

Related Agencies Appropriations Act of 1994. See the final rule in Docket No. HM-207D, 60 FR 12139. Revisions to these guidelines have been published on January 21, 1997, and August 28, 2001, in the final rules in Docket Nos. HM-207F, 62 FR 2970, and HM-189S, 66 FR 45177, respectively. Publication of these guidelines provides the regulated community and the general public with information concerning the manner in which RSPA generally begins its hazmat penalty assessment process and the information that respondents in enforcement cases should provide to justify reduction of proposed penalties.

These guidelines, which are periodically updated, are used by RSPA's enforcement personnel and attorneys as a means of determining a proposed civil penalty for violations of Federal hazardous material transportation law and the regulations issued under that law. As a general statement of agency policy and practice, these guidelines are not finally determinative of any issues or rights, and do not have the force of law. They are informational, impose no requirements, and constitute a statement of agency policy for which no notice of proposed rulemaking is necessary. See also the discussion of the nature and RSPA's use of these penalty guidelines in the preamble to the final rules published on March 6, 1995, 60 FR 12139-40, and January 21, 1997, 62 FR 2970-71.

These penalty guidelines remain subject to revision, and, in any particular case, RSPA's Office of Hazardous Materials Enforcement (OHME) and Office of the Chief Counsel will use the version of the guidelines in effect at the time a matter is referred by OHME for possible issuance of a notice of probable violation. Questions concerning RSPA's penalty guidelines and any comments or suggested revisions may be addressed to the persons identified above, in **FOR FURTHER INFORMATION CONTACT**.

#### *A. Baseline Penalty Amounts*

This final rule publishes the latest revisions that RSPA has made to the List of Frequently Cited Violations and their baseline assessments. These revisions to Part II of the guidelines are the result of revisions to the requirements in RSPA's regulations and our overall review of the penalty guidelines during the past two years. These revisions consider the increase in the maximum civil penalty to \$32,500, in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, as discussed above.

In the List of Frequently Cited Violations, we list the section number(s) of 49 CFR for each violation, except the word "Various" is used when a generally stated violation may be covered by more than one section of the regulations (e.g., the testing requirements applicable to the manufacture of each different DOT specification cylinder are contained in different sections of 49 CFR Part 178). In those instances where the baseline assessment is stated as a range (e.g., \$5,000 to \$10,000), the factors generally considered in determining an amount within that range are indicated within the description of the violation (e.g., the length of time that a continuing violation has lasted). Otherwise, we generally apply the top, middle, or bottom of the range depending on the Packing Group of the hazardous material involved in a violation, or we use the middle of the range for the "normal" type of violation.

RSPA created and uses these penalty guidelines to promote consistency and provide a standard for imposing similar penalties in similar cases. When a violation not described in the guidelines is encountered, RSPA often determines a baseline assessment by analogy to a similar violation in the guidelines. However, as emphasized in Parts III and IV of the guidelines, the baseline assessments are only the starting point for assessing a penalty for a violation. Because no two cases are identical, rigid use of the guidelines would produce arbitrary results and, most significantly, would ignore the statutory mandate to consider several specific assessment criteria set forth in 49 U.S.C. 5123 and 49 CFR 107.331. Therefore, regardless of whether or not the guidelines are used to determine a baseline amount for a violation, RSPA enforcement and legal personnel must apply the statutory assessment criteria to all relevant information in the record concerning any alleged violation and the apparent violator. Consideration of these criteria often warrants a final penalty that is lower or higher than the initial baseline assessment.

#### *B. Increasing Penalties for Prior Violations*

Section 5123(c) of 49 U.S.C. provides that "any history of prior violations" must be considered in determining the amount of a civil penalty for a violation of Federal hazardous material transportation law or a regulation or order issued under that law. As set forth in Section IV.E of the penalty guidelines, our general standard is to increase the baseline penalty for a violation by 25% for each prior case, up

to a maximum increase of 100%. We are revising this section of the guidelines to clarify that we apply an increase of 10% for each prior ticket against the same company or individual.

Until this year, RSPA has generally limited to five years the time that it will "look back" for prior violations, although we recognize that there may be circumstances in which it would be appropriate to "look back" for a longer period of time. We have measured the five year period according to the calendar years in which the prior case and the new case are initiated. For example, the violations in a prior case initiated any time during 1997 or later were generally considered as an aggravating factor in a new case in which a Notice of Probable Violation was issued at any time during 2002.

We are revising Section IV.E. of the penalty guidelines to advise the public that, starting in 2003, RSPA will "look back" six years (rather than five) for prior violations from the calendar year in which the new case is initiated. Thus, as a general rule, we will disregard prior violations in any civil or criminal hazardous materials enforcement case (or ticket) that was initiated in a calendar year more than six years before the year in which the case is initiated. For example, in any case in which RSPA issues a Notice of Probable Violation during 2003, we will normally consider prior violations in cases and tickets with a number beginning in "97" or later in proposing and assessing a civil penalty for the new violations; in the absence of unusual circumstances, we would not consider prior violations in cases initiated in 1996 or earlier in proposing and assessing a civil penalty for violations in a case initiated during 2003.

### **III. Editorial Revisions**

#### *A. Preemption*

In the Homeland Security Act of 2002 (the Act) (Pub. L. 107-296), Congress has made it clear that security is a part of the safe transportation of hazardous materials in commerce. Section 1711 of the Act amended the preemption provisions in 49 U.S.C. 5125(a) and (b) to specify that the Federal hazardous material transportation law preempts non-Federal requirements that conflict with Federal hazardous material transportation law, a regulation issued under that law, "or a hazardous material transportation security regulation or directive issued by the Secretary of Homeland Security." RSPA is revising its procedural regulations in subpart C of 49 CFR Part 107 accordingly. In other sections, RSPA is removing references