

prosecution.<sup>2</sup> These incidents are investigated by ATF and referred, as appropriate, to the United States Attorneys.

However, 18 U.S.C. 845(a)(1) provides an exception to section 842(i) for "any aspect of the transportation of explosive materials via railroad, water, highway, or air which are regulated by the United States Department of Transportation and agencies thereof, and which pertain to safety." DOJ has interpreted this provision to exempt persons from application of § 842(i) when (1) DOT has actually regulated a relevant aspect of the transportation of explosives, and (2) those regulations cover the particular aspect of the safe transportation of explosives that prompted Congress to enact the criminal statute from which exemption is sought. For purposes of § 845(a)(1), if it is determined that persons engaged in certain aspects of the transportation of explosives do not pose a security threat and do not warrant regulation, then those persons are not subject to prosecution under 18 U.S.C. 842(i) while they are engaged in the transportation of explosives in commerce.

As discussed in greater detail throughout this document, this notice addresses all of the categories of individuals who are prohibited from transporting explosives in commerce via railroad under § 842(i), as amended by the SEA, and thus 18 U.S.C. 845(a)(1) excepts those categories of individuals from prosecution under § 842(i) for activities occurring during and incident to the transportation of explosives by rail in commerce.

### III. Hazardous Material Regulations

Hazardous materials are substances that may pose a threat to public safety or the environment during transportation because of their physical, chemical, or nuclear properties. Hazardous materials are essential to the economy of the United States and the well being of its people. Hazardous materials fuel cars and trucks, and heat and cool homes and offices. Hazardous materials are used for farming and medical applications and in manufacturing, mining, and other industrial processes. These materials are transported in quantities ranging from several ounces to many thousands of gallons. DOT estimates that one and one-half billion tons of hazmat are transported each year. The majority of hazardous materials move by truck (56%), while rail shipments account for

only six percent of the tonnage. The vast majority of hazardous materials shipments arrive safely at their destinations. Most incidents that do occur involve small releases of material and present no serious threat to life or property.

The hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying a safety hazard and reducing the probability and quantity of a hazardous material release. Under the HMR, which are based on the internationally recognized United Nations system for classification, identification, and ranking of hazardous materials, hazardous materials are categorized by hazard analysis and experience into hazard classes and packing groups. The regulations require each shipper to classify a material in accordance with these hazard classes and packing groups; the process of classifying a hazardous material is itself a form of hazard analysis. Further, the regulations require the shipper to communicate the material's hazards through use of the hazard class, packing group, and proper shipping name on the shipping paper and the use of labels on packages and placards on transport vehicles. Thus the shipping paper, labels, and placards communicate the most significant findings of the shipper's hazard analysis. A hazardous material is assigned to one of three packing groups based upon its degree of hazard, from a high hazard, Packing Group I, to a low hazard, Packing Group III, material. The quality, damage resistance, and performance standards of the packaging in each packing group are appropriate for the hazards of the material transported.

Under the HMR, all hazardous materials are divided into nine general classes according to their physical, chemical, and nuclear properties as follows:

- Class 1—Explosives
- Class 2—Compressed, flammable, nonflammable, and poison gases
- Class 3—Flammable liquids
- Class 4—Flammable solids
- Class 5—Oxidizers and organic peroxides
- Class 6—Toxic and infectious materials
- Class 7—Radioactive materials
- Class 8—Corrosive materials
- Class 9—Miscellaneous dangerous substances and articles

Within Classes 1, 2, 4, 5, and 6, there are more specifically defined divisions, and within Class 1 there are Compatibility Group subdivisions as well. The hazard classes and divisions are not mutually exclusive. Certain

hazardous materials have multiple dangerous properties, each of which must be addressed according to its relative potential to do harm. In these cases, the UN system and the HMR allow identification and communication of both the primary and subsidiary threats.

DOT's hazardous materials transportation safety program has historically focused on reducing risks related to the unintentional release of hazardous materials. The HMR are designed to achieve two goals: (1) To ensure that hazardous materials are packaged and handled safely during transportation, thus minimizing the possibility of their release should an incident occur, and (2) to effectively communicate to carriers, transportation workers, and emergency responders the hazards of the materials being transported. The HMR specify how to classify and package a hazardous material. Further, the HMR prescribe a system of hazard communication using placards, labels, package markings, and shipping papers. In addition, the HMR prescribe training requirements for persons who prepare hazardous materials for shipment or transport hazardous materials. The HMR include design, performance, and inspection standards for packaging, which also include operational requirements applicable to each mode of transportation.

With particular regard to explosives, subpart C of 49 CFR part 173 sets forth substantial and comprehensive requirements concerning the definition, classification, and packaging of explosives. Other rules cover the required marking labeling, and placarding of explosives shipments. See §§ 172.320, 411, and 522–525. The HMR also contain specific operational requirements for handling explosives, including requirements that specifically address rail operations (subpart E of 49 CFR part 174) and the disposition of explosive shipments at their rail destinations. See 49 CFR 174.16(b)(1).

In the wake of the terrorist attacks of September 11, 2001, and subsequent threats related to biological and other hazardous materials, DOT undertook a broad review of government and industry hazardous materials transportation safety and security programs. As part of this review, DOT established the Hazardous Materials Direct Action Group (Hazmat DAG). The Hazmat DAG met with representatives of the hazardous materials industry, emergency response community, and state governments to discuss transportation security issues and continuing terrorist threats. In addition,

<sup>2</sup> The penalty for violation of 18 U.S.C. 842(i) is up to ten years imprisonment and a fine of up to \$250,000.