

DOT created a DOT Intermodal Hazardous Materials Transportation Security Task Force, which considered attack or sabotage vulnerabilities, existing security measures, and potential ways to reduce vulnerabilities. The Task Force included representatives from FRA, FMCSA, FAA, U.S. Coast Guard (USCG), and Office of the Secretary.

Based in part on discussions in the Hazmat DAG and on the results of the Task Force review, on February 14, 2002, RSPA published an advisory notice to inform shippers and carriers of voluntary measures that can enhance the security of hazardous materials shipments during transportation (67 FR 6963). The notice addressed personnel, facility, and en route security issues and included contact points for obtaining additional, more detailed information. Among other recommendations, the security advisory notice advised employers to be aware of the possibility that someone they employ may pose a potential security risk. RSPA recommended that employers consider establishing a process to verify the information provided by applicants on application forms or resumes, including checking with former and current employers and personal references provided by job applicants.

On March 25, 2003, RSPA published a final rule under Docket No. RSPA-02-12064 (HM-232), herein referred to as HM-232 (68 FR 14510). The final rule requires 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.

In developing the HM-232 final rule, RSPA assessed the security risks associated with the transportation of different classes and quantities of hazardous materials. RSPA concluded that the most significant security risks involve the transportation of certain radioactive materials; certain explosives; materials that are poisonous by inhalation, certain infectious and toxic substances; and bulk shipments of materials such as flammable and compressed gases, flammable liquids, flammable solids, and corrosives. Based on this security risk assessment, the HM-232 final rule requires persons who offer for transportation or transport the following hazardous materials to develop and implement security plans: (1) A highway route-controlled quantity of a Class 7 (radioactive) material; (2) more than 25 kg (55 lbs) of a Division 1.1, 1.2, or 1.3 (explosive) material; (3) more than 1 L (1.06 qt) per package of a material poisonous by inhalation in

Hazard Zone A; (4) a shipment in a bulk packaging 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; (5) infectious substances listed as select agents by the Centers for Disease Control and Prevention (CDC) in 42 CFR Part 73; and (6) a shipment that requires placarding. Select agents are infectious substances identified by CDC as materials with the potential to have serious consequences for human health and safety if used illegitimately. In effect, then, the HM-232 final rule applies the security plan requirement to a shipper or carrier of a hazardous material in an amount that requires placarding and to select agents. Using the placarding thresholds to trigger enhanced security requirements covers the materials that present the most significant security threats in transportation and provides a relatively straightforward way to distinguish materials that may present a significant security threat from materials that do not. It also provides consistency for the regulated community, thereby minimizing confusion and facilitating compliance.

The HM-232 final rule also includes new security awareness training requirements for all hazardous materials employees. This training must include an awareness of the security risks associated with hazmat transportation, measures designed to enhance transportation security, and a component covering how to recognize and respond to possible security threats. With regard to personnel security, the final rule requires that each security plan include measures to confirm information provided by job applicants for positions that involve access to, and handling of, hazmat.

On May 5, 2003, RSPA published an interim final rule (IFR) to further enhance the hazardous materials transportation security (68 FR 23832). The IFR described the current system of regulations applicable to the transportation of hazardous materials in commerce, and reviewed DOT activities to enhance the security of hazardous materials shipments. In addition, the rule summarized the requirements of the USA PATRIOT Act and regulations adopted by TSA and the FMCSA to implement the background check provisions of the Act, and described actions taken by FAA, TSA, and the U.S. Coast Guard to address security issues associated with the transportation of hazardous materials by air and vessel. The IFR also incorporated into the HMR a requirement that shippers and transporters of hazardous materials

comply with applicable Federal security regulations and revised the procedures for applying for an exemption from the HMR to require applicants to certify compliance with applicable Federal transportation security laws and regulations. Finally, DOT, in consultation with TSA, determined that, based on the analyses and regulatory programs described in the IFR, the provisions of 18 U.S.C. 842(i) do not apply to the commercial transportation of explosives by motor carrier, aircraft, or vessel.

IV. Transportation Security Administration

In the wake of the terrorist attacks of September 11, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA), which established the TSA.³ TSA was created as an agency within DOT, operating under the direction of the Under Secretary of Transportation for Security. TSA became an agency of the DHS in March 2003, by operation of the Homeland Security Act of 2002. (Pub. L. 107-296.) At this point the Under Secretary became the Administrator. The Secretary of DHS has delegated back to the Administrator of TSA all of his authority in ATSA that was vested with the Secretary by operation of law under the Homeland Security Act. TSA continues to possess the statutory authority that ATSA established, which grants the Administrator authority for security in all modes of transportation.⁴

As part of its security mission, TSA is responsible for assessing intelligence and other information in order to identify individuals who pose a threat to transportation security and to coordinate countermeasures with other Federal agencies to address such threats.⁵ In addition, TSA is charged with serving as the primary liaison for transportation security to the intelligence and law enforcement communities.⁶

TSA has exercised this authority extensively in the aviation and commercial trucking industries. For instance, TSA regulations require a fingerprint-based criminal history records check (CHRC) on individuals with access to secured areas of airports and aircraft. See 49 CFR parts 1542 and 1544. In addition, TSA recently issued an interim final rule that requires commercial drivers to successfully complete a fingerprint-based CHRC in

³ Pub. L. 107-71, November 19, 2001, 115 Stat. 597.

⁴ 49 U.S.C. 114(d).

⁵ 49 U.S.C. 114(f)(1)-(5), (h)(1)-(4).

⁶ 49 U.S.C. 114(f)(1) and (5).