

1 *[MARCH 25, 2009]*

2
3 **SECTION-BY-SECTION JUSTIFICATION**
4 **of**
5 **Interested Parties for Hazardous Materials Transportation**
6 **Reauthorization of the HMTA**
7

8 *Explanation of recommended changes to chapter 51 of title 49 U.S.C. This explanation does*
9 *not address editorial corrections.*

10
11 **§5101 – Purpose.**
12

13 Congress has found that transportation of hazardous materials is vital to the economic health
14 of the country, as well as to our national defense and security. This transportation may be so
15 vital under certain circumstances that DOT should be authorized to facilitate or enable the
16 transportation of essential materials.

17
18 The historic purpose of the law and regulations has been to protect against harm when
19 hazardous materials are transported. DOT administers a comprehensive regulatory program.
20 Each person who offers hazardous materials for transportation in commerce must comply
21 with all applicable requirements of DOT regulations, or a special permit or approval or
22 registration issued under the regulations. The practical effect of these regulations is that
23 hazardous materials may not be transported by any mode without permission. This blanket
24 prohibition against transportation unless there is a specific DOT authorization for that
25 transportation, makes efficient consideration of such authorizations critical to the industry
26 involved and to the national economy at large.

27
28 Not every quantity, form or characteristic of hazardous material warrants imposition of the
29 full scope of safety and security requirements. This risk-based principle underpins Hazmat
30 law.

31
32 Training of hazmat employees and emergency response personnel is essential for effective
33 compliance with the safety and security regulations. Differing requirements as materials cross
34 municipal, tribal, or State borders would confound these personnel, and would have a severe
35 impact on public safety. Therefore, national uniformity of requirements should be pursued to
36 the extent practicable.

37
38 **§5102 – Definitions.**
39

40 The definition of "hazmat employer" should be restored to its original text in order to clarify
41 the person responsible for training hazmat employees. The training of hazmat employees is
42 critically important as incident statistics of human error and civil penalty standards attest.
43 Every "hazmat employee" has an "employer." Hazmat employers include contractors and
44 other third parties whose hazmat employees provide services to offerors, carriers, and
45 packaging manufacturers. This definition is used in the hazmat statute and regulations only
46 to assign responsibility for employee training. Each hazmat employer is responsible for
47 training its hazmat employees. This definition and the proposed change to it do not affect
48 the scope of DOT's existing statutory inspection and compliance authority over every
49 individual who performs a hazmat employee function.

50
51 The law defines "transportation" to include the "storage" when the storage is incidental to
52 the movement. However, the law provides no definition of this activity that attends every
53 hazmat shipment. In order to ensure no gaps in the regulation of hazardous materials during

54 transportation “storage” is defined to ensure a regulatory chain of custody from loading the
55 material for movement to unloading at destination.

56

57 **§5103 – General regulatory authority.**

58

59 All of the functions that are performed by “hazmat employees” as defined in §5102 are listed
60 under the Secretary’s regulatory authority except the function “loads, unloads, or handles
61 hazardous materials” in transportation. This change is recommended to clarify who is subject
62 to DOT’s regulatory authority.

63

64 Shippers are required to ensure the individuals are available to provide detailed information
65 about materials to emergency responders during incidents. DOT should have authority to
66 issue regulations pertaining to these individuals to ensure that the information provided meets
67 the needs of responders.

68

69 An analysis of DOT hazmat incident data reveals that serious consequences can result from
70 mistakes and equipment failures related to the unloading of hazmat from bulk packagings with
71 capacities greater than 3,000 liters. Few regulations cover this activity. Industry best
72 practice standards should serve as a template for credible, enforceable requirements that will
73 ensure that all engaged in this activity follow recognized safety procedures.

74

75 When DOT’s seeks to establishing requirements for transportation activities performed at
76 fixed facilities, DOT should consult with all other federal agency’s who may also have fixed
77 site requirements in order to harmonize requirements, minimize regulatory gaps and
78 duplications, and promote jurisdictional certainty, consistency, and clarity

79

80 **§5103a – Limitation of issuance of hazmat licenses.**

81

82 The changes to this section are intended to address the problems industry is experiencing with
83 the hazardous materials endorsement (HME) security background checks. These problems
84 include the requirement for individuals to submit to fingerprint-based background checks even
85 when they do not transport hazmat that is a security concern; the need for drivers to obtain
86 duplicative credentials and go through multiple redundant background checks; and the cost of
87 the HME credential. To address these matters, the Interested Parties recommend that –

88

- 89 1. The Secretary of Homeland Security commence a rulemaking to designate Security
90 Sensitive Hazardous Materials (SSHM), after consulting with DOT, NRC and HHS.
- 91 2. TSA conduct periodic name-based background checks for all drivers transporting
92 placarded loads, but require fingerprint-based background checks only for drivers that
93 transport SSHM.
- 94 3. The TWIC should be the fingerprint-based background check credential required of those
95 transporting SSHM.
- 96 4. The Secretary of Homeland Security be authorized to promulgate a rule to add or modify
97 the disqualifications for obtaining a TWIC.
- 98 5. Require shippers to check that the driver receiving SSHM has a valid TWIC.

99

100 **§5105 – Transporting certain highly radioactive material.**

101

102 Sections (a)-(c) are repealed because the railroad study is complete and the regulations have
103 been issued. Subsection (d) is modified and expanded to include HRCQ for inspection prior to
104 shipment, previously it was only applied to spent fuel shipments, and it was clarified that
105 reinspection of HRCQ shipments of radioactive material are not appropriate except when
106 changes to the condition of the cargo, the vehicle or the operation of the vehicle invalidate
107 the certification of inspection.

108 **§5107 - Hazmat employee training requirements and grants.**

109

110 We agree that grants to train hazmat employee instructors and/or hazmat employees should
111 be limited to nonprofit organizations. However, the additional limitation that the nonprofit
112 organization should be a “hazmat employee” organization is not the most effective public
113 policy. Other well-qualified nonprofit organizations also offer reputable training programs to
114 hundreds of hazmat employees every year. There is no justifiable reason to exclude such
115 organizations from the opportunity to apply for a grant under this section.

116

117 **§5107 - Non-duplication of agency authority.**

118

119 In its wisdom, Congress provided that the regulatory authority of OSHA would encompass the
120 regulatory jurisdiction of other federal agencies in areas of health and safety unless the other
121 federal agencies exercised their authority to occupy this field of regulation. The intent of the
122 “reverse preemption” provision on the Occupational Safety and Health Act was not to leave
123 these important areas of federal regulatory authority unexercised, but rather to avoid
124 duplicative or conflicting requirements. A drafting error was made in 1990 that removed the
125 applicability of the regulatory non-duplication provision to any DOT hazardous materials
126 regulations concerning the “handling” of hazardous materials. Regrettably, the effect
127 exposes the regulated community to a number of out-dated and conflicting hazmat safety
128 standards. It is unfortunate the OSHA has not rectified these regulatory deficiencies in the
129 intervening years. We strongly urge that the drafting error be corrected to ensure a seamless,
130 non-conflicting regulatory standard for hazmat transportation safety.

131

132 **§5111 - Electronic hazard communications and information sharing pilot program**

133

134 Current regulations applicable to all modes of transportation require paper documentation
135 with entries for specific information, in a prescribed sequence, and in some cases in a
136 mandatory format, to communicate the hazards associated with hazardous materials in
137 transportation. Transposing information from one written document to another during
138 interlining carriage may result in erroneous transcription of data. On occasion, the paper
139 documentation may not be readily available to emergency responders due to catastrophic
140 destruction due to fire, chemical exposure or other factors.

141

142 The transportation industry is moving toward electronic transmission of data to more
143 accurately and expeditiously provide emergency responders as well as interlining carriers with
144 the information required by the modal transportation regulations to communicate the hazards
145 associated with hazardous materials in transportation. Currently many diverse systems for
146 electronic data interchange are evolving and are driven by industry needs to enable more
147 rapid transmittal of critical information. The US railroads currently utilize EDI when booking
148 movement of cargo between railroads and intermodal interlining carriers. The International
149 Air Transportation Association (IATA) and the International Vessel Operators Hazardous
150 Materials Association (VOHMA) introduced a proposal to develop an electronic platform for
151 multi-modal application which will be discussed during the coming biennium of the UN SCOE.
152 In order to ensure that US shippers and carriers by all modes will be positioned to remain
153 competitive in the global marketplace, the Secretary needs to be given authority for
154 conducting pilot programs to assess the efficiency and cost effectiveness of electronic hazard
155 communication and information sharing and to report the results in a timely manner to the
156 US Congress to determine the feasibility of including provisions that continuing programs
157 should be written into future regulatory activities within the hazardous materials
158 transportation safety program under this chapter. While the pilot programs for each mode
159 may identify modal specific variations, the resultant EDI systems that may be introduced
160 must be uniformly adaptable to all modes of transportation in all geographies and provided in
161 a “user-friendly” format.

162
163 Cost effectiveness must consider associated costs of hardware to enable electronic
164 transmission to roadside emergency responders as well as participating industries within the
165 multiple modes of transport versus its overall benefits for enhancing safety and business
166 communication.

167
168 **§5115 – Training curriculum for the public sector.**

169
170 An effective national hazmat transportation safety program requires coordination and
171 consistency in enforcement policies and protocols. Federal hazmat requirements are enforced
172 by officials at all levels of government. Yet, no uniform standards have been developed. The
173 section establishes a Hazardous Materials Transportation Center of Excellence to develop
174 standards for investigator qualifications and to address training deficiencies with guidelines.
175 The Center’s uniform training approach would promote efficient, risk-based enforcement
176 actions by enhancing the investigatory skills and regulatory understanding of enforcement
177 officials.

178
179 **§5116 – Planning and training grants; emergency preparedness fund.**

180
181 Federal law provides that states can impose fees on the transportation of hazardous materials
182 only if the fees are fair and used for purposes related to such transportation. At the same
183 time, federal law provides that the Secretary shall consider several factors in determining the
184 amount of emergency training grants allocated to states, including whether a state assesses a
185 hazmat transportation fee directly on the regulated community, how much money is
186 collected, and whether the funds are used for congressional-approved purposes. DOT says it
187 cannot enforce this congressional requirement because it does not know what Congress
188 intended by the review. Congress should clarify that states assessing fees in violation of
189 federal hazmat law do not qualify for a grant, that DOT has the authority to reduce a state’s
190 grant if the revenue from the state’s fee(s) reduces its need for assistance relative to other
191 states that impose no fees, and that the authority to apply fee criteria to a state’s grant
192 allotment should cover planning as well as training grants. DOT should not reward states that
193 are violating the prohibitions of the HMTA with regard to the imposition of hazmat fees.
194 Additionally, the annual report required by Congress on the allocation and use of the planning
195 and training grants should be clarified to provide that same level of transparency for planning
196 grants as is now required for training grants. Finally, the amount of funds available under this
197 section has been subject to the congressional appropriations process. The text “without
198 further appropriation” is superfluous and should be stricken.

199
200 **§5119 – Uniform forms and procedures.**

201
202 In 1990, Congress provided authority for DOT to eliminate the administrative redundancy of
203 individual state hazmat transportation permits. Although DOT did not exercise this
204 authority, a group of seven states formed the Alliance for Uniform Hazmat Transportation
205 Procedures and implemented a base-state, reciprocal permitting program. This “Uniform
206 Program” has been endorsed by industry and the CVSA. DOT never moved forward with a
207 rule to implement the Uniform Program. In 2005, Congress attempted to push the program
208 forward by creating a new “working group” to recommend procedures for establishing a
209 uniform program; however, this solution was inadequate, as it turned its back on the work
210 that the Alliance had already completed and DOT never reconvened the “working group.”
211 Going forward, the IPs recommend that Congress reaffirm its 1990 commitment to
212 streamline hazmat permitting and set a date certain by which DOT must implement the
213 Uniform Program. The IP recommendation would provide transition grants to states that
214 volunteer to join the Uniform Program. Six years after enactment, individual state hazmat
215 transportation permits would be preempted, unless incorporated into the Uniform Program.

216 The Uniform Program does not limit the amount of fees a state may impose for registration;
217 although fees must comport to the fair and reasonable standard set forth in section 5125(f).
218

219 **§5120 – International uniformity of standards and requirements**

220

221 The Interested Parties recommend that Congress confers upon PHMSA responsibility for
222 participating in various international forums that deal create “standards and requirements”
223 for the international transportation of hazardous materials (e.g. dangerous goods). These
224 forums include the “United Nations Committee of Experts on the Transport of Dangerous
225 Goods,” the “International Civil Aviation Organization,” and numerous other organizations
226 that work to ensure international hazmat safety and facilitate commerce through
227 international harmonization of hazmat regulations and standards. PHMSA has been
228 designated by the Secretary as the lead agency in this work, and has performed the function
229 admirably for five decades. Currently, PHMSA holds the Chair of the UN Committee of
230 Experts.
231

232 **§5121 – Administrative**

233

234 The 2005 amendments provided DOT new inspection and investigation authority. DOT
235 inspectors may open and/or remove from transportation certain packagings if they have an
236 “objectively reasonable and articulable belief” that the packaging contains a hazardous
237 material. Under certain circumstances, DOT may order the removal of a package from
238 transportation for additional scrutiny. In such cases, the inspector must document his
239 reasoning. In addition, inspectors are authorized to gather information about the packaging
240 from offerors, carriers, etc., and may order the offeror to move the packaging to a safe
241 location. The section also contains provisions relating to the resumption of transportation
242 for a packaging deemed to be safe; the issuance of emergency orders for unsafe conditions or
243 practices; the development of regulations; maintenance of facilities and staff; authorizations
244 for private sector contracts, grants, and cooperative agreements; and, mandatory issuance of
245 reports. The IPs recommend the following changes to this section:

- 246 1. Existing 5121 states that a DOT inspector may open a package if s/he has a reasonable
247 and articulable believe that the package may contain a hazardous material. The 2005
248 amendments to this section were aimed at and predicated upon a new need for authority
249 to check “undeclared” packages, i.e., those suspected of containing hazmat but not
250 otherwise identified. The need was based on the ValuJet incident which involved a totally
251 undeclared package. No new authority to open or test materials in declared packages was
252 discussed or justified by the Administration. Therefore, the IPs believe an inspectors
253 ability to search, open, or remove from transportation packages of concern, should be
254 limited to those which the inspector believes contain “undeclared” hazardous materials.
255 In addition, package opening activity should take place “at a properly equipped facility
256 designated by the Secretary for this purpose.” These amendments would refine an
257 inspectors search criteria to ensure s/he believes that a package in fact contains a
258 hazardous material that has not been declared in shipment. Further the amendments
259 would protect public health and safety by limiting package opening activities to locations
260 selected by the Secretary for this purpose.
- 261 2. The IPs are seeking clarification to ensure that the Secretary notifies a carrier and
262 offeror, but not other parties related to the package (e.g., packaging manufacturer), that
263 a package has been removed from transportation. The IPs see no safety or regulatory
264 benefit from notifying a packaging manufacturer, tester or “other person responsible for
265 the package” in addition to the carrier.
- 266 3. The IPs would add a new subsection at (c)(4) on indemnification, intended to indemnify
267 and hold harmless persons who are injured by a release from package opened or otherwise
268 handled under this section.

- 269 4. The IPs are seeking an amendment that would require the DOT Secretary to issue
 270 regulations regarding inspections, investigations, and emergency orders, which address at
 271 least the following: (a) delay in the transportation of time-sensitive materials (e.g.,
 272 medical products); (b) training and equipment for inspectors; (c) restoration of an opened
 273 package for transportation; and (d) cost and damage factors.
- 274 5. Subsection (g) on grants and cooperative agreements would be amended to ensure the
 275 Secretary of Transportation works closely with the Commercial Vehicle Safety Alliance
 276 to ensure state enforcement personnel have adequate information about and training on
 277 hazmat.
- 278 6. The IPs are adding a new subsection (i) directing the DOT Secretary to issue a report in
 279 2010 and every three years thereafter on hazardous materials shipments, deliveries, and
 280 movements. A new subsection (j) is added to clarify that if the Secretary determines
 281 information reported under this section could reveal a vulnerability to attack, such
 282 information may only be disclosed to certain parties under specified circumstances.

283
 284 **§5123 - Civil Penalties.**
 285

286 Most carrier violations of the HMR are discovered during roadside, terminal or railyard
 287 inspections. Many of these violations stem from activities that occur outside of the control
 288 of the carrier and it is not reasonable to expect carrier employees to discover many of these
 289 violations. Carriers must remain responsible for correct performance of the hazmat
 290 regulations under their control; however, activities such as hazmat classification, package
 291 selection and marking, and shipping paper preparation are typically performed by other
 292 entities. To correct this problem, the HMTA should make clear that carriers should not be
 293 held liable for violations that result from activities that are performed by another party in
 294 the supply chain unless the carrier has actual knowledge of a violation.

295
 296 Since 1799 the U. S. Code has included a statute of limitations in recognition that, over time,
 297 “faded memories, lost witnesses, and discarded documents” can make the defense of an
 298 enforcement action prejudicial to the respondent. Furthermore, the safety intention of
 299 enforcement diminishes the longer the agency takes to process civil penalty cases. The
 300 statute of limitations governing the HMTA is 28 U.S.C. 2462, i.e., five years. The FAA
 301 concluded through notice-and-comment rulemaking that this period starts with the date of
 302 the violation giving rise to the penalty. This is consistent with 3M v. Browner, 17 F.3d
 303 1453 (D.C. Circuit, 1994). Other enforcing administrations within DOT, however, have
 304 selected different starting dates. Subsection (h) would make all enforcement procedures
 305 within DOT uniform and in accord with the D.C. Circuit Court with respect to the statute of
 306 limitations on civil penalty cases.

307
 308 **§5124 – Criminal penalty.**
 309

310 The 2005 amendments added a “reckless” liability standard to all modes of hazmat
 311 transportation. A “reckless” standard is recognized by courts as a state of mind more
 312 blameworthy than “negligence,” but substantially less than “willful.” The HMTA already
 313 recognizes this standard in aviation where passengers ride above cargo. However, this
 314 standard imposes no different penalty than if convicted of a willful violation, and the
 315 standard has not been used in cases outside of air cargo. No experience in commercial
 316 hazardous materials cargo transportation has shown it to be necessary or advisable to reduce
 317 the burden of proof for the prosecution to impose full criminal sanctions against shippers,
 318 carriers, and container manufacturers outside the aviation mode.

319
 320 **§5125 – Preemption.**
 321

322 The safe and secure transportation of hazardous materials is best achieved through uniform
 323 regulatory requirements. To this end, Congress explicitly provided preemptive authority to
 324 DOT. The IP recommendations strengthen DOT’s preemption authority in 4 ways:
 325 1. DOT would be authorized to preempt state/local regulations that impose an unreasonable
 326 burden on commerce. Currently, DOT refuses to apply this standard and leaves this
 327 analysis to the courts.
 328 2. Security background checks and security credentials would be added to the list of “covered
 329 subjects.” This means that states/localities could not require separate background checks
 330 or credentials for the transportation of hazardous materials, unless they were
 331 substantively the same as the federal requirements.
 332 3. Verbal incident reporting also would be added to the list of covered subjects. Currently,
 333 state/local written incident reporting requirements are preempted if they are different
 334 than DOT’s written incident reports; however, states have been free to impose unique
 335 verbal incident reporting requirements. Persons that operate in multiple jurisdictions
 336 have difficulty recognizing whether a particular locality has a specific immediate verbal
 337 hazmat incident reporting requirement.
 338 4. Enforcement of hazardous materials regulations for motor carriers relies in part upon
 339 State participation. Most State enforcement actions are based on a “strict liability”
 340 standard, rather than the existing federal “willfully” or “knowingly” standards. As such,
 341 the strict liability standards are subject to preemption under the HMTA. The 2005
 342 amendments removed all preemptive limitations to State enforcement authority. The
 343 IPs are recommending that DOT convene a working group to analyze whether the
 344 “knowing” and “willful” standards of liability are adequate for enforcing the hazardous
 345 materials regulations.

346
 347 **§5128 – Authorization of appropriations.**
 348

349 The Interested Parties recommend that the Secretary be given full discretionary authority
 350 provided the Secretary to flex funds between emergency planning and training grant
 351 programs, rather than the partial flex authority that exists now.
 352

353 The Interested Parties recommend that the funding for hazmat training grants come from
 354 general revenue, not hazmat registration fees which are used for state emergency planning
 355 and training activities.
 356

357 Until DOT finalizes the §5119 rulemaking to establish a uniform, reciprocal state-based
 358 registration and permitting program for motor carriers of hazardous materials, financial
 359 assistance should be provided to the participating states to provide technical assistance to
 360 other states wishing to join the Program. The \$1,000,000 annual request is reasonable given
 361 that Congress has provided up to \$1 million a year to enable states to transition into other
 362 base-state agreements. This temporary appropriation for states should be an allowable use of
 363 the \$21.8 million set-aside state emergency planning and training activities.
 364

365 **FREE-STANDING PROVISIONS**

366
 367 **Sec. XXX – Hazardous materials safety permit report.**
 368

369 The hazardous materials safety permit authorized by § 5109 has entered its third permitting
 370 cycle. Since the program’s inception, however, the program has been a source of fraught
 371 with complaints and poor management. There have been thousands of denials the vast
 372 majority of which are administrative because DOT databases are not linked. Rather than
 373 setting a standard of safety and allowing all carriers to aspire to meet the standard, the
 374 program operates with a floating standard that results in carriers being “safe” in one
 375 permitting cycle and though nothing in their operations changes, they are deemed “unsafe”

376 in the next cycle. The cumulative effect of the arbitrary 30 percent disqualification threshold
377 could technically disqualify every carrier who applies; practically, the disqualification rate is
378 highly than 30 percent. In the beginning, carriers could be disqualified for non-preventable
379 crashes. While FMCSA, the program administrator, now allows carriers to submit evidence of
380 non-preventability, such proof is only accepted after a carrier's permit has been denied. The
381 standard was developed with long-haul LTL carriers in mind, while the majority of permittees
382 are short-haul carriers with specialized equipment for the high hazard materials that they
383 carry. These companies are not in a position to fall back on the movement of other types
384 of cargo which they address disqualification issues, legitimate or not. The program lacks
385 meaningful oversight when denials outrank suspensions or revocations up to factors of 100.
386 FMCSA should be required to report to Congress on the status of this program, its problems,
387 and what the agency is willing to do address these issues and to restore confidence in this
388 safety initiative.

389

390 **Sec. XXX – Security background check and threat assessment report.**

391

392 The Interested Parties recommend that TSA be required to report to Congress on its efforts
393 to eliminate redundant security background checks for drivers that have hazardous materials
394 endorsements. This requirement builds upon a prior requirement imposed on TSA to analyze
395 the various federal background checks and determine their equivalency.