What To Do When
The DOT Hazardous Materials Inspector Comes Calling

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This document was composed by members of the COSTHA Dangerous Goods Supply Chain Logistics Transportation Panel.

The information contained in this document does not constitute professional advice on this subject matter and does not imply any endorsement by COSTHA.

This document is a high-level guidance document and does not constitute advice by COSTHA. There is no guarantee given that the information provided is correct, complete, and/or up to date.

Anyone with questions regarding the proper way to manage an inspection should consult a qualified professional and/or legal counsel.

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Checklist:

What To Do When the DOT Hazardous Materials Inspector Comes Calling or Visits

Before an inspection all companies should establish and define procedures for dealing with visits to a company site(s) by any regulatory inspector (i.e., FMCSA, FAA, EPA, OSHA, etc.).

Immediate Actions:
At a minimum, when an inspector arrives immediately do the following:

- **Identify the inspector.**
  - Ask to see credentials.
  - Write down the relevant information including the inspector's name, agency affiliation, address, telephone number, fax number, email, and the statutory authority under which the inspection is being conducted. Request a business card. The card should bear the agency's logo.

- **Notify the appropriate company official responsible** for interacting with the inspector. This should be someone at a supervisory level and/or the subject matter expert. If the designated employee is unavailable, you may be able to convince the investigator to return on a more convenient date and/or time.

- **Determine the scope of the inspection:** Ask the inspector to identify those company activities of particular interest to the inspector. The inspection usually has a specific purpose and asking this question can better prepare you for what will follow. It may also serve to narrow the scope of the inspection.

- **Advise legal counsel** of the presence of the inspector.

- **Take notes** on what is seen, what is said, by whom, and whether any samples or copies of documents are taken. If the inspector takes photographs, you should take photographs of the same thing. Make sure your legal representative gets copies of all documents requested by the inspector.

- **When in doubt about any question posed by the inspector, do not answer.** Communicate to the inspector that you do not understand the question and ask the inspector to put the question in writing, addressed to your company counsel or designated contact. Provide them with the contact information for the company's legal counsel.

- **Prepare a memo** on the inspection specifics to file describing the visit as soon as the inspector leaves. Include all relevant details of the inspection, copies of documents produced or requested, etc.

Introduction

This booklet describes the process of hazardous materials transportation investigations and regulatory enforcement. It describes what regulations are being enforced, who is authorized to do it, how the process works, and what the company should do to protect its rights throughout the process.

The federal hazardous materials regulations are issued by the United States Department of Transportation (DOT) and appear in Title 49 of the Code of Federal Regulations (CFRs), Parts 100-185. These requirements are issued under the authority of the Hazardous Materials Transportation Act (HMTA), found in Title 49 of the United States Code (USC), Sections 5101 and following. Look particularly at Sections 5121-5124.

In addition to the federal government, most States and many city governments have adopted all or part of the DOT hazardous materials regulations. While their requirements may be virtually the same, enforcement processes may be different. In most States and cities, hazardous materials regulatory enforcement is adapted to fit a pre-existing enforcement scheme, often one comparable to criminal traffic offenses. The description of the federal procedures in this booklet will give some guidance on dealing with State and local enforcement of the same regulations, but if the prosecution is being conducted by non-federal authorities, it is essential that the company obtain a copy of the State or local laws to determine their rights during the process.

Who Is Regulated?

The DOT / Hazardous Materials Regulations (HMR) apply to hazardous materials shippers, carriers, and packaging (container) suppliers/manufacturers.

Per 49 CFR §171.1, Applicability of Hazardous Materials Regulations to persons and functions:

Federal hazardous materials transportation law (49 U.S.C. 5101 et seq.) directs the Secretary of Transportation to establish regulations for the safe and secure transportation of hazardous materials in commerce, as the Secretary considers appropriate. The Secretary is authorized to apply these regulations to persons who transport hazardous materials in commerce. In addition, the law authorizes the Secretary to apply these regulations to persons who cause hazardous materials to be transported in commerce. The law also authorizes the Secretary to apply these regulations to persons who manufacture or maintain a packaging or a component of a packaging that is represented, marked, certified, or sold as qualified for use in the transportation of a hazardous material in commerce. Federal hazardous material transportation law also applies to anyone who indicates by marking or other means that a hazardous material being transported in commerce is present in a package or transport conveyance when it is not, and to anyone who tampers with a package or transport conveyance used to transport hazardous materials in commerce or a required marking, label, placard, or shipping description.

The term shipper includes any person who conducts any activities to prepare a hazardous material for transportation (including classification, packaging, marking, labeling, and documentation), or who offers it to a carrier or otherwise offers the material into transportation. As such, the term shipper can include several different people and organizational entities, such as warehousemen, freight forwarders, and brokers. A synonym for shipper often used by DOT is offeror. In 49 CFR §171.8, see Person Who Offers or Offeror.

In 49 CFR §105.5, Person is defined as: *An individual, firm, co-partnership, corporation, company, association, or joint-stock association (including any trustee, receiver, assignee, or similar representative); or a government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports a hazardous material to further a commercial enterprise or offers a hazardous material for transportation in commerce. Person does not include the following:*

(1) The United States Postal Service.

(2) Any agency or instrumentality of the Federal government, for the purposes of 49 U.S.C. 5123 (civil penalties) and 5124 (criminal penalties).

(3) Any government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports hazardous material for a governmental purpose.

A person who performs a function subject to the HMR must meet the rules applicable to that function, such as selecting a package or blocking and bracing the load. Also see 49 CFR §171.8, Pre-transportation function.

In 49 CFR §171.8, carrier is defined as "*a person who transports passengers or property in commerce by rail car, aircraft, motor vehicle, or vessel*".

The term packaging supplier includes anyone engaged in the manufacture or remanufacture of any hazardous materials non-bulk, intermediate bulk, or bulk packaging, or in its reconditioning, testing, retesting, or marking, if that packaging is sold or represented as being appropriate for hazardous materials shipments.

Many companies also fall within the DOT hazardous materials regulations because they ship, or transport hazardous wastes or hazardous substances as identified by the U.S. Environmental Protection Agency (EPA). EPA generally has agreed with DOT, through a memorandum of understanding (MOU), that DOT will be the primary agency involved in the enforcement of rules applicable to the transportation of these materials, but EPA also may bring an enforcement action.

Some differences in regulatory terminology should be recognized, particularly when dealing with EPA and the hazardous waste regulations. EPA calls the person responsible for the creation of hazardous waste a "generator." This includes any person who produces a waste material or makes the decision that a material shall be discarded. The role of a hazardous waste generator becomes that of a DOT hazardous materials shipper when the waste is offered for transportation. Generator requirements appear in 40 CFR Parts 261 and 262.

EPA calls carriers of hazardous waste "transporters," and each transporter is assigned a registration number by that agency or State agencies. Federal transporter requirements are published in 40 CFR Part 263.

What Materials Are Regulated?

Hazardous materials are defined in the Hazardous Materials Transportation Act (HMTA) and Hazardous Materials Regulations (HMR) as those which because of their dangerous characteristics and, in the judgment of the Secretary of Transportation, are in a particular amount and/or form that may pose an unreasonable risk to health and safety or property when they are transported in commerce. They include explosives (Class 1); gases (Class 2); flammable liquids (Class 3); flammable solids, spontaneously combustible materials, and water reactive materials (Class 4); oxidizers and organic peroxides (Class 5); poisons and infectious substances (Class 6); radioactive materials (Class 7); corrosive materials (Class 8); and miscellaneous hazardous materials, including lithium batteries, hazardous wastes, hazardous substances designated by the Environmental Protection Agency (EPA) and marine pollutants (MARPOL) designated by the International Maritime Organization, as potentially threatening to the environment but that do not otherwise fall into Classes 1-8 (Class 9). Remember that virtually all sizes and quantities of hazardous materials are regulated to some degree even though they may qualify for exceptions.

Hazardous Wastes

Hazardous wastes are defined by EPA under the Resource Conservation and Recovery Act (RCRA), Title 42 United States Code, Sections 6901 and following. These materials may be listed specifically by chemical name, or by the industry or chemical reaction that generates them. They also may be defined generically by hazard characteristics. EPA regulates waste materials that are ignitable, corrosive, reactive, or fall within an EPA-defined toxicity characteristic listing procedure (TCLP). EPA's hazard characteristics are similar to DOT's hazard classifications, but they are not identical. It is essential to look at the EPA's definitions and requirements in 40 CFR Parts 260 and 261 when identifying wastes. It is also essential to understand the export requirements if importing or exporting such cargoes. Refer to https://www.epa.gov/hw/hazardous-waste-transportation.

Hazardous Substances

The term "hazardous substance" has two EPA definitions. The first group of hazardous substances were designated many years ago as water pollutants under the Clean Water Act. The second and much broader group were designated under Superfund, also known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in Title 42 United States Code, Section 9601 and following. These include various water pollutants, air pollutants, hazardous wastes, materials against which action has been taken under the Toxic Substances Control Act (TSCA), and others that EPA may add to the list. Look for the list in 40 CFR Part 302. When DOT refers to a hazardous substance, it is using the CERCLA definition and the list in 40 CFR Part 302.

EPA-defined materials are regulated in all phases of their handling, including transportation. As noted above, DOT and EPA (as well as State and local governments) may get involved in enforcement of these transportation regulations, but it is most likely that the federal inspector for transportation will be from some department or agency within the DOT or the USCG.

Marine Pollutants (MARPOL)

These materials have been identified or meet the classification criteria defined by the International Maritime Organization (IMO) and are part of the International Maritime Dangerous Goods Code (IMDG). The manufacturer of the chemical substance makes the determination based on testing requirements identified in the Globally Harmonized System (GHS). Marine Pollutants are regulated in virtually all package sizes when transported by water, although there are exceptions for small quantities, see 49 CFR 171.4. In the United States, under 49 CFR these materials also are regulated in bulk quantities when shipped by highway, rail or air. See Appendix B to 49 CFR §172.101, and section §172.322 for the Marine Pollutant mark which must be used to identify marine pollutants when required by the regulations.

What Are the Basic Requirements?

Shippers, carriers, and packaging suppliers must train, test, and certify their "hazmat employees" who directly affect hazardous materials transportation, or who are responsible for the company's regulatory compliance. See 49 CFR Part 172, Subpart H.

In addition, a shipper of hazardous materials has the obligation to know when a hazardous material is being shipped, to identify that material as hazardous, and to assign it to the proper hazard class and Packing Group, as appropriate. The shipper must also determine the proper shipping name and UN or North American (NA) identification number for the material and, based on this information, must select the proper packaging, marking, labeling, documentation, and placarding for the shipment, given the quantity and mode(s) of transportation that are utilized. Shipping papers must be certified (except in private carriage), and must include Emergency Response Information, and an emergency contact telephone number that is monitored at all times the material is being transported, including transportation incidental to storage (49 CFR §172.604).

If the material being shipped is an EPA-defined hazardous waste or hazardous substance, or a marine pollutant (MARPOL), particular marking and documentation requirements also apply. For example, a reportable quantity of a hazardous substance designated by EPA and regulated by DOT would require marking the letters "RQ" on the package and entering those letters as part of the description on shipping documents. For wastes, the shipping document required by §172.205 is called a Uniform Hazardous Wastes Manifest (EPA Form 8700-22) and must have information on it prescribed by both agencies. States may require some additional hazardous waste manifest information.

A carrier is only authorized to accept materials that have been properly prepared for transportation, and the carrier is required to ensure that the shipping documents, if any, are in order. The carrier must handle the shipment safely, load it on the vehicle or vessel in accordance with general segregation requirement as covered in 49 CFR Part 176 subpart D and Part 177 subpart C and minimize risks during handling and deliver the cargo without unnecessary delay to the next carrier or the consignee. The carrier is also obligated to meet certain operational/modal requirements which, are prescribed in Parts 174 to 177 of 49 CFR.

Any person in physical possession, including carriers, have specific spill reporting and clean-up responsibilities under the DOT and EPA regulations. In addition, the carrier (transporter) has certain obligations regarding the hazardous waste manifest.

Container suppliers must manufacture, remanufacture, or recondition packaging to the DOT and/or UN performance-oriented packaging standards. These criteria are very detailed, as set forth in DOT specifications or UN performance standards, 49 CFR Parts 178, as well as general requirements as covered in 49 CFR §173.24,

173.24a, 173.24b, 173.27, and 173.28. There also are on-going maintenance, repair, and retesting requirements for reusable packagings in Parts 173 and 180. It is important to recognize that the critical responsibility for use of correct packaging rests with the shipper, particularly regarding the compatibility of the product with the packaging that is selected. Packaging manufacturers and carriers who provide containers (including cargo tanks) may not have the technical expertise to judge the compatibility of that packaging relative to the properties of the product or material the shipper will put in it. The material's Safety Data Sheet (SDS) may provide additional guidance regarding compatibility based on hazardous characteristics.

Who Enforces the Regulations?

The regulations may be enforced by DOT personnel through PHMSA, or the modal agencies FRA, FAA, FMCSA and the USCG, under the Department of Homeland Security (DHS), or by State or local government authorities. In addition to PHMSA, DOT is made up of three modal agencies, each of which is vested with some regulatory enforcement authority.

The **Pipeline and Hazardous Materials Safety Administration** (PHMSA) adopts the regulations and enforces the Hazmat registration program and regulations applicable to makers, reconditioners, and re-testers of packaging, as well as holders of special permits and approvals. They also have authority to enforce regulations applicable to shippers who use multiple modes of transportation.

- The **Federal Railroad Administration** (FRA) deals with rail carriers, tank car manufacturers and repair shops, and shippers primarily of tank car quantities of hazardous materials.

- The **Federal Aviation Administration** (FAA) deals with operators of aircraft, including corporate aircraft, and with anyone who offers hazardous materials for air transport or carrying such material onto an airplane, including passengers who put hazardous materials in carry on or checked baggage.

- The **Federal Motor Carrier Safety Administration** (FMCSA) enforces the regulations applicable to motor carriers of all types and sizes, makers of cargo tanks, and companies shipping hazardous materials by highway. This Administration adopts and enforces the Federal Motor Carrier Safety Regulations, 49 CFR Parts 380-399.

The **Department of Homeland Security** (DHS) has the following agencies that are involved in regulating transportation:

- The **Transportation Security Administration** (TSA) is responsible for security regulations across all modes of transportation. They have authority to conduct investigations, hold hearings, issue subpoenas, require the production of relevant documents, records, and property, and take evidence and depositions.

- The **United States Coast Guard** (USCG) deals with water carriers and shippers of hazardous materials by water, both in bulk and in packaged form, and have jurisdiction on intermodal transportation within a 50-mile radius of any designated port or waterfront facility.

Each of these enforcement bodies, although implementing the same statute, does so in a somewhat different way and follows different procedures, and so it is important to discuss them separately.

Pipeline and Hazardous Materials Safety Administration (PHMSA)

PHMSA's enforcement staff devotes attention to packaging manufacturers, reconditioners, retest facilities, and shippers. These include companies involved with the design, testing and fabrication of fiberboard boxes, drums, cylinders, intermediate bulk containers (IBCs), and portable tanks. PHMSA also enforces regulations involving special permit and approval holders. PHMSA does some shipper inspections and enforcement and is also involved with regulatory development and outreach efforts and hazmat registration issues.

PHMSA inspectors are based in Washington, D.C. and in regional field offices. PHMSA utilizes the contract services of a package testing laboratory in Tobyhanna, Pennsylvania, and usually will use test reports from this lab in enforcement cases involving packaging. All enforcement actions by PHMSA are handled through PHMSA Headquarters in Washington, D.C. and, if contested, will involve the office of the PHMSA Chief Counsel.

Federal Railroad Administration (FRA)

This group within DOT, uses field staff to enforce a wide range of railroad safety requirements adopted over many years under a variety of statutes, including the Railroad Safety Act. Hazardous materials enforcement is only one element of their inspection role. Their enforcement actions against rail carriers, therefore, may have multiple statutory bases. A typical hazardous materials infraction by a rail carrier may relate to improper car placement in a train, such as when certain hazardous materials cars are placed too close to the engine or certain other hazardous materials cars.

FRA Inspectors also conduct inspection and enforcement activities on packaged hazardous materials within rail cars, tank cars or within freight containers transported on rail cars such as flat cars and stack trains.

FRA inspectors are based regionally and are responsible for inspecting rail yards and shipper facilities where tank cars and cargo transport units may be awaiting filling, or loaded cars may be in transit, including intermodal carriage, or awaiting rail carrier pick-up.

The field inspector who finds violations often will take the first step of advising the staff person of the company in writing of his findings as a "Notice of Probable Violations." This advice is, in essence, a warning. It means at least two things – first, the warning is going into the company's file for potential enforcement action later and, second, it means the inspector will return to determine whether corrective actions have been taken. If they have not, enforcement action usually is initiated. Enforcement cases following a single visit are becoming more common with issuance of "Notice of Violation with Proposed Penalty." Cases generally are prepared by FRA inspectors, and include copies of earlier correspondence,

photographs, and other documentation of the violations. For the most part, FRA hazardous materials enforcement actions are processed through the FRA Chief Counsel's office in Washington, D.C.

Enforcement is usually conducted through the local Captain of the Port offices where the cargo is located, and Washington Headquarters is seldom involved, unless a catastrophic incident has occurred.

In recent years the USCG has been participating in Multi-Agency Strike Force Operations (MASFO) which are often conducted on routes where multimodal transport takes place.

Federal Aviation Administration (FAA)

FAA inspectors are located at principal airports throughout the country and conduct their examination of air carriers' operations and shippers' cargo that may be present at that site. They also visit air freight forwarder facilities on airport grounds. FAA inspectors often are called to express package carrier facilities to observe packages that are loading or otherwise appear to be hazardous materials prepared improperly for air transportation. Air carriers are required by regulation to notify the FAA when violations of the HMR and/or the International Civil Aviation Organization (ICAO) are discovered in air shipments. The FAA's hazardous materials cases are developed in the regions, but also may be prosecuted through the FAA Chief Counsel's office in Washington, D.C.

Here is a basic breakdown of what to expect during a shipper, freight forwarder, or repair station inspection: SafeCargo for Shippers & E-Commerce / Why Am I Being Inspected? / The Inspection Process.

Federal Motor Carrier Safety Administration (FMCSA)

FMCSA operates regionally, enforcing hazardous materials and motor carrier safety regulations. As with other modes, inspectors have broad carrier safety responsibilities in addition to assuring hazardous materials compliance. FMCSA inspectors are concerned primarily with truck safety, so they spend time at common carrier terminals, truck stops, weigh stations, and facilities of larger private carriers. Violations observed involving a shipper's freight may be tracked back to the shipper.

FMCSA inspections and enforcement actions are based on defined risk categories for truck safety. Several programs operated through the FMCSA website can be utilized by companies to demonstrate their safety records, field tests, and safe driving records. The more violations a carrier has, the more likely they will be chosen for an inspection.

It should be noted that inspectors do not have authority to stop a moving vehicle, so they usually conduct roadside inspections at stopping points such as weigh

stations. Very frequently their inspections are performed in conjunction with State law enforcement personnel, such as the highway patrol.

With the growing number of State and local personnel engaged in motor carrier safety and hazardous materials regulatory enforcement, in the highway mode the inspector may not be a federal employee. The inspector may be acting under the provisions of a cooperative agreement with FMCSA, or under the authority of specific State or local law that adopts the DOT regulations and may be federally funded. FMCSA enforcement of hazardous materials generally is handled through the regional counsels' offices.

United States Coast Guard (USCG)

The Coast Guard's hazardous materials enforcement responsibilities are carried out in conjunction with the HMR and other laws and regulations governing safety of life at sea (SOLAS). Inspectors are assigned by the Captain of the Port in the area in question, and they focus on the cargo and on water carriers' handling of that cargo. These are known as Port State Control (PSC) inspectors.

Coast Guard personnel are unlikely to visit a shipper facility outside the port area. Shipper cases usually involve correspondence following the Coast Guard's examination of the shipper's freight in the port area or aboard a vessel. Note that containers may be placed on hold by the USCG at port or terminal facilities, which will warrant immediate corrective action.

Civil Versus Criminal Prosecution

The enforcement mechanism for hazardous materials violations is found in Title 49 U.S. Code (USC) Sections 5122-5124. Parallel provisions appear in the Federal Aviation Act. The term "civil" in this context is used to distinguish administrative penalties from the criminal provisions discussed below.

DOT's civil penalty or civil forfeiture program is administered entirely within the various parts of the agency, without the involvement of the court system or the Justice Department unless it is necessary for the government to initiate a collection action. Section 5123 of the statute declares civil penalties applicable to persons who "knowingly violate" a provision of the Hazardous Materials Transportation Act, or an order or regulation issued under the HMTA. This provision often misleads companies that get a DOT civil penalty letter, because they think they are being accused of intentional violation. It is important to look at the definition of "knowingly" in this statute:

A person acts knowingly when –

A. the person has actual knowledge of the facts giving rise to the violation; or

B. a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

If a person is in possession of his senses, it is likely that he is aware of his direct acts. If those acts happen to violate the law, liability ensues. Arguments over knowledge of the law generally are fruitless. If, however, the person did not know the shipment involved a hazardous material (such as a carrier who had not been so advised by a shipper), lack of knowledge may be a valid defense.

Under the civil penalty procedures, the agency determines the amount of the penalty that could be assessed, and in discussions with the company involved, an effort is made to agree on the figure that will be assessed (compromise). In determining the amount of the penalty, the agency must take into account the degree of culpability and assess the nature, circumstances, extent, and gravity of the violations committed and, with respect to the person found to have committed such violation along with any history of prior offenses, ability to pay, effect on ability to continue to do business, and other matters as justice may require.

It is essential to consider at the outset whether one should request a hearing. See Hearings, below. Whether handling the matter informally or engaging in settlement discussions with agency personnel, several subject areas should be covered:

1. ***Any factual discrepancies***. Are all the agency's allegations accurate? If not, provide proof of the inaccuracy.

2. ***Any interpretive discrepancies***. Does the inspector read the requirement in a manner different than the company? If so, the company should take

the steps to verify the soundness of its position. This may involve discussions with trade associations and other companies in the business. Expert advice may be necessary. The company's efforts also may involve discussions with the drafters of the regulation within the agency (who are separate and distinct from those who enforce it). Legislative and regulatory interpretation is very much a historical function and a legal one, and a review of the originating documents for the rule in question can be very revealing.

3. ***Any mitigating factors***. This can include actions by third parties, unauthorized actions by employees or agents, weather, or other unusual circumstances not likely to be repeated.

4. ***Past record***. If this is the first offense by the company raised before the enforcing agency, this clean compliance record should be emphasized. A good safety record and program also should be stressed.

5. ***Financial hardship***. The law compels DOT to consider the economic impact of the penalty, but as a factual matter it is difficult for DOT to assess such matters independently. It is in the interest of any alleged violator to bring financial hardship to the attention of the enforcing agency as early as possible, to reduce or to eliminate the penalty. If this is done, be prepared to submit certified financial statements to substantiate a claim of economic hardship.

6. ***Corrective action***. Here is where the greatest emphasis should be placed. Regardless of mitigating circumstances and the like, the most effective means to achieve a reasonable compromise is to assure the agency that the infraction will not be repeated. This involves establishing or revising your safety program(s) which provides a level of confidence of adequate quality controls to preclude mistakes from getting out the door. The better this aspect of the presentation, and the more forcefully it is presented by high officials in the company who are authorized and committed to make it effective, the more successful it will be.

If, after consideration of any mitigating circumstances and the negotiations with the alleged violator, no mutually acceptable penalty figure is determined and the company refuses to pay the amount demanded by the agency, the agency may ask the Justice Department, through the U.S. Attorneys, to bring a collection action in a federal district court. Traditionally, the U.S. Attorney's office also is capable of compromising the penalty, but the agency discourages settlement flexibility at this stage since getting a "better deal" from the Justice Department would tend to make alleged violators less inclined to reach a compromise at the DOT level.

The final determination of a penalty, either through litigation or compromise, may be deducted from sums owed by the United States to the person charged, such as

income tax refunds. All monies collected are paid into the U.S. Treasury as miscellaneous receipts. DOT is not authorized to keep the penalty money the agency collects.

Administrative Hearings

Under the civil penalty system, the alleged violator is given the opportunity to request a hearing. Despite the common language of the statute, the various DOT enforcement agencies take different approaches in their procedures, and this is particularly evident with regard to hearing rights. The Federal Railroad Administration, the Federal Motor Carrier Safety Administration, the Federal Aviation Administration, and PHMSA will schedule a hearing before an administrative law judge hired from a federal pool of such judges. The Coast Guard, on the other hand, conducts a more informal proceeding before a hearing officer who is a member of the Coast Guard.

For any actions taken by the FRA and FAA, one can ask for a hearing at virtually any stage of discussions with the agency. In FMCSA, one is encouraged to ask for a hearing at the outset, but it is possible to undertake settlement discussions first and, if those do not resolve the matter, still pursue a hearing. In the Coast Guard, a hearing must be requested at the outset.

Only in the PHMSA procedures is it explicitly stated that starting informal settlement discussions with the PHMSA waives any right to a hearing. In proceedings before PHMSA, therefore, it is essential to request a hearing whenever there is any doubt about the agency's or the company's perception or interpretation of the facts or the regulations. This path of action may also make PHMSA more receptive to penalty mitigation discussions, which should be seriously considered with, and through, legal counsel. A hearing is a right of the alleged violator. Once requested, it may be withdrawn by the company without any repercussions.

The various agencies within DOT differ in level of formality in their hearings. Generally, it is up to the administrative law judge who is assigned for the proceeding to set the procedures that will be followed. It is essential to review the rules of procedure that the judge will utilize at the outset of the process and frequently thereafter, to avoid losing any rights or overlooking any obligations that may be established in those procedures. It is important to note any requirements that claims must be stated in the pleadings, that documents must be served in a particular manner, that discovery may or may not be conducted, and how motions are handled.

Normally, hearings take place at the most convenient location for the parties, usually in the area where the alleged violator resides and not necessarily where the alleged violation(s) have occurred. The decision of an administrative law judge

usually is appealable within the agency. If there is a possibility of conflict of interest, disinterested agency counsel and officials may be asked to hear the appeal.

Criminal Penalties

The HMTA also authorizes imposition of criminal sanctions by a cross-reference to Title 18 of the United States Code. The current amount of fines, civil penalties and potential imprisonment terms can be found here. Other than for a violation of the provision of the HMTA on unlawful tampering with hazard warnings or packaging under §5104(b) of Title 49 U.S. Code, the criminal penalties are carefully circumscribed by applying them only to violations that are committed "willfully." This phrasing indicates that there must be a more deliberate violation with knowledge of that fact, as opposed to a knowing act that happens to be a violation.

Criminal proceedings involve a more substantial burden of proof on the part of the prosecution to show intent to violate the law. As noted, the one exception is §5104(b), concerning tampering with labels and packaging, where only a violation that would meet civil penalty levels of proof need be shown to apply criminal penalties.

Criminal penalties, since they involve use of grand juries, the federal criminal courts, and the Justice Department, are more time-consuming and difficult for the government to prosecute than civil penalties, which are administered in their entirety by DOT. In addition, the accused in a criminal procedure benefits from a presumption of innocence, and guilt must be proved beyond a reasonable doubt. The scales are tipped in favor of the accused under the Federal Rules of Criminal Procedures, which compel proof of guilt beyond a reasonable doubt. Under the civil forfeiture system, on the other hand, the scales are unquestionably tipped against the interest of the alleged violator. Accordingly, the agency will often choose to enforce regulations through civil rather than criminal penalty procedures, although the agency has the discretion to impose both types of penalties on the same person for the same offense.

Compliance Orders, Subpoenas, Etc.

Under 49 U.S. Code 5121 and 5122, the agencies within DOT are authorized to perform many administrative and quasi-judicial functions that relate to enforcement, including issuing subpoenas, conducting inspections, holding hearings, taking depositions, and requiring production of documents and property.

The agency also can issue "compliance orders," after notice and an opportunity for hearing. These orders are enforceable through the district courts upon request by the Attorney General to whom the DOT would refer the matter for enforcement. The power to issue compliance orders is not often used, but it is available if circumstances warrant.

Particularly in cases involving the Federal Motor Carrier Safety Administration, civil penalty cases may be resolved with the payment of a penalty combined with a "consent order" imposing requirements on the party that may be in addition to the regulations. For example, a carrier might be obliged to establish a specific safety program, with periodic progress reports to be filed with the agency.

Specific Relief

Section 5122(a) of Title 49 U.S. Code authorizes the Justice Department, at the request of DOT, to bring suit in an appropriate federal court for equitable relief to redress a violation by any person of a provision of the HMTA or an order or regulation issued under the HMTA. The district courts are authorized to grant such relief as may be necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

It is unclear when such equitable relief would be appropriate, or the manner in which one might cause DOT to initiate such a request. Although this equitable authority complements the assortment of powers given to DOT under this statute, this power is not exercised with any frequency. If DOT has reason to believe that an imminent hazard exists, the agency may go directly to the federal district courts, or may ask the Justice Department to do so, to petition for an order suspending or restricting the transportation of the hazardous materials responsible for that imminent hazard. The HMTA defines "imminent hazard." See the Appendix for selected statutory provisions.

Enforcement Procedures

- FRA's enforcement procedures are in 49 CFR Part 209.
- The Coast Guard's procedures are in 33 CFR Part 1.
- FAA's enforcement procedures are in 14 CFR Part 13.
- FMCSA's procedures are in 49 CFR Part 386.
- PHMSA's procedures are in 49 CFR Part 107.

Each of the administrations reviewed here has its own enforcement procedures and the procedures of the agency bringing the action should be examined in detail, as there are significant differences between them.

Remember that depending on the agency bringing the action against you, an initial request for hearing may be necessitated. Make sure that the procedures address this and provide specific language to use such as "on a without prejudice basis we request a hearing to be scheduled and reserve the right to cancel same through appropriate legal channels."

What to Do About Hazardous Materials Enforcement?

One could say that the greatest peace of mind in a regulatory context comes from total compliance – in which case you may alleviate the worry about enforcement. The reality, however, is that in large corporations with conceivable enforcement obligations under hundreds of regulatory provisions, occasional noncompliance may occur. This is especially true as the rules change to harmonize with the UN standards, often authorizing overlapping transition periods of several years. Accordingly, although prevention is the best medicine, it is prudent to establish an enforcement policy and culture in your company.

The best thing to do about any enforcement of any regulation is to anticipate and prepare for it. The best preparation is to establish a written procedure that is made part of the company's operations manual for the site and is incorporated in the company's training program for all new employees. In-house compliance audits with designated oversight responsibilities are often part of that corporate program.

While the likelihood of a hazardous materials inspection may be slight, the growing number of State and local officials getting involved with enforcement increases that likelihood. In addition, many federal enforcement programs are similar, and effective preparation for one often will be helpful for another.

A company procedural manual should be prepared to guide employees on what to do. The procedural manual should be consistent for all sites and all government inspectors. Company-wide decisions should be made and followed on at least the following points:

- ***Who will see the inspector?*** This should be a supervisory level employee. If none is present, the inspector should be asked to return at another time, or to await the arrival of the supervisor. As long as this request is valid and is made politely, it usually will be accommodated. Many companies also have their supervisor contact legal counsel for the company or a corporate representative from their EHS or Compliance Department before the inspection begins, or at least while the inspector is there, although the lawyer need not be present.

- ***Will photographs be allowed?*** Especially if trade secrets may be revealed through photographs, this policy should be considered very carefully. Consider other actions which should be taken to protect proprietary information.

- ***Will the inspector be asked to get a warrant?*** Under many regulatory enforcement programs, you may force inspectors to obtain a search warrant before entering the premises. They may not always be able to do so and, in any case, getting the warrant will consume time. Careful thought should be given, however, to the delicate balance between deterring or deferring the inspection and inciting the inspector to be particularly thorough upon the inspector's return. In any case, the policy should be consistent company-wide, so the individual asking the inspector to get the warrant is not perceived as

having personally obstructed the inspection. Please note that in some cases, courts have said that the hazardous materials industry is so pervasively regulated that an inspection can never be a surprise, and that warrants are unnecessary. Check with your legal counsel in establishing your company's policy on warrants and inspections.

- ***Will inspectors be allowed to talk to nonsupervisory employees?*** This generally should be discouraged. If possible, the supervisor should remain within earshot.

- ***Will inspectors be allowed to tape conversations with employees?*** This also should be discouraged. These provisions should be included in company manuals and procedures.

Every inspector should be asked to show proper credentials, and the information from these credentials should be recorded. The information should include the inspector's name, agency, and office within that agency, telephone number and address of the inspector. Ask for the fax number and e-mail address as well. If possible, have the inspector note the regulatory or statutory authority under which the inspection is being conducted. Any inspector who refuses to show credentials should be refused admittance.

At the outset, the company supervisor should determine the scope and purpose of the inspector's visit, and what initiated it (e.g., employee complaint, customer complaint, incident report). The inspector should state the scope of the impending inspection, and this will set the limits for the activities to be inspected. An inspector wishing to see one aspect of the facility should be shown no more than that. Broad guided tours should not be volunteered. Similarly, direct questions should be answered, politely, but additional information should not be volunteered.

At no time should any employee sign any document or statement, although signing to acknowledge receipt of a copy of the inspector's report is not incriminating. This should be stated along with your signature – "for receipt only." It has become very common for some inspectors to carry laptop computers with which they will type statements of employees and will ask the employees to sign them. These almost always are confessions, carefully phrased by the inspector who did the typing to make the case easier to prove. No one should sign them.

If the inspector asks any questions or asks for copies of any information about which the supervisor is uncertain, the supervisor should express this uncertainty, and should politely ask the inspector to make the request in writing to legal counsel for the company. The inspector should be given counsel's name and contact information. The supervisor should advise counsel of this action, so counsel may anticipate the request.

The supervisor should take notes during the inspection, in order to prepare a subsequent memo about the visit. These notes and the follow-up memo should describe all parts of the facility seen by the inspector and all people who spoke to the inspector. It also should include a general description of the topics of conversation, all areas that seemed of particular interest to the inspector, any photographs taken, any samples taken, any documents copied, and any reference by the inspector to potential violations during the inspection or in a closing conference. If you are unsure about any noted violations ask the inspector for regulatory references. The supervisor's follow-up memo also should attach duplicates of all such photos, samples, or documents. If the inspector leaves any paperwork, such as a compliance review form or exit briefing, this too should be attached. The memo should be kept by the supervisor, and in the files at the facility. Copies should be sent immediately to other affected supervisory personnel and to legal counsel for the company.

What To Do After the Inspection

The inspection should stimulate several actions within the company. To do nothing is a serious mistake. This is true even if the inspector was very relaxed and unthreatening.

- Confer with legal counsel to determine what the next step may be on the agency's part, and the timing of that step. Did the inspector say he was returning? If so, when? Enforcement actions usually take months to commence, but a return visit could occur at any moment. All further correspondence with the agency should include review by counsel before submission.

- During the inspection, did the inspector indicate the discovery of any violations? These should be verified and, if you determine a violation occurred, correct it immediately. Make appropriate memos to the file to document the date and nature of the correction. It also is helpful to write the inspector advising of any improvements made, without phrasing this as an admission of any violation.

- Are there broader implications? Is it possible this infraction is repeated elsewhere in the plant, or in other company facilities or operations? If so, broader corrective action should be undertaken. If the problem seems industry-wide, perhaps a trade association should be brought into the picture. This also is a good time to have top management remind employees of the seriousness with which the company views regulatory compliance. If a problem existed, make sure people do not repeat it, and change your procedures and training accordingly. Document all program improvements and make hard copies of all relevant e-mail memos.

- Counsel should draft a response and/or a defense to an enforcement action, even though one may not commence for months or even years. Prepare when the events are current and fresh in mind. This contemporaneous outline also will reveal areas where more information may be necessary. It would be helpful to get any regulatory requirements interpreted if opinions vary on the meaning of any provision. Realize that this is a time-consuming process and counsel should act on it immediately. Any interpretation from any government agency should be sought through counsel, who should take pains to determine the answer likely to be given before asking the question in writing. Assistance from industry experts and/or industry organizations may be helpful prior to approaching regulatory agencies for clarifications or legal interpretations.

- If the company believes it was incorrectly advised of a potential violation, it is worthwhile to bring the matter to the attention of the inspector and/or his supervisor immediately. It is always more difficult to deter an enforcement action once it gets underway than to head it off before it gets going.

Some companies prepare “crash carts” with copies of commonly requested documents (hazardous materials employee training records, sample shipping papers, etc.) Inspectors are politely shown to a conference room and the supervisor provides information as requested. A compliance inspection involving any government agency should serve as a learning experience for the company. Counsel and management should critique the written company procedures, to determine whether they need revision or whether additional employee training may be appropriate. No one likes surprises during an inspection, and all efforts should be made following an inspection that involves surprises to adjust procedures to minimize that potential in the future.

Conclusion

As indicated earlier, the best preparation for any inspection is a good compliance program. This is where the effort should begin and should be on-going. A company that has implemented an effective compliance program will probably not be faced with preparing a defense for a major enforcement action.

Appendix A
Hazardous Materials Definitions
§105.5 Definitions

Subpart A—Definitions, § 105.5 Definitions.

(a) This part contains the definitions for certain words and phrases used throughout this subchapter (49 CFR parts 105 through 110). At the beginning of each subpart, the Pipeline and Hazardous Materials Safety Administration ("PHMSA" or "we") will identify the defined terms that are used within the subpart—by listing them—and refer the reader to the definitions in this part. This way, readers will know that PHMSA has given a term a precise meaning and will know where to look for it.

(b) Terms used in this part are defined as follows:

Approval means written consent, including a competent authority approval, from the Associate Administrator or other designated Department official, to perform a function that requires prior consent under subchapter C of this chapter (49 CFR parts 171 through 180).

Associate Administrator means Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

Competent Authority means a national agency that is responsible, under its national law, for the control or regulation of some aspect of hazardous materials (dangerous goods) transportation. Another term for Competent Authority is "Appropriate authority" which is used in the International Civil Aviation Organization's (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air. The Associate Administrator is the United States Competent Authority for purposes of 49 CFR part 107.

Competent Authority Approval means an approval by the competent authority that is required under an international standard (for example, the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air and the International Maritime Dangerous Goods Code). Any of the following may be considered a competent authority approval if it satisfies the requirement of an international standard:

(1) A specific regulation in subchapter A or C of this chapter.

(2) A special permit or approval issued under subchapter A or C of this chapter.

(3) A separate document issued to one or more persons by the Associate Administrator.

Federal hazardous material transportation law means 49 U.S.C. 5101 *et seq.*

File* or *Filed means received by the appropriate PHMSA or other designated office within the time specified in a regulation or rulemaking document.

Hazardous material means a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce, and has been designated as hazardous under section 5103 of Federal hazardous materials transportation law (49 U.S.C. 5103). The term includes hazardous substances, hazardous wastes, marine pollutants, elevated temperature materials, materials designated as hazardous in the Hazardous Materials Table (see 49 CFR 172.101), and materials that meet the defining criteria for hazard classes and divisions in part 173 of subchapter C of this chapter.

Hazardous Materials Regulations* or *HMR means the regulations at 49 CFR parts 171 through 180.

Indian tribe has the same meaning given that term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

Person means an individual, firm, co-partnership, corporation, company, association, or joint-stock association (including any trustee, receiver, assignee, or similar representative); or a government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports a hazardous material to further a commercial enterprise or offers a hazardous material for transportation in commerce. Person does not include the following:

(1) The United States Postal Service.

(2) Any agency or instrumentality of the Federal government, for the purposes of 49 U.S.C. 5123 (civil penalties) and 5124 (criminal penalties).

(3) Any government or Indian tribe (or an agency or instrumentality of any government or Indian tribe) that transports hazardous material for a governmental purpose.

Political subdivision means a municipality; a public agency or other instrumentality of one or more States, municipalities, or other political body of a State; or a public corporation, board, or commission established under the laws of one or more States.

Preemption determination means an administrative decision by the Associate Administrator that Federal hazardous materials law does or does not void a specific State, political subdivision, or Indian tribe requirement.

Regulations issued under Federal hazardous material transportation law include this subchapter A (parts 105–110) and subchapter C (parts 171–180) of this chapter, certain regulations in chapter I (United States Coast Guard) of title 46, Code of Federal Regulations, and in chapters III (Federal Motor Carrier

Safety Administration) and XII (Transportation Security Administration) of subtitle B of this title, as indicated by the authority citations therein.

Special permit means a document issued by the Associate Administrator, the Associate Administrator's designee, or as otherwise prescribed in the HMR, under the authority of 49 U.S.C. 5117 permitting a person to perform a function that is not otherwise permitted under subchapter A or C of this chapter, or other regulations issued under 49 U.S.C. 5101 *et seq.* (e.g., Federal Motor Carrier Safety routing requirements).

State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Virgin Islands, American Samoa, Guam, or any other territory or possession of the United States designated by the Secretary.

Transports* or *Transportation means the movement of property and loading, unloading, or storage incidental to the movement.

Waiver of Preemption means a decision by the Associate Administrator to forego preemption of a non-Federal requirement—that is, to allow a State, political subdivision or Indian tribe requirement to remain in effect. The non-Federal requirement must provide at least as much public protection as the Federal hazardous materials transportation law and the regulations issued under Federal hazardous materials transportation law and may not unreasonably burden commerce.

Appendix B
Pertinent Hazardous Materials Transportation Act Enforcement Sections
49 U.S. Code 5121, 5122, 5123, and 5124

5121. POWERS AND DUTIES OF THE SECRETARY

(a) General Authority. —To carry out this chapter, the Secretary may investigate, conduct tests, make reports, issue subpoenas, conduct hearings, require the production of records and property, take depositions, and conduct research, development, demonstration, and training activities. Except as provided in subsections (c) and (d), after notice and an opportunity for a hearing, the Secretary may issue an order requiring compliance with this chapter or a regulation prescribed, or an order, special permit, or approval issued, under this chapter.

(b) Records, Reports, and Information. —A person subject to this chapter shall—

(1) maintain records and property, make reports, and provide information the Secretary by regulation or order requires; and

(2) make the records, property, reports, and information available for inspection when the Secretary undertakes an investigation or makes a request.

(c) Inspections and Investigations. —

(1) In general. —A designated officer, employee, or agent of the Secretary—

(A) may inspect and investigate, at a reasonable time and in a reasonable manner, records and property relating to a function described in section 5103(b)(1);

(B) except in the case of packaging immediately adjacent to its hazardous material contents, may gain access to, open, and examine a package offered for, or in, transportation when the officer, employee, or agent has an objectively reasonable and articulable belief that the package may contain a hazardous material;

(C) may remove from transportation a package or related packages in a shipment offered for or in transportation for which—

(i) such officer, employee, or agent has an objectively reasonable and articulable belief that the package may pose an imminent hazard; and

(ii) such officer, employee, or agent contemporaneously documents such belief in accordance with procedures set forth in guidance or regulations prescribed under subsection (e);

(D) may gather information from the offeror, carrier, packaging manufacturer or tester, or other person responsible for the package, to ascertain the nature and hazards of the contents of the package;

(E) as necessary, under terms and conditions specified by the Secretary, may order the offeror, carrier, packaging manufacturer or tester, or other person responsible for the package to have the package transported to, opened, and the contents examined and analyzed, at a facility appropriate for the conduct of such examination and analysis;

(F) when safety might otherwise be compromised, may authorize properly qualified personnel to assist in the activities conducted under this subsection; and

(G) shall provide to the affected offeror, carrier, packaging manufacturer or tester, or other person responsible for the package reasonable notice of—

(i) his or her decision to exercise his or her authority under paragraph (1);

(ii) any findings made; and

(iii) any actions being taken as a result of a finding of noncompliance.

(2) Display of credentials. —An officer, employee, or agent acting under this subsection shall display proper credentials, in person or in writing, when requested.

(3) Safe resumption of transportation. —In instances when, as a result of an inspection or investigation under this subsection, an imminent hazard is not found to exist, the Secretary, in accordance with procedures set forth in regulations prescribed under subsection (e), shall assist—

(A) in the safe and prompt resumption of transportation of the package concerned; or

(B) in any case in which the hazardous material being transported is perishable, in the safe and expeditious resumption of transportation of the perishable hazardous material.

(d) Emergency Orders. —

(1) In general.—If, upon inspection, investigation, testing, or research, the Secretary determines that a violation of a provision of this chapter, or a regulation prescribed under this chapter, or an unsafe condition or practice, constitutes or is causing an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

(2) Written orders. —The action of the Secretary under paragraph (1) shall be in a written emergency order that—

(A) describes the violation, condition, or practice that constitutes or is causing the imminent hazard;

(B) states the restrictions, prohibitions, recalls, or out-of-service orders issued or imposed; and

(C) describes the standards and procedures for obtaining relief from the order.

(3) Opportunity for review. —After taking action under paragraph (1), the Secretary shall provide for review of the action under section 554 of title 5 if a petition for review is filed within 20 calendar days of the date of issuance of the order for the action.

(4) Expiration of effectiveness of order.—If a petition for review of an action is filed under paragraph (3) and the review under that paragraph is not completed by the end of the 30-day period beginning on the date the petition is filed, the action shall cease to be effective at the end of such period unless the

Secretary determines, in writing, that the imminent hazard providing a basis for the action continues to exist.

(5) Out-of-service order defined.—In this subsection, the term "out-of-service order" means a requirement that an aircraft, vessel, motor vehicle, train, railcar, locomotive, other vehicle, transport unit, transport vehicle, freight container, potable tank, or other package not be moved until specified conditions have been met.

(e) Regulations. —

(1) Temporary regulations. —Not later than 60 days after the date of enactment of the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005, the Secretary shall issue temporary regulations to carry out subsections (c) and (d). The temporary regulations shall expire on the date of issuance of the regulations under paragraph (2).

(2) Final regulations. —Not later than 1 year after such date of enactment, the Secretary shall issue regulations to carry out subsections (c) and (d) in accordance with subchapter II of chapter 5 of title 5.

(3) Matters to be addressed. —The regulations issued under this subsection shall address—

(A) the safe and expeditious resumption of transportation of perishable hazardous material, including radiopharmaceuticals and other medical products, that may require timely delivery due to life-threatening situations;

(B) the means by which—

(i) noncompliant packages that present an imminent hazard are placed out-of-service until the condition is corrected; and

(ii) noncompliant packages that do not present a hazard are moved to their final destination;

(C) appropriate training and equipment for inspectors; and

(D) the proper closure of packaging in accordance with the hazardous material regulations.

(f) Facility, Staff, and Reporting System on Risks, Emergencies, and Actions. — (1) The Secretary shall—

(A) maintain a facility and technical staff sufficient to provide, within the United States Government, the capability of evaluating a risk related to the transportation of hazardous material and material alleged to be hazardous;

(B) maintain a central reporting system and information center capable of providing information and advice to law enforcement and firefighting personnel, other interested individuals, and officers and employees of the Government and State and local governments on meeting an emergency related to the transportation of hazardous material; and

(C) conduct a continuous review on all aspects of transporting hazardous material to decide on and take appropriate actions to ensure safe transportation of hazardous material.

(2) Paragraph (1) of this subsection does not prevent the Secretary from making a contract with a private entity for use of a supplemental reporting system and information center operated and maintained by the contractor.

(g) Grants and Cooperative Agreements.—The Secretary may enter into grants and cooperative agreements with a person, agency, or instrumentality of the United States, a unit of State or local government, an Indian tribe, a foreign government (in coordination with the Department of State), an educational institution, or other appropriate entity—

(1) to expand risk assessment and emergency response capabilities with respect to the safety and security of transportation of hazardous material;

(2) to enhance emergency communications capacity as determined necessary by the Secretary, including the use of integrated, interoperable emergency communications technologies where appropriate;

(3) to conduct research, development, demonstration, risk assessment, and emergency response planning and training activities; or

(4) to otherwise carry out this chapter.

(h) Report. —The Secretary shall, once every 2 years, prepare and make available to the public on the Department of Transportation's Internet Web site a comprehensive report on the transportation of hazardous materials during the preceding 2 calendar years. The report shall include—

(1) a statistical compilation of accidents and casualties related to the transportation of hazardous material;

(2) a list and summary of applicable Government regulations, criteria, orders, and special permits;

(3) a summary of the basis for each special permit;

(4) an evaluation of the effectiveness of enforcement activities relating to a function regulated by the Secretary under section 5103(b)(1) and the degree of voluntary compliance with regulations;

(5) a summary of outstanding problems in carrying out this chapter in order of priority; and

(6) recommendations for appropriate legislation.

5122. Enforcement

(a) General. —At the request of the Secretary, the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this chapter or a regulation prescribed, or order, special permit, or approval issued under this chapter. The court may award appropriate relief, including a temporary or permanent injunction, punitive damages, and assessment of civil penalties considering the same penalty amounts and factors as prescribed for the Secretary in an administrative case under section 5123.

(b) Imminent Hazards. — (1) If the Secretary has reason to believe that an imminent hazard exists, the Secretary may bring a civil action in an appropriate district court of the United States—

(A) to suspend or restrict the transportation of the hazardous material responsible for the hazard; or

(B) to eliminate or mitigate the hazard.

(2) On request of the Secretary, the Attorney General shall bring an action under paragraph (1) of this subsection.

(c) Withholding of Clearance.—(1) If any owner, operator, or individual in charge of a vessel is liable for a civil penalty under section 5123 of this title or for a fine under section 5124 of this title, or if reasonable cause exists to believe that such owner, operator, or individual in charge may be subject to such a civil penalty or fine, the Secretary of Homeland Security, upon the request of the Secretary, shall with respect to such vessel refuse or revoke any clearance required by section 60105 of title 46.

(2) Clearance refused or revoked under this subsection may be granted upon the filing of a bond or other surety satisfactory to the Secretary.

5123. Civil Penalty

(a) Penalty. — (1) A person that knowingly violates this chapter, or a regulation, order, special permit, or approval issued under this chapter is liable to the United States Government for a civil penalty of not more than $89,678 for each violation. A person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

(2) If the Secretary finds that a violation under paragraph (1) results in death, serious illness, or severe injury to any person or substantial destruction of property, the Secretary may increase the amount of the civil penalty for such violation to not more than $209,249.

(3) If the violation is related to training, a person described in paragraph (1) shall be liable for a civil penalty of at least $540..

(4) A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues.

(b) Hearing Requirement. —The Secretary may find that a person has violated this chapter, or a regulation prescribed, or order, special permit, or approval issued under this chapter only after notice and an opportunity for a hearing. The Secretary shall impose a penalty under this section by giving the person written notice of the amount of the penalty.

(c) Penalty Considerations. —In determining the amount of a civil penalty under this section, the Secretary shall consider—

(1) the nature, circumstances, extent, and gravity of the violation;

(2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) other matters that justice requires.

(d) Civil Actions To Collect.—The Attorney General may bring a civil action in an appropriate district court of the United States to collect a civil penalty under this section and any accrued interest on the civil penalty as calculated in accordance with section 1005 of the Oil Pollution Act of 1990 (33 U.S.C. 2705). In the civil action, the amount and appropriateness of the civil penalty shall not be subject to review.

(e) Compromise. —The Secretary may compromise the amount of a civil penalty imposed under this section before referral to the Attorney General.

(f) Setoff. —The Government may deduct the amount of a civil penalty imposed or compromised under this section from amounts it owes the person liable for the penalty.

(g) Depositing Amounts Collected. —Amounts collected under this section shall be deposited in the Treasury as miscellaneous receipts.

(h) Penalty for Obstruction of Inspections and Investigations. —

(1) The Secretary may impose a penalty on a person who obstructs or prevents the Secretary from carrying out inspections or investigations under subsection (c) or (i) of section 5121.

(2) For the purposes of this subsection, the term "obstructs" means actions that were known, or reasonably should have been known, to prevent, hinder, or impede an investigation.

(i) Prohibition on Hazardous Material Operations After Nonpayment of Penalties. —

(1) In general.—Except as provided under paragraph (2), a person subject to the jurisdiction of the Secretary under this chapter who fails to pay a civil penalty assessed under this chapter, or fails to arrange and abide by an acceptable payment plan for such civil penalty, may not conduct any activity regulated under this chapter beginning on the 91st day after the date specified by order of the Secretary for payment of such penalty unless the person has filed a formal administrative or judicial appeal of the penalty.

(2) Exception. —Paragraph (1) shall not apply to any person who is unable to pay a civil penalty because such person is a debtor in a case under chapter 11 of title 11.

(3) Rulemaking. —Not later than 2 years after the date of enactment of this subsection, the Secretary, after providing notice and an opportunity for public comment, shall issue regulations that—

(A) set forth procedures to require a person who is delinquent in paying civil penalties to cease any activity regulated under this chapter until payment has been made or an acceptable payment plan has been arranged; and

(B) ensures [1] that the person described in subparagraph (A)—

(i) is notified in writing; and

(ii) is given an opportunity to respond before the person is required to cease the activity.

5124. Criminal Penalty

(a) In General.—A person knowingly violating section 5104(b) or willfully or recklessly violating this chapter or a regulation, order, special permit, or approval issued under this chapter shall be fined under title 18, imprisoned for not more than 5 years, or both; except that the maximum amount of imprisonment shall be 10 years in any case in which the violation involves the release of a hazardous material that results in death or bodily injury to any person.

(b) Knowing Violations. —For purposes of this section—

(1) a person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge; and

(2) knowledge of the existence of a statutory provision, or a regulation or a requirement required by the Secretary, is not an element of an offense under this section.

(c) Willful Violations. —For purposes of this section, a person acts willfully when—

(1) the person has knowledge of the facts giving rise to the violation; and

(2) the person has knowledge that the conduct was unlawful.

(d) Reckless Violations. —For purposes of this section, a person acts recklessly when the person displays a deliberate indifference or conscious disregard to the consequences of that person's conduct.

Appendix C
Indicators Of Hazardous Materials Shipment Violations

This is a partial list of things which a shipper, container supplier, or carrier may use as a spot check on compliance with the DOT Hazardous Materials Regulations. As stated in the title, these are indicators of violations and are not necessarily violations in and of themselves.

The hazardous materials regulations for shippers are organized in the Code of Federal Regulations (CFR), Title 49, Parts 100-185, as both communication regulations and general requirements. When a DOT compliance inspection is made, documentation, marking, labeling, and packaging are observed for discrepancies. With this list as a guide, you may spot check your own documentation, marking, labeling, and packaging for compliance. When using this information, remember this is intended to be used as an aid and does not cover all aspects of the regulations.

"HAZMAT EMPLOYEE" TRAINING

- Failure to train, test and/or certify "hazmat employees" in general awareness, function specific, safety and/or security training.
- Failure to maintain complaint records of employees' training while employed, inclusive of the preceding 3 years, and 90 days thereafter.

CLASSIFICATION AND PROPER SHIPPING NAME

- Improper determination of the class or division of the hazardous material.
- Failure to properly classify material having more than one hazard.
- Incorrect selection of the Hazard Class, Packing Group or Hazard Zone of the material.
- Improper description and/or shipping name and/or UN/NA identification number for material shipped.
- Omission of technical name of material following an "n.o.s." shipping description or hazardous substance in a reportable quantity.

PACKAGES AND PACKAGING

- Use of containers/packaging which are not authorized for the commodity being shipped.
- Use of containers that have not been designed or closed to withstand the forces normally incident to transportation.
- Manufacturing and marking containers as meeting a DOT specification or UN standard when they do not meet the specification or standard.
- Packages exceeding maximum quantity limitations for materials.
- Weight of the material exceeding the maximum quantity limitation of the package.
- No commodity description (proper shipping name) on the container.
- No identification numbers (when required) on placard or orange panel.
- Omitting marking of consignee's or consignor's name and address.
- Obscuring or covering required marks or labels.

- Obscuring the UN specification code on a package.
- Manufacture of a new design type without design qualification testing.
- Manufacturer's failure to conduct periodic retesting of design type.
- Manufacturer's failure to maintain required test reports.
- Not following the manufacturer's closure instructions while packaging the material.
- Steel drums:
  - with no DOT specification or UN markings;
  - temporary repairs such as damaged, sealed with tape, putty, chewing gum, or screws, or shipped upside down;
  - in improper condition because they are severely dented, or excessively rusted or corroded;
  - DOT specification or UN markings illegible; reuse of non-bulk containers below required minimum wall thicknesses, or without leak proofness testing when required.
- Corrugated fiberboard boxes:
  - with no DOT specification or UN marking when inside containers are larger than the limited quantity exception for the commodity;
  - marked with DOT specification or UN markings but are poorly constructed (i.e., gaps, uneven closures, seams and joint separation indicating noncompliance with tested design type);
  - water-damaged;
  - improperly closed boxes (not in accordance with the tested design type for that box);
  - leaking containers;
  - non-DOT specification or non-UN fiberboard box used when a specification or UN-marked container required;
  - failure to prepare fiberboard box for air transportation with requisite cushioning, absorbent material and closure protection.
  - Use of packaging that is not compatible with the hazardous material being shipped.
- Polyethylene containers:
  - that are open-head used for materials not authorized to be in them;
  - leaking containers;
  - illegible markings.
- Non-DOT specification or non-UN-marked fibre drums:
  - when the specification or UN-marking is required;
  - constructed of materials weaker than required by the specification or tested design type;
  - fiber drums for liquids without inside polyethylene liner or other required protection;
  - damaged by forklift.
- Cylinders:
  - reused despite being single-use cylinders (e.g., DOT Specification 39);
  - refilled beyond test date;

    - in improper condition because of no valve protection, bulges, or dangerous dents or corrosion, or defective valves;
    - cylinder re-filled without permission by someone other than the owner;
    - improperly or illegibly marked;
    - identification symbols not registered with the Department of Transportation.
- Portable tanks:
    - missing name of owner or lessee on tank;
    - no labels and/or placards displayed on container containing hazardous materials.
- Cargo tanks:
    - marked for one hazardous material used for another hazardous material without proper identification of contents;
    - improperly marked, e.g., size of marking or not marked in contrasting color;
    - omission of the marking “QT” or “NQT” when required on cargo tank;
    - refilling of cargo tank beyond test date.
- Tank cars:
    - offered for transportation without properly closing all openings on filled or emptied cars containing residues of a hazardous material;
    - damaged or missed placards;
    - refilling of tank car beyond test date.

Marking and LABELING

- No labels on outer container to represent mixed packaging of hazardous materials (materials with more than one hazard – subsidiary risk labeling).
- Label on the container not consistent with the hazard class on the shipping papers.
- Having the applicable marks and/or labels obscured or covered by another non-hazardous materials mark or label.
- Color and/or size of label does not meet the standards of the regulations.
- Not using the applicable lithium battery mark and/or lithium battery class 9 label when appropriate.
- No DOT Special Permit number marked on containers shipped under DOT Special Permit; incorrect marking of DOT-SP number.
- Container markings not in a contrasting color.
- Combination container of liquid hazardous material not marked with orientation arrows on two opposite sides of the package.
- No label / marking on shipments destined for air transport; no label on “LIMITED QUANTITIES” when offered for air transportation.
- No “Cargo Aircraft Only” label when required for air shipments.
- Less than two Radioactive Materials labels (White I, Yellow II or Yellow III) on containers (two opposite sides).
- Not using the EPA’s hazardous waste label, marine pollutant mark, infectious substance mark or fumigation mark when it is required.

- Having a consumer commodity (ORM-D) mark on the package. Note: The ORM-D exception was eliminated December 31, 2020.

PLACARDING

- Failure to placard vehicle requiring placarding.
- Failure to use more than one kind of placard to indicate more than one hazard class of material loaded within the vehicle.
- Freight container containing hazardous material over 640 cubic feet not placarded.
- Placards not applied to both sides of cargo tank.
- Placarding material that is not required to be placarded or failure to remove placard when vehicle is emptied.
- Failure to properly maintain placards.

SHIPPING PAPERS

- No proper shipping name and/or classification and/or Packing Group of hazardous material entered on shipping papers.
- When applicable, no technical name listed in parenthesis as part of the basic shipping description.
- Proper shipping name and/or classification abbreviated.
- No shipper's certification.
- No words for "LIMITED QUANTITY" on ocean shipments excepted for specification or UN packaging and labeling.
  - Note: A limited quantity package offered for transport by ground does not require a shipping paper – see 49 CFR §172.200 (b)(3)
- No DOT Special Permit number on shipments moving under DOT Special Permit.
- Color of label indicated in lieu of the proper hazard class.
- Improper format for hazardous materials description on shipping papers, e.g., hazardous materials not entered first, not highlighted or no "HM" column.
- Incorrect sequence of hazardous materials description, e.g., Identification number, proper shipping name, hazard class, packing group.
- No identification number (UN or NA) on shipping paper.
- Failure to indicate whether an air shipment is authorized for passenger aircraft or is restricted to cargo-only aircraft.
- Failure to retain shipping papers for two years from date of receipt by initial carrier.
- Failure to retain shipping papers containing Hazardous Wastes as required.

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Appendix D
List of violations from the FAA and PHMSA

Federal Aviation Administration (FAA)

The Federal Aviation Administration publishes quarterly a compilation of enforcement actions against regulated aviation entities that are closed with either a civil penalty or issuance of a certificate suspension or revocation. The compilation is based on data from the agency's Enforcement Information System (EIS). For purposes of these compilations, a regulated aviation entity holds a certificate issued by the FAA, (e.g., air carrier operating certificate, repair station certificate, pilot school certificate, airport operating certificate) or is a foreign air carrier or other aviation entity regulated under Part 129 of the Federal Aviation Regulations, 14 CFR Part 129.

FAA Enforcement Reports

Pipeline and Hazardous Materials Safety Administration (PHMSA)

The Pipeline and Hazardous Materials Safety Administration (PHMSA), Office of Hazardous Materials Safety (OHMS) processed 145 enforcement cases and 268 tickets in calendar year 2020. Summaries of the enforcement cases and tickets closed in 2020 are provided in the table below. These enforcement actions resulted in the collection of $1,795,218.05 in civil penalties.

It is the task of PHMSA's Hazardous Materials Field Operations staff to improve compliance with the safety and training standards of the HMR by inspecting companies and individuals who offer hazardous materials for transportation or who manufacture, maintain, repair, recondition or test packages authorized for transporting hazardous materials. Click here to see the full 2020 report.

Appendix E

COSTHA
The Council on Safe Transportation of Hazardous Articles

COSTHA is a dynamic, not-for-profit industry association devoted to promoting regulatory compliance and safety in the international and domestic transportation of hazardous materials / dangerous goods.

COSTHA is the leading provider of information, publications, and educational programs designed for regulatory compliance personnel and others employed in the industry. COSTHA brings ongoing advocacy and up-to-date information to hazardous materials / dangerous goods transportation professionals.

Our membership consists of a large cross section from all aspects of the industry including chemical, automobile, pharmaceutical, cosmetics and fragrance manufacturers as well as freight forwarders, shippers and carriers by all modes. The diverse membership is rounded out by consultants, trainers and packaging manufacturers and reconditioners.

COSTHA members set the agenda and determine priorities that serve the common good of companies and professionals in our industry. COSTHA has the reputation and established relationships to connect people and industry segments with regulators and other industry experts.

With COSTHA, you also benefit from a collective voice that is represented at the International Maritime Organization (IMO), ADR, SCT Mexico, Transport Canada, UN Sub-Committee of Experts on the Transport of Dangerous Goods (UN SCOE TDG), Interested Parties Group, US DOT: EPA, FAA, FMCSA, FRA, PHMSA, USPS.

COSTHA constantly monitors changes to the international regulations at the IMO, ICAO and IATA and attends and participates at the UN SCOE TDG meetings, providing members with timely and valued information even before it becomes effective.

For information on COSTHA please contact us.
www.costha.com

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