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Via: <http://www.regulations.gov>

Re: Risk Based Adjustment of Transportation Security Plan Requirements –
PHMSA-06-25885 (HM-232F)

The American Trucking Associations, Inc.¹ (“ATA”) is writing to comment on the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) notice of proposed rulemaking entitled *Risk-Based Adjustment of Transportation Security Plan Requirements* (hereinafter the “Proposed Rule”).² As the national representative of the trucking industry, ATA and its members are interested in matters affecting the transportation of hazardous materials, including the proposed revisions to the U.S. hazardous materials regulations (“HMRs”) governing the preparation of hazardous materials security plans.

This rulemaking is the outgrowth of a petition filed by ATA to designate a subset of hazardous materials (*i.e.*, security sensitive hazardous materials) that would be used to trigger security plan requirements under the HMRs. ATA filed this petition in June 2005 and supports PHMSA’s efforts to narrow the scope of hazardous materials that are used to trigger a motor carriers obligation to prepare a written security plan under the HMRs. 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.

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 73 *Federal Register* 52558 (September 9, 2008).

Against this background, we submit these comments on three aspects of the Proposed Rule: (1) the proposed list of security sensitive hazardous materials; (2) the requirement to perform route specific analyses; and (3) the requirement to update the security plan. We discuss each of these issues in detail, below:

A. Modifications to the Proposed List of Hazardous Materials.

Subject to certain exceptions identified herein, ATA generally supports the proposed list of hazardous materials that would trigger the security plan requirements. The Proposed Rule indicates that PHMSA applied five factors in narrowing the list of hazardous materials that should trigger the regulatory requirement to draft and maintain a security plan:

In our qualitative risk evaluation, we considered the following factors: (1) Physical and chemical properties of the material or class of materials and how those properties could contribute to a security incident; (2) quantities shipped and mode of transport; (3) past terrorist use; (4) potential use; and (5) availability.³

These selection criteria closely parallel the list suggested by ATA in its June 2005 petition and comments to the Advance Notice of Proposed Rulemaking; however, PHMSA has excluded the cost/benefit analysis and, most significantly, has not adequately applied the “availability” factor to its proposed list.⁴

In applying PHMSA’s selection criteria to the proposed list, we believe that several modifications are in order. We discuss these modifications, below:

1. The Use of “Any Quantity” as a Regulatory Threshold.

The Proposed Rule would regulate several hazard classes at the “any quantity” level. These include certain explosives; poison by inhalation materials; desensitized explosives; dangerous when wet materials; organic peroxide, Type B, temperature controlled; and select agents.⁵ ATA believes that the “any quantity”

³ 73 *Federal Register* at 52561/3.

⁴ The qualitative risk evaluation factors originally suggested by ATA include the following: (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.

⁵ See 73 *Federal Register* at 52571/3 proposed to be codified at 49 CFR § 172.800(b).

threshold is inappropriate for virtually all hazard classes, with the exception of select agents, certain explosive detonators. Applying the qualitative risk evaluation factors to each hazard class, PHMSA should determine a quantity of material that is too small to be used as a weapon of mass destruction. For example, a small cylinder (1 liter) of a Zone C or D poison by inhalation material would be insufficient to cause mass casualties and therefore is unlikely to be attractive to a terrorist. Similarly, a quantity of less than a pound of 1.5 explosives is unlikely to be attractive to a terrorist as a weapon of mass destruction. Finally, a small shipment of pharmaceutical nitroglycerine and similar materials also should not trigger written security plan regulatory requirements. We urge PHMSA to reconsider the proposed list of security sensitive hazardous materials that are listed with thresholds of “any quantity” and determine a realistic quantity at which these materials can function as a weapon of mass destruction.

2. Desensitized Explosives in Class 3 or Division 4.1.

The Proposed Rule would require written security plans for motor carriers that transport “[a]ny quantity of a desensitized explosive meeting the definition of a Class 3 or Division 4.1 material.”⁶ Unfortunately, many of the desensitized explosives that are shipped as Class 3 or Division 4.1 materials are not identified as desensitized explosives on the hazardous materials shipping paper, making it difficult - if not impossible - for a motor carrier to know whether they are transporting these materials.

PHMSA has included these materials on the basis that they may be reconstituted into explosives and have been used in prior terrorist attacks. Based upon the qualitative risk evaluation criteria, ATA recommends excluding these materials on the grounds that they are not capable of functioning as a weapon of mass destruction absent further processing. We also believe that these materials are commercially available and that a terrorist would likely procure these materials through legitimate processes rather than risk being apprehended while stealing them and reprocessing them prior to their use in a terrorist attack.

If PHMSA ultimately determines that these materials should be included on the list of the materials that trigger the regulatory requirement to prepare and maintain a security plan, PHMSA must promulgate a list of specific UN identification numbers to provide the motor carrier with the tools necessary to comply with the security regulations or enable the business decision to not transport these types of materials. Absent the use of UN identification numbers, carriers will not know that they are transporting these materials, which may result in instances of non-compliance with the HMRs.

⁶ 73 *Federal Register* at 52571/3 proposed to be codified at 49 CFR § 172.800(b)(8).

3. Dangerous When Wet Materials.

The Proposed Rule would require a security plan for shipments of any quantity of Division 4.3 dangerous when wet material.⁷ ATA recommended that only dangerous when wet materials that meet Packing Group I be included and only in packages that exceed 3,000 liters. In proposing to regulate this entire class of materials for any quantity in transportation, PHMSA seems to ignore its own qualitative risk evaluation criteria. The preamble to the Proposed Rule indicates that Division 4.3 materials are “industrial chemicals easily available with no security restrictions.”⁸ In light of the ease in which these materials may be legitimately procured, it makes little sense to impose additional security requirements on their transportation. A terrorist seeking to obtain these materials likely would obtain them commercially rather than bear the risk of being caught trying to hijack or otherwise steal these materials while in transportation.

4. Toxic Substances.

PHMSA proposes to include any quantity of Division 6.1 toxic substances meeting the criteria for Packing Group I as a regulatory trigger for written security plans. ATA agrees that Division 6.1 materials in Packing Group I are a potential security risk; however, given the nature of these substances and their commercial availability, we do not believe that they should be regulated in quantities below 3,000 liters. Included in this category are many commercially available pesticides that are easily obtained from a garden supply or agricultural supply center.⁹ These hazardous materials can be purchased by consumers with virtually no security requirements and therefore it is inappropriate to include small to medium sized packages of these materials as a regulatory trigger for written security plans.

B. Route Specific Analyses.

The existing security plan regulations require motor carriers to assess *en route* security. The Proposed Rule would radically alter this general requirement by mandating a written risk assessment that includes “an assessment of specific risks that exist on specific routes or in specific locations.”¹⁰ ATA supports the general requirement to address en route security; however, the requirement to address specific risks on specific

⁷ 73 *Federal Register* at 52571/3 proposed to be codified at 49 CFR § 172.800(b)(10).

⁸ 73 *Federal Register* at 52565/1.

⁹ See e.g. UN2644, Methyl Iodide, 6.1, PGI, which is sold under the following trade names: Raid Ant and Roach Killer and Grant’s Ant Stakes.

¹⁰ 73 *Federal Register* at 52567/2.

routes is unworkable for most for-hire motor carriers. Most for-hire carriers do not travel on the same route each day. The freight transported by these carriers and the customers they service vary on a day-to-day basis. For this reason, a requirement to assess specific risks on specific routes would result in a security plan that is out-of-date the day after it is written.

En route security is an important component to a security plan. Addressing situations such as stopping to refuel or driver rest periods in a general fashion is appropriate; however, it is unreasonable to expect a motor carrier to address specific risks on specific routes when the pick-up and delivery locations, refueling locations, rest areas and type of freight being transported change from day-to-day.

C. Security Plan Updates.

The HMRs require motor carriers to revise and update written security plans “as necessary to reflect changing circumstances.”¹¹ The Proposed Rule would modify this regulation by requiring the security plan to “be reviewed at least annually and revised and/or updated as necessary to reflect changing circumstances.”¹² The preamble to the Proposed Rule sets forth examples of changing circumstances that would trigger the obligation to update the security plan. Included in these examples are acquisitions, mergers, operating rights, changes in materials transported, and expanded or reduced service levels.¹³ This is a significant modification to the existing update requirement that will result in many more security plan updates than are currently required under the existing regulation. The costs associated with this revision are not discussed in the Proposed Rule, and we believe that these costs could be significant.

ATA recognizes the need to maintain current security plans and to update them upon a *material* change in circumstances. Changes such as expanded or reduced service levels or a change in the materials transported may not necessitate a revision to the security plan in all instances. ATA supports the practice of periodically reviewing security plans, but believes that formal revisions to the security plans should only be required upon a *material change in circumstances that would render a significant aspect of the security plan deficient*. The acquisition of a new terminal or the implementation of a new security measure, such as king pin locks or security seals, are the types of changes that should be reflected in a security plan; however, a change in company ownership or a decision to provide freight transportation services to a new customer or along a new route are not the types of material changes that would render an existing security plan deficient. PHMSA should make clear that only material changes in circumstances that render an

¹¹ 49 CFR § 172.802(b).

¹² 73 *Federal Register* at 52572/3 proposed to be codified at 49 CFR §172.802(c).

¹³ See 73 *Federal Register* at 52567/2.

existing security plan deficient trigger the regulatory requirement to update a company's security plan.

D. Carrier Knowledge

Some motor carriers have made a business decision not to transport certain hazardous materials in quantities that trigger the HMR security requirements. These carriers still face the problem of undeclared hazardous materials. If a shipper chooses not to label or mark a hazardous materials package and does not provide a proper shipping paper to a carrier, it is virtually impossible for a carrier to discover that the package contains hazardous materials in violation of the HMRs. For this reason, PHMSA should clarify that a carrier is not in violation of the security plan requirements where the carrier unknowingly transports undeclared security sensitive hazardous materials and does not have a security plan.

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For the reasons set forth above, ATA supports PHMSA's decision to embrace a risk-based approach to hazardous materials transportation security generally, and its proposed narrowing of the list of hazardous materials subject to the security plan requirements. We recommend the following revisions to the Proposed Rule:

- Modify the list of materials that trigger the security plan requirements to exclude desensitized explosives on the grounds that they cannot function as a weapon without further modification and they are commercially available without security restrictions.
- Eliminate the use of the "any quantity" threshold, which is inappropriate for virtually all hazard classes except of select agents and certain explosive detonators.
- Do not include dangerous when wet materials within Packing Group I, unless transported in quantities that exceed 3,000 liters, on the grounds that these industrial chemicals are readily available at other points in the supply chain with no security restrictions.
- Exclude Division 6.1 materials in Packing Group I from the list of security sensitive hazardous materials, unless they are transported in quantities exceeding 3,000 liters, on the grounds that these substances are commercially available.

- Do not require specific route analyses as part of the vulnerability assessment for motor carriers that service multiple customers and travel irregular routes.
- Require formal revisions to security plans only when there is a material change in circumstances that would render a significant aspect of the existing security plan deficient.
- Include a provision making clear that the transportation of undeclared hazardous materials is not a violation of the HMRs, unless the carrier has knowledge that a specific package contained undeclared security sensitive hazardous materials.

If you have any questions concerning these comments, please contact the undersigned at (703) 838-1910.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard Moskowitz".

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