include the costs of: continued development and lifecycle maintenance of information systems; disaster recovery infrastructure, 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, and waivers;<sup>41</sup> and office costs, including office space, notification mailing costs, and required program travel. See Figure 2 for additional cost details.

## 3. Threat Assessment Total Costs

Based on its population and cost estimates assumptions, TSA concludes that the total of start-up and the first five years' recurring costs will be \$65.76 million. Recurring costs are not adjusted for inflation. All figures are rounded to the nearest thousand.

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<sup>40</sup> All cost and fee estimates in recurring years are not adjusted for inflation.

<sup>41</sup> 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 or decrease, which would necessitate an adjustment in the Threat Assessment Fee.

<b>Figure 2: TSA Security Threat Assessment Start-Up and Recurring Cost Estimates</b>							
<b>All figures in thousands (000)</b>							
	<b>Start-Up</b>	<b>1st Year</b>	<b>2nd Year</b>	<b>3rd Year</b>	<b>4th Year</b>	<b>5th Year</b>	<b>Total</b>
<b>Estimated Annual New Applicants &amp; Renewals</b>	NA	360	410	390	394	398	1,952
<b>COST COMPONENTS</b>							
<b>Personnel-Federal &amp; Contractor</b>							
Personnel for threat assessments, notifications, waivers & appeals	NA	\$6,640	\$4,522	\$4,409	\$4,409	\$4,522	\$24,502
Personnel for program office	\$360	\$2,361	\$2,001	\$2,001	\$2,001	\$2,001	\$10,725
Personnel for compliance teams	NA	\$518	\$518	\$518	\$518	\$518	\$2,590
Fee processing & analysis	NA	\$132	\$132	\$132	\$132	\$132	\$660
IT support	NA	\$132	\$132	\$132	\$132	\$132	\$660
<b>Personnel - Federal &amp; Contractor Subtotal</b>	<b>\$360</b>	<b>\$9,783</b>	<b>\$7,305</b>	<b>\$7,192</b>	<b>\$7,192</b>	<b>\$7,305</b>	<b>\$39,137</b>
<b>Information Systems</b>							
Screening Gateway Development	\$3,845						\$3,845
Screening Gateway operations, maintenance & connectivity	\$50	\$625	\$625	\$625	\$625	\$625	\$3,175
Disaster recovery site		\$600	\$250	\$250	\$250	\$250	\$1,600
Adjudication helpdesk system & support		\$1,080	\$1,231	\$1,170	\$1,181	\$1,193	\$5,855
Law Enforcement Mgmt. System (LEMS) access & support	\$113	\$50	\$50	\$50	\$50	\$50	\$363
AAMVA system access, connectivity & maintenance	\$12	\$50	\$50	\$50	\$50	\$50	\$262
<b>Information Systems Subtotal</b>	<b>\$4,020</b>	<b>\$2,405</b>	<b>\$2,206</b>	<b>\$2,145</b>	<b>\$2,156</b>	<b>\$2,168</b>	<b>\$15,100</b>
<b>Terrorist &amp; Intel Analyses</b>							
Intelligence analysis services	NA	\$328	\$373	\$355	\$358	\$362	\$1,776
<b>Terrorist &amp; Intel Analyses Subtotal</b>	<b>NA</b>	<b>\$328</b>	<b>\$373</b>	<b>\$355</b>	<b>\$358</b>	<b>\$362</b>	<b>\$1,776</b>
<b>Office</b>							
Communications (applicant data digitization & mailings)	NA	\$1,210	\$1,358	\$1,311	\$1,324	\$1,366	\$6,569
Office facilities (space)		\$439	\$439	\$439	\$439	\$439	\$2,195
Travel	\$60	\$184	\$184	\$184	\$184	\$184	\$980
<b>Office Subtotal</b>	<b>\$60</b>	<b>\$1,833</b>	<b>\$1,981</b>	<b>\$1,934</b>	<b>\$1,947</b>	<b>\$1,989</b>	<b>\$9,744</b>
<b>GRAND TOTALS</b>	<b>\$4,440</b>	<b>\$14,349</b>	<b>\$11,865</b>	<b>\$11,626</b>	<b>\$11,653</b>	<b>\$11,824</b>	<b>\$65,757</b>

#### 4. Threat Assessment Fee Calculation

TSA will charge a fee to recover most of its security threat assessment start-up costs as well as all recurring costs. The start-up costs include non-recurring costs required to perform the 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 five-year period to recover these one-time costs equitably.

This amortization period coincides with the requirement in the FMCSA companion rule<sup>42</sup> to the May 5 IFR<sup>43</sup> that States mandate a five-year maximum renewal period for the HMEs. Thus, a five-year amortization period means the start-up costs will be borne by all individuals who either currently hold an HME or who apply for an HME in that five-year period. TSA notes that the amortization is done by totaling all start-up costs and the five-year annual recurring costs and dividing by 1.952 million requests for a new or renewed HME—the total number expected in the first five 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 \$4.44 million, added to the estimated sum of the first five years' annual recurring costs of \$61.32 million, equal a total of \$65.76 million. These total costs are then divided by the 1.952 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 \$33.69, which is rounded up to \$34 per applicant.

As noted above, States that have chosen to collect and transmit fingerprints and applicant information under the Hazmat Program Rule are still required to collect the Threat Assessment Fee on behalf of TSA and remit it to TSA in accordance with the final rule. In States that have chosen to allow a TSA agent to collect and transmit fingerprints and applicant information under the Hazmat Program Rule, the TSA agent is required to collect this fee on behalf of TSA and remit it to TSA in accordance with the final rule.

#### 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.<sup>44</sup> 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 have opted 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 have chosen 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

In this final rule, TSA establishes the following fees for HME applicants who submit fingerprints and applicant information to a TSA agent:

- (1) Information Collection and Transmission Fee: \$38.
- (2) Threat Assessment Fee: \$34.
- (3) FBI Fee: \$22.

Thus, the total fees for such applicants are \$94.

Under the final rule, in States that have opted to collect and transmit fingerprints and applicant information on their own, HME applicants will be required to pay the \$34 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 will 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 may vary from State to State. Thus, TSA cannot estimate the total fees for such applicants.

#### VII. Section by Section Analysis

TSA did not receive any substantive public comments on the fee collection procedures proposed in the Fee NPRM, and so has made very few revisions to those procedures in the final rule.

Section 1572.301 establishes the applicability of this part and definitions of terms used in this part. This part applies 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 driver's license," "endorsement," and "hazardous materials" are used as defined in FMCSA regulations.

The term "day" is defined as a calendar day.

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

The term "hazardous materials endorsement" is 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" is 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" is defined as a U.S. State or the District of Columbia.

The term "Threat Assessment Fee" is 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" is 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 1572.303 through 1572.399 are reserved.

Section 1572.401 requires 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 § 1572.403. The State also is required to collect and remit to the FBI the FBI Fee in accordance with established FBI procedures. After discussions with the FBI, TSA added this requirement to the final rule because the FBI intends to bill States for CHRCs it will perform in accordance with procedures already established by FBI and the States.

Section 1572.401 also requires a TSA agent that collects fingerprints and applicant information under 49 CFR

<sup>42</sup> 68 FR 23843 (May 5, 2003).

<sup>43</sup> 68 FR 23852 (May 5, 2003).

<sup>44</sup> See Title II of Pub. L. 101-515, November 5, 1990, 104 Stat. 2112, codified in a note to 28 U.S.C. 534.

part 1572 to collect the Information Collection Fee, Threat Assessment Fee, and FBI Fee in accordance with procedures approved by TSA. A TSA agent also is required to remit to TSA the Threat Assessment Fee and the FBI Fee in accordance with procedures approved by TSA.

Section 1572.403 describes the procedures a State is required to follow if the State chooses to collect and transmit fingerprints under the Hazmat Program Rule. Section 1572.403 pertains only to the collection of the Threat Assessment Fee to cover TSA's costs and the FBI Fee to cover the costs of the CHRC.<sup>45</sup> Nothing in this regulation prohibits a State from collecting additional fees, under its own user fee authority, to cover its costs of collecting and transmitting fingerprints and applicant information at the time the State collects the TSA Threat Assessment Fee and the FBI Fee from HME applicants.

Paragraph 1572.403(a) requires States to impose the Threat Assessment Fee and the FBI 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 establishes the TSA Threat Assessment Fee at \$34. Finally, it requires the individual applying for the HME, or that individual's employer, to remit the Threat Assessment Fee and the FBI 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 1572.403(b) requires each State to collect the Threat Assessment Fee and the FBI 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 1572.403(d)(8) provides that TSA does not envision issuing any refunds. Once the application is received by TSA, analysis of the application will commence immediately. Therefore, TSA incurs the costs of performing the analysis immediately. Paragraph 1572.403(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 1572.403(c) establishes 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 are considered to be held in trust for the beneficial interest of the United States. Thus, States are required to safeguard all Threat Assessment Fees collected until they are remitted to TSA. In addition, States are required to account for Threat Assessment Fees separately. However, States are permitted to commingle such fees with other sources of revenue.

Paragraph 1572.403(d) establishes procedures for the remittance of Threat Assessment Fees to TSA. States are required to remit all Threat Assessment Fees collected under this part to TSA on a monthly basis. Every month, TSA will 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 will bill the State \$3400 (100 × \$34). The State is required to pay the invoice in full within 30 days of the date that TSA sends the invoice to the State.

The payments must be remitted to TSA by check, money order, wire, or any other payment method acceptable to TSA in the future. Payments must be made in U.S. currency and made payable to the "Transportation Security Administration." States are 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, which shall not be more than 30 days after the date on which TSA sends the invoice to the State.

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

Section 1572.405 describes the procedures that an HME applicant is required to follow if a TSA agent collects fingerprints and applicant information under the Hazmat Program Rule. Paragraph 1572.405(a) requires an individual applying for an HME, or that individual's employer, 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 establishes the Threat Assessment Fee at \$34, the FBI Fee at \$22, and the Information Collection Fee at \$38.

Paragraph 1572.405(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. A TSA agent will: (1) Collect and remit to TSA the Threat Assessment Fee; (2) collect and keep the Information Collection Fee; and (3) collect and remit to TSA the FBI Fee for forwarding to the FBI.

Paragraph 1572.405(c) requires that fees remitted under this section be remitted to TSA by check, money order, wire or any payment method acceptable to TSA in the future. Payments must be made in U.S. currency and made payable to the "Transportation Security Administration." It also specifies that TSA will not issue any refunds of fees submitted under this section. Finally, it specifies that applications submitted under 49 CFR part 1572 are 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 final 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 are discussed in that rulemaking.

#### **Regulatory Analyses**

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to 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

<sup>45</sup> As noted above, the FBI currently allows States to charge \$24 for the FBI CHRC.

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 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 rule is not economically significant, as neither the costs nor benefits exceed \$100 million annually.

2. This 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.

3. Both threshold tests and a Final Regulatory Flexibility Analysis show the rule will not have a significant direct impact on a substantial number of small entities.

4. The rule will impose no significant barriers to international trade.

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

#### **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 final 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 final rule establishes 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 fees are \$34 (Threat Assessment Fee) and \$38 (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 final rule, which is available for review in the docket of this matter. The regulatory evaluation examines the costs and benefits of the final rule establishing 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 costs that result from the implementation of the Hazmat Fee Rule are the administrative and labor costs related to determining an equitable level for the Transportation Security Administration's threat assessment fee; remitting and processing that fee; and remitting and processing the Federal Bureau of Investigation's criminal history record check fee. The costs identified in this regulatory evaluation are not the costs of completing threat assessments or criminal history record checks. Because those identity vetting procedures are mandated by a

companion interim final rule, titled "Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License" RIN 1652-AA17 (Hazmat Program Rule), the costs of those procedures were catalogued in that rule's attendant regulatory evaluation.

The total administrative and labor costs of the Hazmat Fee Rule, however, are a function of how each State decides to fulfill the requirements of the Hazmat Program Rule. In complying with the Hazmat Program Rule, each State must either collect and forward all fingerprints, applicant information, and fees to TSA and the FBI, or allow an entity approved by TSA to complete these tasks. States were required to notify TSA in writing of their choice by December 27, 2004.

The Hazmat Program Rule was published on November 24, 2004, and 17 States notified TSA that they will opt to collect all requisite fees and applicant information and then pass that information along to TSA and the FBI. In constant 2004 U.S. dollars, the total ten year cost for this aspect of the program is estimated to be approximately \$900,000.

The remaining 34 States will allow a TSA-approved agent to perform all required fingerprint, fee and information collection duties. For this aspect of the program, the ten-year cost of the Fee Rule is estimated to be \$1.3 million. The total ten-year cost for this final rule, therefore, is estimated to be \$2.2 million in constant 2004 U.S. dollars. Discounted, the rule is estimated to cost \$1.6 million over the ten-year horizon.

Two summary tables provide an overview of the cost estimates. See Figures 2 and 3. A detailed discussion of the cost estimates can be found in the Cost of Compliance Section of this evaluation.

**Figure 3. Summary of Costs, Constant 2004 US Dollars**

Year	State Costs	TSA Costs	Total <sup>1</sup>
2005	\$125,800	\$131,600	\$257,400
2006	\$45,900	\$131,600	\$177,500
2007	\$125,800	\$131,600	\$257,400
2008	\$45,900	\$131,600	\$177,500
2009	\$125,800	\$131,600	\$257,400
2010	\$45,900	\$131,600	\$177,500
2011	\$125,800	\$131,600	\$257,400
2012	\$45,900	\$131,600	\$177,500
2013	\$125,800	\$131,600	\$257,400
2014	\$45,900	\$131,600	\$177,500
<b>Total<sup>1</sup></b>			<b>\$2,200,000</b>

Source: TSA calculations.

<sup>1</sup>Totals may not sum due to rounding.

**Figure 4. Summary of Costs, Discounted 2004 US Dollars<sup>1</sup>**

Year	State Costs	TSA Costs	Total <sup>2</sup>
2005	\$125,800	\$131,600	\$257,400
2006	\$42,900	\$123,000	\$165,900
2007	\$109,900	\$114,900	\$224,800
2008	\$37,500	\$107,400	\$144,900
2009	\$96,000	\$100,400	\$196,400
2010	\$32,700	\$93,800	\$126,500
2011	\$83,800	\$87,700	\$171,500
2012	\$28,600	\$82,000	\$110,600
2013	\$73,200	\$76,600	\$149,800
2014	\$25,000	\$71,600	\$96,600
<b>Total<sup>2</sup></b>			<b>\$1,600,000</b>

Source: TSA calculations.

<sup>1</sup>A 7% discount rate was used in this analysis

<sup>2</sup>Total may not sum due to rounding

### Benefits

There are several qualitative benefits realized from the implementation of the Hazmat Fee Rule. Primarily, the Hazmat Fee Rule provides a funding mechanism for the Hazmat Program Rule, which regulates the population of drivers with hazardous materials endorsements. By creating a set of fees, TSA ensures that the cost of regulation is not the sole responsibility of the Federal Government. TSA determined that creating a fee rule was the most efficient and cost effective way to fund the aforementioned Hazmat Program Rule.

### Final Regulatory Flexibility Assessment

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 determined that this final rule will not have a significant economic impact on a substantial number of small entities.

An analysis of the rule's impact on small entities, as well as responses to comments on the analysis that TSA prepared for the Fee NPRM, is contained in the Final Regulatory Evaluation, which is available in the docket of this rulemaking. Based on that analysis, TSA has determined that the rule will have an impact on a substantial number of small entities. However, TSA has determined that the impact on entities affected by the rule will not be significant. Accordingly, TSA hereby certifies that this rule will not have a significant economic impact



on a substantial number of small entities.

### 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 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 rule will 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.

### 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 have only a domestic impact and therefore no effect on any trade-sensitive activity. This final rule will impact only individuals applying for a State-issued HME, not individuals with an HME issued by Canada or Mexico. As noted above, TSA has implemented a program for Canadian drivers who transport explosives into the U.S. TSA is also consulting with Canada and Mexico on requiring threat assessments for Canadian and Mexican drivers who transport hazmat into the U.S., and will continue to do so. TSA will also 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 final rule under the principles and criteria of Executive Order 13132. TSA notes that various statutes mandate the requirements of this final rule, 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 will 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 will not have federalism implications. However, TSA determined that the Hazmat Program Rule has federalism implications.<sup>46</sup> In the preamble of the Hazmat Program Rule, TSA noted that both TSA and FMCSA coordinated with the States in the development of the rule.

### 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 will not have a significant effect on the human environment. The final rule will only implement a fee structure for commercial drivers who transport hazardous materials, and thus will 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). TSA has determined that this rulemaking is not a major regulatory action under the provisions of the EPCA.

### List of Subjects in 49 CFR Part 1572

Fees, Commercial driver's 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, as follows:

#### Subchapter D—Maritime and Land Transportation Security

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

■ 1. The authority citation for part 1572 is revised 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).

■ 2. Add new subparts D and E to part 1572 as follows:

#### Subpart D—Fees for Security Threat Assessments for Individuals

Sec.  
1572.301 Scope and definitions.  
1572.303–1572.399 [Reserved]

#### Subpart E—Fees for Security Threat Assessments for Hazmat Drivers

1572.401 Fee collection options.  
1572.403 Fee procedures for collection by States.  
1572.405 Fee procedures for collection by TSA agents.

#### Subpart D—Fees for Security Threat Assessments for Individuals

##### § 1572.301 Scope and definitions.

(a) *Scope.* This part applies to:  
(1) States that issue a hazardous materials endorsement for a commercial driver's license;

(2) Individuals who apply for or renew a hazardous materials endorsement for a commercial driver's license and must undergo a security threat assessment under 49 CFR part 1572; and  
(3) Entities who collect fees from such individuals on behalf of TSA.

(b) *Terms.* As used in this part: *Commercial driver's 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

<sup>46</sup> See 69 FR 68741 (November 24, 2004).

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 driver's 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.

#### §§ 1572.303–1572.399 [Reserved]

### Subpart E—Fees for Security Threat Assessments for Hazmat Drivers

#### § 1572.401 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 § 1572.403. The State also must collect and remit the FBI Fee in accordance with established procedures.

(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 procedures approved by TSA;

(2) Transmit to TSA the Threat Assessment Fee in accordance with procedures approved by TSA; and

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

#### § 1572.403 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 a new HME or renewal of an existing HME for a CDL in that State, must follow for collection and transmission of the Threat Assessment Fee and the FBI Fee.

(a) *Imposition of fees.* (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 a new HME or renewal of an existing HME: \$34.

(2) 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.

(3) An individual who applies for a new or renewed HME, or the individual's employer, must remit to the State the Threat Assessment Fee and the FBI 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 and FBI Fee when an individual submits an application to the State for a new HME or renewal of an existing 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 a new HME or renewal of an existing 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 in U.S. currency and made payable to the "Transportation Security Administration."

(7) Threat Assessment Fees must be remitted by check, money order, wire or any other payment method acceptable to TSA.

(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.

#### § 1572.405 Fee procedures for collection by TSA agents.

This section describes the procedures that an individual who applies for a new HME or renewal of an existing HME for a CDL must follow if a TSA agent collects and transmits the Information Collection Fee, 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: \$38.

(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 a new HME or renewal of an existing HME: \$34.

(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, or the individual's employer, 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 made in U.S. currency and made payable to the "Transportation Security Administration."

(2) Fees required under this section must be remitted by check, money order, wire or any other payment method acceptable to TSA.

(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.

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