

**DEPARTMENT OF TRANSPORTATION****Research and Special Programs Administration****DEPARTMENT OF HOMELAND SECURITY****Transportation Security Administration**

[Docket No. RSPA-2004-18730]

RIN 2137-AE02

**Hazardous Materials: Enhancing Rail Transportation Security for Toxic Inhalation Hazard Materials**

**AGENCY:** Research and Special Programs Administration (RSPA), Department of Transportation; and Transportation Security Administration, Department of Homeland Security.

**ACTION:** Notice; request for comments.

**SUMMARY:** The Department of Transportation (DOT) and the Department of Homeland Security (DHS) are examining the need for enhanced security requirements for the rail transportation of hazardous materials that pose a toxic inhalation hazard. The two departments are seeking comments on the feasibility of initiating specific security enhancements and the potential costs and benefits of doing so. Security measures being considered include improvements to security plans, modification of methods used to identify shipments, enhanced requirements for temporary storage, strengthened tank car integrity, and implementation of tracking and communication systems.

**DATES:** Submit comments by October 18, 2004. To the extent possible, we will consider late-filed comments as we make decisions on the issues addressed in this notice.

**ADDRESSES:** You may submit comments identified by the docket number RSPA-04-18730 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Web site: <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2251.

- Mail: Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001. If sent by mail, comments are to be submitted in two copies. Persons wishing to receive confirmation of receipt of their comments should

include a self-addressed stamped postcard.

- Hand Delivery: Docket Management System; Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**Instructions:** You must include the agency name and docket number RSPA-04-18730 for this notice at the beginning of your comment. Internet users may access comments received by DOT at <http://dms.dot.gov>. Note that comments received may be posted without change to <http://dms.dot.gov> including any personal information provided. Please see the Privacy Act section of this document. All comments should be sent to the Docket Management System. Comments or portions of comments that include trade secrets, confidential commercial or financial information, or sensitive security information will not be posted in the public docket. Such information will be placed in a separate file to which the public does not have access, and a note will be placed in the public docket to state that the agency has received such materials from the commenter. RSPA and TSA have established a procedure to review all comments prior to placement in the public docket. See Submission of Comments section of this document for information on the steps you should take if you believe your comments or portions of your comments contain trade secrets, confidential information, or sensitive security information that should be protected.

**Docket:** You may view the public docket through the Internet at <http://dms.dot.gov> or in person at the Docket Management System office at the above address.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Background**

Under the Hazardous Materials Regulations (HMR; 49 CFR parts 171-

180), toxic inhalation hazard materials (TIH materials) are gases or liquids that are known or presumed on the basis of tests to be so toxic to humans as to pose a hazard to health in the event of a release during transportation. See 49 CFR 171.8, 173.115, and 173.132. TIH materials pose special risks during transportation because their uncontrolled release can endanger significant numbers of people. To assure their safe and secure transportation, TIH materials are among the most stringently regulated hazardous materials. TIH materials play a vital role in our society, including purifying water supplies, fertilizing crops, providing fundamental components in manufacturing, and fueling the space shuttle.

The same characteristics of TIH materials that cause concern in the event of an accidental release also make them attractive targets for terrorism or sabotage. About 10 million tons of TIH materials are shipped by rail in the United States every year. While this is only a fraction of the 3.1 billion tons of hazardous materials shipped annually by all modes of transportation, a terrorist attack against the rail transportation of TIH materials in an urbanized area could endanger significant numbers of people. Improving the security of these shipments presents complex challenges.

Under the Aviation and Transportation Security Act (ATSA), Pub. L. 107-71, 115 Stat. 597 (November 19, 2001), and delegated authority from the Secretary of Homeland Security, the TSA Assistant Secretary has broad responsibility and authority for "security in all modes of transportation \* \* \*" <sup>1</sup> In executing those responsibilities and duties, the Assistant Secretary is empowered, among other things, to:

(1) Assess threats to transportation, 49 U.S.C. 114(f)(2);

(2) Develop policies, strategies and plans for dealing with threats to transportation, 49 U.S.C. 114(f)(3);

(3) Make other plans related to transportation security, including coordinating countermeasures with

<sup>1</sup> 49 U.S.C. 114(d). The TSA Assistant Secretary's current authorities under ATSA have been delegated to him by the Secretary of Homeland Security. Under Section 403(2) of the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2315 (2002) (HSA), all functions of TSA, including those of the Secretary of Transportation and the Undersecretary of Transportation of Security related to TSA, transferred to the Secretary of Homeland Security. Pursuant to DHS Delegation Number 7060.2, the Secretary delegated to the Assistant Secretary (then referred to as the Administrator of TSA), subject to the Secretary's guidance and control, the authority vested in the Secretary respecting TSA, including that in Section 403(2) of the HSA.

appropriate departments, agencies, and instrumentalities of the United States Government, 49 U.S.C. 114(f)(4);

(4) Enforce security-related regulations and requirements, 49 U.S.C. 114(f)(7);

(5) Oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities, 49 U.S.C. 114(f)(11); and

(6) Issue, rescind, and revise such regulations, including issuing regulations and security directives without notice or comment or prior approval of the Secretary, as are necessary to carry out TSA functions, 49 U.S.C. 114(l)(1) and (2).

In sum, the TSA Assistant Secretary's authority with respect to transportation security is comprehensive and supported with specific powers related to the development and enforcement of security plans, regulations, and other requirements. Accordingly, under this authority, the Assistant Secretary may identify a security threat to a mode of transportation, develop a measure for dealing with that threat, and enforce compliance with that measure.

The HMR are promulgated under the mandate in section 5103(b) of Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*, as amended by § 1711 of the Homeland Security Act of 2002, Pub. L. 107-296) that the Secretary of Transportation "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." Section 5103(b)(1)(B) provides that the HMR "shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate."

As is evident from the above discussion, DHS and DOT share responsibility for hazardous materials transportation security. The two agencies consult and coordinate concerning security-related hazardous materials transportation requirements to assure that they are consistent with the overall security policy goals and objectives established by DHS and that the regulated industry is not confronted with inconsistent security regulations promulgated by multiple agencies.

## II. Current Security Requirements

On March 25, 2003, RSPA published a final rule under Docket No. RSPA-02-12064 (HM-232; 68 FR 14510). The final rule added a new Subpart I to Part 172 of the HMR to require persons who offer certain hazardous materials for transportation in commerce and persons who transport certain hazardous

materials in commerce to develop and implement security plans. The final rule also included new security awareness training requirements for all hazardous materials employees (hazmat employees) and in-depth security training requirements for hazmat employees of persons required to develop and implement security plans.

The security plan regulations adopted under HM-232 require persons who offer for transportation or transport the following hazardous materials to develop and implement security plans:

(1) Materials, including TIH materials, that must be placarded under the HMR;

(2) Shipments in bulk packagings with a capacity equal to or greater than 13,248 L (3,500 gal) for liquids or gases or greater than 13.24 cubic meters (468 cubic feet) for solids; and

(3) Infectious substances listed as select agents by the Centers for Disease Control and Prevention (CDC) in 42 CFR part 73.

In accordance with Subpart I of Part 172 of the HMR, then, persons who offer for transportation or transport TIH materials in commerce must develop and implement security plans. The security plan must include an assessment of possible transportation security risks and appropriate measures to address the assessed risks. Specific measures implemented as part of the plan may vary commensurate with the level of threat at a particular time. At a minimum, the security plan must address personnel security, unauthorized access, and en route security. For personnel security, the plan must include measures to confirm information provided by job applicants for positions that involve access to and handling of the hazardous materials covered by the plan. For unauthorized access, the plan must include measures to address the risk that unauthorized persons may gain access to materials or transport conveyances being prepared for transportation. For en route security, the plan must include measures to address security risks during transportation, including shipments stored temporarily en route to their destinations.

## III. Purpose of This Notice

RSPA and the Federal Railroad Administration (FRA) of the Department of Transportation (DOT) and TSA and the Information Analysis and Infrastructure Protection Directorate (IAIP) of DHS are considering measures to enhance the security of rail shipments of TIH materials. We are examining security issues related to security plans, including obscuring the visibility of TIH cargoes, temporary

storage of TIH materials in rail tank cars, tank car integrity, and tracking and communications. RSPA, FRA, IAIP, and TSA developed this notice to solicit information from the regulated community, state and local governments, emergency responders, and the public on the feasibility of adopting new security measures and potential impact of the measures being considered on the transportation industry and the U.S. economy as a whole.

DOT and DHS are highly cognizant that the transport of TIH materials is not limited to rail. Currently, TIH is also transported via highway, pipeline and maritime. DOT and DHS's focus on rail is only the first phase in a interdepartmental multiphase effort to assess and secure the transportation of TIH in all transportation modes to create an end-to-end secure TIH supply chain.

### A. Security Plans

As indicated above, shipments of TIH materials are subject to the security plan requirements in Subpart I of Part 172 of the HMR. Each person who offers or transports TIH materials must develop and implement a security plan that covers personnel security, unauthorized access, and en route security. The HMR requirement for a security plan sets forth general requirements for a security plan's components rather than a prescriptive list of specific items that must be included. The regulation sets a performance standard that provides shippers and carriers with the flexibility necessary to develop plans that address their individual circumstances and operational environment. Accordingly, each security plan will differ because it will be based on a company's individualized assessment of the security risks associated with the specific materials it ships or transports and its unique circumstances and operational environment.

Shippers and carriers were required to have security plans in place by September 25, 2003. To assist the industry to comply with the security plan requirements, RSPA developed a security plan template to illustrate how risk management methodology can be used to identify points in the transportation process where security procedures should be enhanced within the context of an overall risk management strategy. The security plan template is posted in the docket and on the RSPA Web site at <http://hazmat.dot.gov/rmsef.htm>. In addition, a number of industry groups and associations have developed guidance material to assist their members to develop appropriate security plans.

DOT and DHS are interested in determining how these security plans might be improved, particularly as they relate to TIH materials. DHS, using its expertise in security matters and working with DOT, including RSPA and FRA, is considering specific criteria for these security plans to adequately address the security risks to TIH materials. DHS is also willing to review security plans to ensure that they properly address these criteria. RSPA is considering revising its security plan rule to incorporate the DHS criteria for TIH materials and establish a process by which DHS would review the security plans of TIH transporters and shippers. DOT and DHS (RSPA, FRA, IAIP, TSA) are considering ways to improve compliance with the RSPA rule, both as currently written and as it may be revised.

In this notice, we are seeking information from shippers and carriers concerning the process by which their security plans were developed, including any problems encountered during either the drafting or implementation phase, recommended "best practices," and any additional guidance or assistance that may be appropriate. In addressing these issues, commenters may wish to consider the following questions:

1. What methodology was used to develop your security plan? Did you rely in whole or in part on guidance material provided by DOT or the industry (e.g., the American Chemistry Council, the Chlorine Institute, the Association of American Railroads)? How helpful were the materials you utilized? Should DOT/DHS work with the industry to develop model security plans or "best practices" for shippers and transporters of TIH materials?

2. Can the methodology that you utilized to develop your security plan be applied generally to some or all shipments of TIH materials? Are there specific measures you have implemented that you would recommend for other shippers/carriers of TIH materials?

3. Does your security plan include "layered" measures that are tied to specific threat levels? How are these implemented? What difficulties have you experienced in developing such "layered" measures? Would more definitive guidance from DOT/DHS be helpful?

4. Have you assessed the effectiveness of different types of security measures implemented as part of your security plan? If so, what types of measures did you use and how did you make the assessment?

5. Would it be useful if DOT/DHS provided general guidelines or standards for security measures that would normally be expected for TIH shipments while allowing tailoring for individual circumstances or operational environments? What would be the impact of requiring company certification that these guidelines or required standards are achieved?

6. Should DOT/DHS require submission of security plans for TIH shipments by rail for review and approval to ensure that the plans are adequate?

**Note:** DOT and DHS recognize that company security plans may contain sensitive information describing newly adopted security measures, and that unregulated public dissemination of the information could defeat these measures. In the event DOT and DHS decide to require companies to submit their security plans, a determination as to whether the information would be covered by regulations governing the protection of sensitive security information (SSI) (see 49 CFR parts 15 and 1520) would be made at that time.

#### *B. Identification of Materials and Hazard Communication*

Because of concerns about the potential use of TIH materials as weapons of opportunity or weapons of mass destruction, DOT and DHS are considering whether to require the removal from rail tank cars used to transport TIH materials of identifying marks, names, stenciling, placards, or other markings that could help a terrorist or criminal identify a target. Shippers and transporters of TIH material use a variety of methods to identify the materials contained inside a rail tank car and to communicate the hazard of the material to emergency responders and transport workers. In addition to the hazard communication requirements of the HMR (see discussion below), shippers may paint rail tank cars in distinctive colors or patterns to reduce or eliminate the possibility of mishandling the tank car during transportation or in an emergency. Further, shippers may print the name of their company on their rail tank cars; in many instances, the company name can be used to deduce the contents of the tank cars.

In addition to voluntary measures employed by shippers of TIH materials, hazard communication is accomplished using the shipping documents, placards, and markings required under the HMR. In accordance with subpart C of part 172 of the HMR, shipments of TIH materials must be accompanied by appropriate shipping documentation. A shipping paper must include the material's

proper shipping name, hazard class, UN identification number, and packing group number, and the total quantity of the material being shipped (see § 172.202 of the HMR). The shipping paper helps transport workers and emergency responders identify the material and assess its hazard. The shipping paper must include an emergency response telephone number for use in the event of an emergency involving the hazardous material. The number must be for a person who is knowledgeable about the material and has comprehensive emergency response and incident mitigation information for that material (see § 172.604 of the HMR). In addition, the shipping documentation for a specific hazardous materials shipment must include emergency response information that can be used by emergency responders in the mitigation of an incident involving the material (see § 172.602 of the HMR).

Placards use colors, symbols, numbers, and text to quickly communicate the hazard of a specific material. Currently, all rail shipments of TIH materials must be placarded in accordance with subpart F of part 172 of the HMR. The primary function of placards is to provide initial warning information in the event of an emergency or accident involving a shipment of hazardous materials. Placards provide first-on-scene emergency responders with the information necessary to quickly assess an accident situation from a distance, reducing the possibility of someone approaching the accident site without wearing protective clothing or equipment. Firefighters, police, and other responders can thus avoid unnecessary exposure to dangerous, perhaps life-threatening, material. In addition, placards provide emergency response personnel with the information necessary to determine whether there is a need to evacuate persons in the vicinity of an accident. Further, placards indicate to emergency responders how to safely and appropriately manage the accident, mitigate the threat of environmental damage, and conduct life-saving operations. In addition to providing critical information to emergency response personnel, placards identify hazardous shipments for transport workers and assure that they are handled safely and efficiently throughout the transportation process. For example, the regulations applicable to rail carriers in part 174 of the HMR include specific handling requirements for placarded railcars, including their placement in a train car sequence,

separation of tank cars containing incompatible materials, and special procedures for switching operations. The regulations also include specific operational controls for placarded freight containers that help to assure safe handling by transport workers during transportation. In addition, by Congressional mandate, the Occupational Safety and Health Administration regulations applicable to facilities that manufacture and handle hazardous materials require placards to remain on rail cars or motor vehicles loaded with hazardous materials and stored at the facility after delivery and prior to unloading.

In addition to placards, rail tank cars loaded with TIH materials are required to have certain identifying markings. As with placards, these markings provide initial warning information in the event of an emergency or accident involving a shipment of hazardous materials and alert transport workers to the presence of a TIH chemical in a specific shipment, assuring that the shipment is handled safely and in conformance with regulatory requirements. For example, packages of TIH materials, such as cylinders, portable tanks, cargo tanks, and rail tank cars, must be marked "INHALATION HAZARD" (*see* § 172.313(a)); marked with a 4-digit UN identification number (*see* §§ 172.301, 172.302); and marked with the proper shipping name of the material (*see* §§ 172.326, 172.328, and 172.330). Tank cars are also marked with a code related to the specification to which they were built. TIH materials are typically required to be transported in certain high integrity tank cars.

On January 15, 2003, RSPA completed a study of the role placards play for transportation safety and security. (The study can be found on our Web site at <http://hazmat.dot.gov/pubtrain/0803RedactedPlacardingReportSSI.pdf> and will be placed in the docket established to receive comments to this notice.) The study reviewed the use of placards to enhance hazardous materials transportation safety and evaluated both operational and technological alternatives to placarding. The study concluded that the existing placarding system should be retained, but that DOT should continue to review the use of operational procedures and technological developments as security enhancements and as alternatives to placards in specific high-risk situations as well as for broad application. In considering potential changes to the placarding requirements as part of its continuing review, the study further concluded that DOT should consider the impact on costs, training, and

international trade that could result from changes in the current placarding requirements.

In addition, DHS is conducting a study to examine alternative methods for communicating the hazards of hazardous materials transported in rail tank cars. The study will identify up to ten alternative methods to rail car placarding. The evaluation of the alternatives will include: (1) Technical considerations (*i.e.*, the speed and accuracy of the identification of a specific hazardous material by first responders and system interoperability with systems currently in use by the emergency response community); (2) international considerations (*i.e.*, the impact on international rail transportation from the United States to Canada and Mexico); (3) costs (*i.e.*, installation, start-up, and system maintenance costs, as well as the costs to train the users, showing particular consideration for small urban and rural volunteer first responders); and (4) speed (*i.e.*, the time required to train first responders to use the new technology). DHS expects to complete the study by the end of 2004.

We encourage commenters to address the potential impacts associated with removing placards and identifying marks from rail tank cars and replacing them with some other hazard communication system. In particular, we invite commenters to address the following questions:

1. Should identifying marks, such as distinctive paint colors or patterns and company names, be prohibited? What would be the practical impact of such a prohibition?

2. If placards and other identifying marks are removed from rail tank cars transporting TIH materials, are there alternative operational procedures or systems that could simply and effectively communicate the hazards of the material to emergency response personnel and transport workers? What are the advantages and disadvantages of the alternative procedures or systems? What costs would be associated with development and implementation of such alternative procedures or systems? What security benefits would be associated with each?

3. If alternative procedures or systems are considered that would allow removal of placards and other identifying marks from rail tank cars transporting TIH materials, what should the criteria be for balancing safety and security considerations and demonstrating that these procedures and systems are viable, practical, and workable? How secure would such systems be? Do these systems have the

potential to be used maliciously to identify shipments and locations for attack? How can malicious use of such systems be prevented?

4. What are the impacts on emergency response of a significant change in the way the TIH hazard is communicated? How many emergency responders would be affected? What are the cost implications to the emergency response community of a change in current hazard communication requirements, including costs for new equipment and retraining?

5. What are the impacts for transportation workers of a significant change in the way the TIH hazard is communicated? Do shipping documents provide sufficient information to enable transportation workers to safely handle TIH materials during the course of transportation or would some additional hazard communication mechanism be necessary? What are the cost implications to shippers and carriers of a change in current hazard communication requirements, including costs for new equipment and retraining?

6. Placards depict a hazard type. There are a wide range of materials that may be identified with a similar placard, yet not all of the materials will pose the same security risk. Should DOT/DHS consider the removal of more specific identifying marks on rail tanks cars carrying TIH materials, but leave placards in place? What are the implications for emergency responders of such an approach?

7. Placards are part of an internationally recognized system for communicating the hazards of specific materials in transportation. What are the potential impacts on international transportation of TIH materials of a change to U.S. requirements for communicating the TIH hazard?

In addition, commenters are invited to review the DOT placarding study and comment on its conclusions concerning operational and technological alternatives to placarding and its overall conclusion that the existing placarding system should be retained.

### *C. Temporary Storage of TIH Materials in Rail Tank Cars*

Rail tank cars carrying TIH materials may be stored temporarily at rail yards or other facilities prior to their ultimate delivery. The HMR apply to hazardous materials shipments stored temporarily between the time the shipment is accepted for transportation by a carrier until the time the shipment is delivered to its destination. Such storage is termed "storage incidental to movement." Hazardous materials stored incidental to movement are subject to specific HMR

requirements applicable to such storage. For example, such hazardous materials must be accompanied at all times by appropriate shipping documentation, including emergency response information and an emergency response telephone number in accordance with subparts C and G of part 172. Further, package markings, labels, or placards required under subparts D, E, and F of part 172 must remain on the packages or transport vehicles throughout the time that they are stored incidental to movement. In addition, hazardous materials stored incidental to movement are subject to the requirements for security plans in subpart I of part 172. However, the HMR do not currently address the amounts or types of hazardous materials that may be stored at one time in one location nor do the HMR limit the time that hazardous materials may be stored incidental to movement.

DOT and DHS are currently considering whether revisions to the temporary storage requirements applicable to rail cars transporting TIH materials are appropriate. Commenters are invited to address whether such revisions are appropriate and the impact such revisions could have on the costs to transport TIH materials in addition to the impact on recipients and users (*i.e.*, towns, municipalities). Commenters should provide information related to the following specific questions:

1. Are current security requirements applicable to the temporary storage of TIH materials sufficient? If not, what additional requirements should be considered?

2. Should DOT/DHS consider limits on the amount of TIH materials that may be stored temporarily in a single location? If so, how should such a limit be derived? Should a limit take into consideration the type and location of facility at which the materials are stored and the security features in place at the facility? How would such an aggregation limit affect the transportation of TIH materials, including transportation costs?

3. Should DOT/DHS consider limits on the length of time that TIH materials could be stored temporarily in a single location? If so, how should such a time limit be derived? How would such a time limit affect the transportation of TIH materials, including transportation costs?

4. Should DOT/DHS develop specific criteria for facilities at which TIH materials may be stored temporarily (*e.g.*, fencing, lighting, restricted access, security personnel, remote monitoring, and the like)? If so, what specific features would result in the greatest

security benefit? Would a requirement for specific security features limit the availability of facilities at which TIH materials could be stored temporarily during transportation? If so, identify which features would limit availability and explain what the impact would be on the transportation of TIH materials, including transportation costs.

5. Is it feasible to prohibit the temporary storage of rail tank cars carrying TIH materials in high-population areas or in response to specific threats or threat levels? What impact would such a prohibition have on the transportation and use of TIH materials?

6. Would requirements for expedited handling and delivery of TIH rail cars serve as a feasible alternative method to limit or reduce temporary storage? If so, how should "expedited handling and delivery" be defined? What would be the costs and benefits of a requirement for expedited handling and delivery? What actions can or should the Federal government take to facilitate expedited handling and delivery of TIH rail cars?

#### *D. Tank Car Integrity*

The first railroad tank car standards were developed by the railroad industry in 1903. Current regulatory requirements for the design and construction of railroad tank car tanks are in Part 179 of the HMR. Part 179 prescribes the specifications for tanks that are to be mounted on or form part of a tank car and that are used for the transportation of hazardous materials in commerce. The Association of American Railroads Tank Car Committee (AAR TCC) is an industry group that is comprised of railroads, shippers, and tank car builders. The AAR TCC reviews and approves tank car designs, tank car facilities, and quality assurance programs. This authority is given to the AAR TCC by RSPA in Part 179 of the HMR. The AAR TCC publishes the M-1002 Manual of Standards and Recommended Practices, which is incorporated by reference in the HMR.

Rail tank cars used to transport TIH materials must meet rigorous design and construction standards and must be thoroughly inspected and tested on a regular basis to assure that the integrity of the tank car is maintained with no deterioration. The design, construction, and maintenance standards help to ensure that a rail tank car can withstand most accident situations, including collisions and derailments, with no release of its contents.

DOT and DHS are considering whether rail tank cars used to transport TIH materials should be modified to enhance shipment security.

Modifications could include relatively simple measures to prevent tampering with valves and other accessories to more fundamental revisions to basic designs or materials of construction that would enable the tank car to withstand a terrorist attack. Commenters are encouraged to address the following questions applicable to rail tank car integrity:

1. Are devices commercially available that could be easily installed on rail tank cars to prevent access by unauthorized persons to the contents of the tank car? Are such devices currently in use in the rail industry? How effective are such devices? What costs are associated with the installation of such devices in addition to the cost of the devices themselves—labor costs for installation, time out-of-service for the tank car, etc? Please provide the bases for cost information.

2. What are the current capabilities of rail tank cars carrying TIH materials to survive a terrorist attack? What types of attacks would be survivable? What types of attacks should be survivable? What tests have been conducted or should be conducted to determine these capabilities?

3. What technology is currently available that would strengthen rail tank cars to withstand or mitigate the effects of a terrorist attack? What types of attacks would the technology protect against? Would fundamental redesign of rail tank cars be necessary or could effective modifications be accomplished through changes in construction methods or materials? Would the technology or modifications be applicable to retrofit applications as well as new construction? What types of research and development need to be conducted in conjunction with answering questions related to strengthening rail tank car design? Are there technologies developed for other purposes, such as tank car leak or breach protection, that could play a significant role in enhancing security for TIH materials in addition to or in place of strengthening rail tank cars to withstand or mitigate the effects of a terrorist attack?

4. What are the costs and benefits of modifying rail tank cars used to transport TIH materials to increase the likelihood that they could withstand or mitigate the effects of a terrorist attack? How many tank cars would be affected? Over what period of time could such modifications be accomplished? What would be the impact of such a program on the transportation and use of TIH materials? In responding to these questions, please identify specific

modifications. Please provide the bases for cost and benefit information.

#### *E. Communication and Tracking*

Radio frequency identification (RFID) tags are small electronic devices designed to contain information that can be retrieved at a distance using a specialized reader. The railroad industry uses a rail car and locomotive tracking system that employs RFID tags (known in the industry as Automatic Equipment Identification (AEI) tags) on every freight car and locomotive in the United States and Canada. Railroads use AEI information for confirming train consists and are beginning to use the AEI information to identify specific cars that have been flagged by wayside equipment defect detectors. AEI tagging is the industry standard for rail cars.

Tracking and other types of communications systems enable carriers to monitor a shipment while en route to its destination and to identify various service irregularities. Some types of tracking systems employ Global Positioning System (GPS) or GPS-type positioning information and coded or text messaging transmitted over a terrestrial communications system. The railroad industry and FRA are cooperating on the development of Positive Train Control (PTC) systems. PTC systems include digital data link communications networks, positioning systems, on-board computers with digitized maps and in-cab displays, throttle-brake interfaces on locomotives, wayside interface units, and control center computers and displays. PTC systems can track the precise location of all trains and the individual cars that make up the train and will be capable of remote intervention with train operations. In addition, DHS is currently evaluating the feasibility, costs, and benefits of proposals to develop certain communication and tracking capabilities for rail hazardous materials shipments.

The HMR currently do not include communication or tracking requirements for hazardous materials shipments. Offerors and transporters of TIH materials may elect to implement communication or tracking measures as part of security plans developed in accordance with Subpart I of Part 172 of the HMR, but such measures are not mandatory.

DOT and DHS are considering whether communication or tracking requirements should be required for rail shipments of TIH materials, such as near real-time satellite tracking of TIH rail cars and real-time monitoring of tank car or track conditions. In addition, DOT and DHS are considering reporting

requirements in the event that TIH shipments are not delivered within specified time periods. We invite commenters to address communication and shipment tracking issues associated with enhanced shipment security and, specifically, to consider the following questions:

1. Do rail carriers currently employ other communications or tracking technology for rail shipments? What are the practical limitations of such systems? Can tracking systems be activated from remote locations? Is it feasible to employ such systems only for certain shipments or certain cars? How are such systems affected by power outages, interference, weather and geographic phenomena, or communications outages? Are there distances beyond which a communications or tracking system will not function? Are there safety or productivity benefits associated with the use of communications and tracking technology that would help offset costs?

2. Is the current system of Automatic Equipment Identification (AEI) tags and readers installed by railroads, coupled with data on the consist of trains, adaptable for wider use by government and industry in determining the approximate real-time location of TIH rail cars? How reliable and how accurate is rail car location information collected by the current system for such an application? More generally, how significant is tracking to enhancing security and what degree of tracking accuracy is optimal?

3. Is it feasible to employ small, self-contained tracking systems on certain shipments or certain cars that provide positioning/status information only when queried from a remote location, or based on an event "tripping" a sensor? Is it feasible to employ subordinate sensor equipment on shipments or cars that can communicate with a tracking system located on a locomotive at distances potentially in excess of 1,000 feet?

4. How secure are satellite tracking and similar systems? How do rail carriers ensure that only authorized personnel have access to such information? Do these systems have the potential to be used maliciously to identify shipments and locations for attack? How can malicious use of such systems be prevented?

5. Do or should shippers continuously monitor TIH rail car locations while they are in transportation? How do rail shippers and carriers currently address problems associated with missing or undelivered shipments? Should DOT/DHS mandate pre-shipment coordination among shippers, carriers,

and consignees? Should DOT/DHS mandate a reporting or notification system for TIH chemical shipments that are not delivered within an agreed-upon timeframe? Could such a reporting or notification system be integrated into current industry programs and practices for handling overdue shipments?

6. Are there measures or incentives that may be appropriate to consider in promoting technology development and adoption in conjunction with or separate from regulatory requirements?

#### *F. Additional Issues*

There are a number of additional issues that DOT and DHS will consider in assessing the feasibility and effectiveness of various measures to enhance hazardous materials transportation security. These include the analyses required under the following statutes and executive orders in the event we determine that rulemaking is appropriate:

*Executive Order 12866: Regulatory Planning and Review.* E.O. 12866 requires agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." We therefore request comments, including specific data if possible, concerning the costs and benefits that may be associated with adoption of specific security requirements for rail shipments of TIH materials. A rule that is considered significant under E.O. 12866 must be reviewed and cleared by the Office of Management and Budget before it can be issued.

*Executive Order 13132: Federalism.* E.O. 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. We invite state and local governments with an interest in this rulemaking to comment on the effect that adoption of specific security requirements for rail shipments of TIH materials may have on state or local safety or security programs.

*Executive Order 13175: Consultation and Coordination with Indian Tribal Governments.* E.O. 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that "significantly or uniquely affect" Indian communities

and that impose "substantial and direct compliance costs" on such communities. We invite Indian tribal governments to provide comments as to the effect that adoption of specific security requirements for rail shipments of TIH materials may have on Indian communities.

*Regulatory Flexibility Act.* Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), we must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If you believe that adoption of specific security requirements for rail shipments of TIH materials could have a significant economic impact on small entities, please provide information on such impacts.

#### IV. Submission of Comments

All comments should be sent to DOT's Docket Management System (DMS). However, comments or those portions of comments that RSPA and TSA have determined to include trade secrets, confidential commercial information, or sensitive security information (SSI) will not be placed in the public docket and will be handled separately.

If you believe that your comments contain trade secrets, confidential commercial information, or SSI, those comments or the relevant portions of those comments should be appropriately marked so that RSPA and TSA may make a determination. RSPA procedures in 49 CFR part 105 establish a mechanism by which commenters may request confidentiality. In accordance with 49 CFR 105.30, you may ask RSPA to keep information confidential using the following

procedures: (1) Mark "confidential" on each page of the original document you would like to keep confidential; (2) send DMS both the original document and a second copy of the original document with the confidential information deleted; and (3) explain why the information is confidential (*e.g.*, trade secret, confidential commercial information, SSI). In your explanation, you should provide enough information to enable a determination to be made as to whether the information provided is protected by law and must be handled separately.

In addition, for comments or portions of comments that you believe contain SSI as defined in 49 CFR 15.7, you should comply with TSA and DOT regulations governing the restrictions on the disclosure of sensitive security information. See 49 CFR 1520.9 and 49 CFR 15.9, Restrictions on the disclosure of sensitive security information. For example, these sections restrict the sharing of SSI to those with a need to know, set out the requirement to mark the information as sensitive security information, and address how the information should be disposed. Note also that when mailing in or using a special delivery service to send comments that contain sensitive security information, comments should be wrapped in a manner that prevents the information from being read.

After reviewing your request for confidentiality and the information provided, RSPA and TSA will analyze applicable laws and regulations to decide whether to treat the information as confidential. RSPA and TSA will notify you of the decision to grant or deny confidentiality. If RSPA and TSA deny confidentiality, you will be provided an opportunity to respond to the denial before the information is publicly disclosed. RSPA and TSA will reconsider its decision to deny confidentiality based on your response.

Regarding comments that have not been marked as confidential, prior to posting comments received in response to this notice in the public docket, RSPA and TSA will review all comments, whether or not they are identified as confidential, to determine if the submission or portions of the submission contain sensitive information that should not be made available to the general public. RSPA and TSA will notify you if the agencies make such a determination relative to your comment.

If, prior to submitting your comment, you have any questions concerning the procedures for determining confidentiality or security sensitivity, you may call one of the individuals listed above under **FOR FURTHER INFORMATION CONTACT** for more information.

#### V. Privacy Act

Anyone is able to search the electronic form of comments posted into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

Issued in Washington, DC, and Arlington, Virginia, on August 9, 2004.

**Robert A. McGuire,**

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**Chet Lunner,**

*Assistant Administrator, Office of Maritime and Land Security, Transportation Security Administration.*

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