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Dockets Management System
U.S. Department of Transportation
400 Seventh Street, S.W.
Nassif Building, Room PL-401
Washington, DC 20590-0001

Via *Electronic Filing*: <http://dms.dot.gov>

Re: Docket No. PHMSA-06-25885 (HM-232-F)

Dear Sir or Madam:

The American Trucking Associations, Inc.¹ (“ATA”) submits these comments in response to the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) advance notice of proposed rulemaking entitled *Hazardous Material; Revision of Requirements for Security Plans* (hereinafter the “ANPRM”).² As the national representative of the trucking industry, ATA is interested in matters affecting the transportation of hazardous materials, including the creation of a subset of hazardous materials for purposes of triggering security regulations, such as the requirement to have a written security plan.

This ANPRM was published in response to ATA’s June 2005 petition to except certain hazardous materials from the security plan requirements. ATA’s petition requests that PHMSA embrace a risk based approach to the regulations seeking to enhance the security of hazardous materials in transportation.

A. Factors to Consider in Defining Security Sensitive Hazardous Materials

ATA supports a risk-based approach to the application of regulations governing the security of hazardous materials in transportation. Following the tragic events of September 11, 2001, placarded materials were first identified as the regulatory trigger for hazardous materials transportation security because placarding provided an existing recognizable classification for hazardous materials in transportation.

¹ ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

² See 71 *Federal Register* 55156 (September 21, 2006).

The premise of ATA's petition is that regulating hazardous materials transportation security at the placarded load level is inconsistent with a risk-based approach. Using placards as a trigger for hazardous materials security regulations results in the overregulation of materials that are not capable of being used as a terrorist weapon. For example, using placards as a regulatory trigger results in the inclusion of large shipments of paints, adhesives, and many other hazardous materials that pose no security risk. In addition, in the context of bulk packaging, empty packagings that still contain some hazardous materials residue must continue to bear placards. These loads pose no security risk.

Several years have passed since the promulgation of the original security plan requirements and a more thoughtful analysis should be brought to bear on the subject of what constitutes security sensitive hazardous materials. In applying a risk-based approach to the question of what types and quantities of hazardous materials should be subjected to additional security requirements, we believe that PHMSA should consider the following five factors:

1. The nature of the specific hazardous material and its destructive potential when released;
2. The quantity of the hazardous material that is needed for it to function as a weapon;
3. The availability and security of the material throughout the supply chain (it makes no sense to secure anhydrous ammonia in transportation and allow 200 gallon nurse tanks to be left unattended on a farm);
4. The packaging used (non bulk packages do not lend themselves to rapid release); and
5. The costs and benefits of the particular security measure being considered.

PHMSA should evaluate each class of hazardous materials against the criteria listed above to determine the appropriate regulatory trigger for particular security requirements, including the requirement to have a written security plan.

B. Development of a Security Sensitive Hazardous Materials List

ATA believes that the appropriate security sensitive hazardous materials regulatory trigger list will vary, depending upon the security measure being mandated. In the context of ATA's petition and this ANPRM, we provide recommendations for the development of a trigger list applicable to the requirement to have a written security plan. We are concerned, however, that the development of this list could be used in other contexts. For example, the list that we are submitting as an appendix to these comments is identical to the list and quantities of materials that we are providing to the Transportation Security Administration ("TSA") for purposes of distinguishing the type and quantity of hazardous materials that would trigger a need to conduct a fingerprint-based background check as compared to a name-based background check. We do not believe, however, that this list is the appropriate trigger list for all security initiatives. As

federal regulators consider other security regulatory requirements, it is likely that the appropriate list of trigger materials would vary. Applying a cost-benefit analysis to each regulatory proposal, we believe that the more onerous and expensive the security regulation is, the narrower the trigger list should be. For example, in the future, it may be appropriate to require military escorts for shipments of high-level radioactive waste. Escorts, however, would be infeasible and completely inappropriate for the transportation of gasoline by tank truck.

C. ATA's Recommendations for Hazardous Materials Triggers

Attached to these comments as Appendix A is a report entitled *Analysis of the Transportation Security Administration Draft List of Security Sensitive Materials*. This report was prepared by Frits Wybenga³ and commissioned by ATA for the purpose of narrowing the trigger list of hazardous materials that would require fingerprint-based background checks for commercial drivers. While we do not support the use of a single list for all hazardous materials security measures, we do believe that the recommendations ATA is submitting to TSA in the context of fingerprint-based background checks are appropriate in the context of this rulemaking on materials and quantities that should trigger the requirement to develop and maintain a written security plan.

D. Responses to Questions Posed in the ANPRM

The remainder of these comments responds to the fourteen questions posed by PHMSA in the ANPRM:

- (1) **What is the best basic approach to security plans? Is the current approach correct or should security plans be required only for hazardous materials in threshold quantities that are known to pose significant security risks?**

This question goes to the heart of ATA's petition. ATA believes that security plans should be required only for entities that transport hazardous materials in threshold quantities that are capable of functioning as a weapon of mass destruction. *See Appendix A, infra.*

³ Frits Wybenga served as the Deputy Associate Administrator for the PHMSA Office of Hazardous Materials Safety from January 2000 to March 2005. After September 11, 2001, he assumed primary responsibility for security of hazardous materials transportation at PHMSA, overseeing the development of DOT hazardous materials security regulations, developing similar requirements for inclusion in the United Nations Model Regulations, and serving as the primary DOT contact with TSA in relation to hazardous materials security. He also served as Chairman of the United Nations meeting that developed the United Nations High Consequence List. He is a chemical engineer and has more than 35 years experience in the field of hazardous materials transportation.

ATA's petition to PHMSA requested a narrowing of the list of hazardous materials that trigger the requirement to develop and maintain a written security plan. For those companies that remain subject to the written security plan requirement, we support PHMSA's existing performance based approach, which includes self assessment followed by a specific plan that seeks to mitigate the identified risks in the areas of personnel security, facility security and en route security.

The industries that transport hazardous materials are diverse. Modal differences and even significant differences in the operations of individual motor carriers preclude the ability to enact a one-size-fits-all security plan. For this reason, ATA supports the existing approach to security plans, codified at 49 C.F.R. § 172.802.

(2) Are there ways to lessen the burdens of security plan requirements on companies with minimal security risks?

Yes. This is the rationale behind ATA's petition -- by establishing the list of security sensitive hazardous materials and threshold quantities, PHMSA may then exempt from the written security plan requirements those companies that don't handle the types and quantities of hazmat that are attractive to a terrorist.

ATA assumes that the regulatory structure of 49 CFR § 172.704(a)(5) would remain the same and that companies that do not require a written security plan would not need to provide their employees with in-depth security training.

To further lessen the burden of the security plan requirements, PHMSA should work with TSA on revising the administrative requirement to ensure that each page of the security plan contains the Security Sensitive Information designation paragraph. Removing this administrative requirement would improve industry compliance without compromising security.

(3) Should baseline security requirements or guidelines be established when security plans are not required?

PHMSA should work with industry to refine its existing voluntary security guidelines; however, security requirements should not be imposed on motor carriers that do not transport security sensitive hazardous materials.⁴ PHMSA should also work with the modal administrations to refine their existing security guidelines to ensure consistency where appropriate.

⁴ See RSPA, *Advisory Notice; Enhancing the Security of Hazardous Materials in Transportation*, 67 *Federal Register* 6963 (February 14, 2002). See also RSPA, *Hazardous Materials; Advisory Guidance on Packaging and Shipper Responsibilities*, 67 *Federal Register* 31974 (May 13, 2002).

PHMSA should evaluate the extent to which security requirements should apply to shippers of hazardous materials. For example, shippers should be responsible for verifying driver credentials and applicable federal permits when offering certain highly hazardous materials for transportation.

(4) What factors should be considered in determining whether security risks of a specific hazardous material or class of hazardous materials are significant enough to require preparation of a security plan?

ATA supports a risk-based approach to security regulations – security measures must be narrowly tailored to focus on preventing a high consequence event.⁵ See discussion in Section A of these comments, *supra*.

(5) What role should Packing Groups play in determining the need for security plans?

Each hazard class must be examined to determine if it is able to function as a weapon of mass destruction, and if so, at what quantity. Packing Groups are an inadequate means of determining whether a particular hazardous material is capable of functioning as a weapon of mass destruction or determining the appropriate threshold quantity for security sensitive hazardous materials.

(6) How should the quantities of hazardous materials transported be considered when determining whether a security plan is required?

Only quantities of hazardous materials that are capable of functioning as a weapon of mass destruction should be considered security sensitive hazardous materials. Hazardous materials that can be used as a weapon of mass destruction may not be a serious threat in smaller quantities. PHMSA must evaluate each hazard class to determine the appropriate quantity that will serve as a trigger for security requirements.⁶ Relatively small quantities of zone A TIH materials could pose a significant risk to the public, whereas more common flammable materials may not pose a risk, even when transported in large quantities. Appendix A to these comments sets forth ATA's recommendations for quantities of each hazardous materials class that should be used to trigger the applicability of the written security plan regulatory requirement.

⁵ We do not define the phrase "high consequence event." Examples of a high consequence event would include the bombing of the Murrah building and the attack on the World Trade Center.

⁶ Note in a less-than-truckload environment small packaging of hazardous materials are commonplace and are loaded and unloaded from trailers continually as freight travels across the country. Tracking these small packages would be extremely difficult if not impossible for a terrorist organization.

(7) Does easy availability of a hazardous material in specific quantities outside of transportation play a role in determining whether a security plan should be required?

Yes. PHMSA must consider the availability of hazardous materials throughout the entire supply chain, not just when the materials are in transportation. In many instances the misappropriation of hazardous materials from the transportation system may not be the easiest place from which to obtain these materials. From the perspective of a terrorist, the risk involved with stealing these products is often greater than the risk of simply purchasing the material from a legal source. The security benefits from securing hazardous materials in transportation are rendered moot if a terrorist can obtain these same materials elsewhere.

(8) Should uniform security plan requirements apply across all modes of transportation or should the triggering criteria (hazardous class and quantity) be mode-specific?

ATA does not take a position on this issue.

(9) What factors should be considered when determining whether specific hazardous materials, classes or quantities thereof, should be excepted from security plan requirements?

See response to question number 4, *supra*.

(10) How should the determination of transportation security risk account for specific hazardous materials or classes of materials that by themselves do not pose a security risk, but that could present a security risk in combination with other materials?

Precursors to weapons of mass destruction cannot be used as a weapon of mass destruction unless combined with other materials and therefore should not be considered security sensitive hazardous materials in most instances. An exception to this generalization may be made for precursors that are particularly attractive to terrorists and that are not otherwise commercially available. *See* Appendix A, *infra*.

(11) What compliance or enforcement issues should be considered as we re-assess current security plan requirements?

PHMSA should prioritize its enforcement activities according to perceived risk. PHMSA should continue to ensure that entities subject to the security plan requirements

comply with applicable security regulations and that security plans contain a vulnerability assessment and address facility, personnel and en route security.

Once basic compliance is confirmed, PHMSA should provide security consulting assistance to help regulated entities address perceived vulnerabilities. In the interest of safety and security, greater assistance from government experts would benefit the regulated community.

ATA believes that any time PHMSA amends its regulations, it must do so through notice and comment rulemaking and consider providing an adequate transition period to facilitate industry compliance. This transition period should include an outreach program to help motor carriers comply with the regulations. The motor carrier industry is dominated by small businesses, many of whom do not have a person solely dedicated to security.

PHMSA must consider that when increasing the security requirements for transporting certain hazardous materials, carriers will evaluate the cost of complying with those requirements against the revenue they derive from what are usually low volume materials. Commerce could be impeded -- as carriers make a rational business decision to embargo these commodities, shippers will find it increasingly difficult to identify carriers that can and will transport their products at a competitive price.

(12) Should company size or geographic location (e.g., specific region of the country or urban or rural) play a role in determining whether a security plan is required?

No. The size and location of a company could play a role in the measures included in a security plan, but should not be considered in the decision of whether to have a security plan. Such variation would present opportunities for vulnerabilities in the transportation network to be exploited. The particular hazardous material, its quantity, and its ability to function as a weapon of mass destruction should determine the level of security required.

(13) Does the Government need to provide more information on the specific security concerns that cause the need for preparation of a security plan for certain hazardous materials to assist in security plan preparation?

Yes. The government should provide enough information about security risks to enable industry to make informed decisions regarding security enhancements.

(14) Should the Government maintain an evolving list of hazardous materials for which security plans are required based on changing threats and scenarios?

No. Experience has shown the need to react to evolving threats; however, we would not envision the security sensitive hazardous materials trigger list to change frequently. While the security threat level may go up or down, the properties of risk presented by certain hazardous materials are static. An evolving list of hazardous materials would be difficult to enforce and creates a moving target for compliance.

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For the reasons set forth above, we recommend that PHMSA narrow the list of hazardous materials that trigger the requirement to have a written security plan. We believe that PHMSA should adopt the list of hazardous materials and threshold quantities set forth in Appendix A. ATA does not believe that a single security sensitive hazardous materials trigger list is appropriate for all security risk mitigation measures. If you have any questions concerning these comments, please contact the undersigned at 703-838-1910.

Respectfully submitted,



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