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January 10, 2007

The Honorable Susan Dudley
Office of Information and Regulatory Affairs
Office of Management & Budget
725 17th Street, NW
Washington, DC 20503

Via Facsimile (202) 395-3108

Dear Administrator Dudley:

We are writing to request a meeting with you or the appropriate OMB representatives to discuss the Occupational Safety and Health Administration's (OSHA) proposed rule to update its explosive standards.¹ Although the original proposal was withdrawn on July 17, 2007, OSHA has indicated its intent to repropose this rule, which soon will be sent to your office for review.

The American Trucking Associations (ATA) and its members believe that applying OSHA's standards for handling explosives to for-hire motor carriers will have serious consequences on our nation's ability to transport these critical hazardous materials.² Our responsible policy staff and the Chairman of ATA's hazardous materials policy committee would appreciate an opportunity to discuss ATA's position on the issue and answer questions that you may have concerning the impact of this proposal on the trucking industry. To this end, you will find enclosed the draft comments we prepared in response to the original proposal.

We will be contacting your assistant shortly to arrange a mutually convenient time for our discussions. If possible, we would like to meet after 1:00 on January 24th, after 4:00 on January 28th or in the morning on January 29th. Thank you for considering this request.

Sincerely yours,

Richard S. Moskowitz
Vice President & Regulatory Affairs Counsel

¹ See 71 *Federal Register* 18792 (April 13, 2007) (Docket No. OSHA-2207-0032).

² 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.





DRAFT July 12, 2007 DRAFT

OSHA Docket Office
U.S. Department of Labor
Room N-2625
200 Constitution Avenue, NW
Washington, DC 20210

Re: OSHA Explosives Standard -- Docket No. OSHA-2007-0032

To Whom It May Concern:

The American Trucking Associations, Inc.¹ ("ATA") submits these comments concerning the Occupational Safety and Health Administration's ("OSHA") proposed revisions to the explosives and blasting agents standard in subpart H of part 1910 (hereinafter the "NPRM" or "Proposed Standard").² As the national representative of the trucking industry, ATA is interested in matters affecting the transportation of hazardous materials, including the loading, unloading and storage incidental to the transportation of explosives. The specific purpose of these comments is to describe the impact that the NPRM would have upon for-hire motor carriers that transport explosives and to request that these companies be excluded from the applicability of the Proposed Standard.

At the outset, we applaud OSHA for its recognition of the comprehensive regulations that already apply to for-hire motor carriers that transport explosives.³ The U.S. Department of Transportation ("DOT") has regulated these activities for decades and, operating under these regulations, the for-hire trucking industry has amassed an impressive safety record in the transportation of these hazardous materials. Although OSHA specifically states that it is not required to exercise its authority to regulate working conditions at each stage in the transportation of hazardous materials, that it is "important to avoid duplicative or conflicting requirements between federal agencies," and that it "has no current plans to expand its regulation of working conditions during the transportation of hazardous materials," the NPRM represents a significant expansion of the requirements applicable to the commercial transportation of explosives. To correct this, ATA recommends that OSHA make clear that the provisions of the Proposed

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 72 *Federal Register* 18792 (April 13, 2007).

³ See preamble discussion 72 *Federal Register* at 18798/1.

DRAFT

**DRAFT Comments of the American Trucking Associations
OSHA-2007-0032**

Standard do not apply to for-hire commercial motor carriers that are subject to DOT's jurisdiction under the hazardous materials regulations. The expansion of this Proposed Standard to for-hire motor carriers will not improve worker safety, will impose significant additional costs on for-hire motor carriers that transport explosives, and will impede commerce by forcing many commercial motor carriers to exit the business of explosives transportation. The Proposed Standard will lead to the emergence of a less-competitive, more expensive specialized transportation service industry that may not be able to deliver explosives in a timely manner to military, law enforcement and industries that depend upon these critical materials.

A. Jurisdiction. While we offer no opinion on OSHA's stated interpretation of its scope of jurisdiction for handling of explosives, we are very concerned over the expansion of OSHA regulatory requirements into the transportation of these hazardous materials, which already are subject to comprehensive regulation by the Department of Transportation.⁴ Applying OSHA regulations to commercial transportation of hazardous materials will increase the complexity of the regulations governing this activity and confound motor carriers' ability to comply, as there is a high probability that with two agencies asserting jurisdiction over essentially the same activities, inevitable differences will emerge between the inspection and enforcement practices of the two agencies. A better alternative would be for OSHA to consult with DOT on any perceived regulatory gaps or safety issues associated with the transport of explosives in commerce (including pre-transportation and transportation functions) and work with DOT to address these issues as part of DOT's regulatory framework.

To address this overlap in regulatory scope, we recommend that OSHA embrace DOT's existing jurisdictional interpretation and not regulate the transportation of explosives when transportation activities are performed by for-hire motor carriers operating in accordance with DOT regulations. OSHA already excludes construction work covered by 29 CFR part 1926, the use of explosives in medicines, and the sale and use of consumer and public display pyrotechnics. We recommend that OSHA revise 29 CFR § 1910.109(a)(3), to exclude transportation of explosives by for-hire motor carriers operating in conformance with DOT's regulations:

- (3) This section does not apply to:
- (i) Construction work covered by 29 CFR part 1926;
 - (ii) The use of explosives in medicines and medicinal agents in the forms prescribed by the official *United States Pharmacopeia and the National Formulary (USP-NF)*; ~~or~~
 - (iii) The sale and use of consumer and public display pyrotechnics; or

⁴ We note that the Occupational Safety and Health Act does not specifically grant OSHA jurisdiction over the transportation or handling of hazardous materials. We further note that DOT has comprehensively occupied this field of regulation.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

(iv) Transportation and loading, unloading and storage incidental to transportation, when performed by for-hire motor carriers acting pursuant to applicable United States Department of Transportation regulations.⁵

Excluding for-hire motor carriers from the scope of the Proposed Standard will not increase worker injuries, will avoid duplicative federal regulation, and will ensure that the costs of this Proposed Standard do not exceed its benefits.

B. Compliance. Stand-alone OSHA regulations governing the transportation of explosives may not be consistent with the DOT regulations. Even if consistent at the time of promulgation, as DOT regulations evolve to promote harmonization with international standards, the very real potential for inconsistent regulatory requirements grows. This has been the case historically, as it has taken OSHA many years to revise the nomenclature applicable to the description of explosives. In that regard, we support the elimination of the Class A/Class B explosives descriptions and the adoption of current DOT descriptions. We also note that duplicative regulations, even if consistent, are not necessary and could lead to excessive fines for the regulated community – as the same activity could result in enforcement actions being pursued by multiple enforcement agencies. As mentioned earlier, an even more troubling development with duplicative regulation would be the tacit or explicit acceptance of an action by a regulated party under the regulations of one agency, but a divergent view that such an action is impermissible under the regulations of the other agency.

C. Section-by-Section Analysis of the NPRM. If OSHA determines that the Proposed Standard applies to for-hire motor carriers transporting explosives, ATA has numerous concerns with the provisions of the NPRM. These concerns are discussed below with reference to the specific provision.

- Definitions [1910.109(b)] (“Vehicle” and “Bulk Delivery Vehicle”) – The NPRM sets forth separate definitions for the terms “vehicle” and “bulk delivery vehicle.”

We are concerned that the definition of the term “vehicle” is so broad that it would include forklifts and tugs used for loading and unloading trucks at truck terminals and airport ramps. As such, many of the proposed regulatory requirements (e.g., use of tarps, prohibition on cargo exceeding the height of the cargo body) would be impracticable to apply to these machines during loading and unloading operations.

The use of the term “bulk delivery vehicle” is confusing to motor carriers, as OSHA has not defined the term “bulk” in the Proposed Standard. DOT defines bulk

⁵ 72 *Federal Register* at 18836 to be codified at 29 CFR 1910.109(a)(3) (suggested modification underlined, italics in original).

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

packaging as a packaging, including a transport vehicle or freight container, in which hazardous materials are loaded with no intermediate form of containment and which has: (1) a maximum capacity greater than 450 L (119 gallons) as a receptacle for a liquid; (2) a maximum net mass greater than 400 kg (882 pounds) and a maximum capacity greater 450 L (119 gallons) as a receptacle for a solid; or (3) a water capacity greater than 454 kg (1000 pounds) as a receptacle for a gas.⁶ OSHA must clarify this term to make clear which vehicles it is attempting to cover in this rulemaking. We suggest that this term be narrowed and used as a regulatory trigger for equipment that is used to mix ingredients to form blasting agents or equipment that is used to load blasting agents into drill holes. The current definition is ambiguous and should be revised to make clear that it does not apply to commercial motor vehicles transporting regulated materials in DOT performance oriented packagings. This is an example of a potential inconsistency in regulations that will result from OSHA and DOT both regulating the commercial transportation of explosives.

- Definitions [1910.109(b)] ("Hot Work") – The definition of "Hot Work" includes the term "cutting." While we do not believe that OSHA intends the term hot work to apply to cutting activities that do not generate sparks, the term as used in the NPRM would include the activities of cutting fiberboard boxes, packing tape, and paper. Clearly, OSHA does not intend to prohibit these activities, which would have negligible safety implications for explosives shipments.
- Definitions [1910.109(b)] ("Explosive") – We support OSHA's stated intent to harmonize its definition of explosives with DOT's explosive definitions. Unfortunately, the definition of explosives in the Proposed Standard goes beyond the DOT definition and includes certain hazardous materials that DOT has re-classed into categories other than explosive. For example, many air bag components and seat belt pretensioners are explosives that may be reclassified and shipped as miscellaneous hazardous materials (*i.e.*, Class 9), exempt from the hazard communication requirements such as labeling and placarding.⁷ The Proposed Standard, however, would require these re-classed articles to be treated as explosives, making it virtually impossible for motor carriers to comply with the Proposed Standard.

OSHA should make clear that explosive material that is re-classed and transported as other hazardous materials, is not subject to the Proposed Standard when in transportation. Uniform definitions will lead to improved compliance. Many industries are regulated by multiple agencies and find it difficult to train employees on the differences in terminology used by different agencies. We would encourage

⁶ See 49 CFR § 171.8.

⁷ See 49 CFR § 173.166. See also 49 CFR §§ 173.170 and 173.171, which allows black powder and smokeless powder for small arms to be transported as a flammable solid and 49 CFR § 173.63, which allows cartridges used to project fastening devices to be transported as ORM-D material similar to a consumer commodity.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0052

OSHA and all other federal agencies to have periodic meetings to ensure that regulatory nomenclature is consistent across the entire federal government.

- General Provisions – Explosives Hazards [1910.109(c)(1)(i)] – This requirement to “transport” explosives “in a safe manner” is not necessary. The list of regulatory requirements applicable to the transportation of explosives is long. A general requirement to transport these materials in a safe manner is vague and will lead to subjective enforcement actions. Regulated entities must transport explosives in accordance with the federal regulations, which promote safe transportation. A requirement to transport explosives “in a safe manner” provides no additional instruction to the regulated community and is simply an additional regulatory citation to support duplicative penalties for non-compliance.
- General Provisions - Explosives Hazards [1910.109(c)(1)(vii)] – This provision requires employers to ensure that no one enters a facility containing explosives or transports explosives while under the influence of drugs or alcohol. Motor carriers agree with the requirement to prohibit such persons from entering their place of business or transporting explosives; however, motor carrier employers are often unable to determine whether an individual is under the influence of drugs or alcohol. In the case of transporting explosives, drivers are out on the road and employers have no ability to observe driver behavior. For this reason, DOT has extensive regulations on pre-employment and random drug and alcohol testing.⁸ If an employer prohibits drugs and alcohol in the workplace and has a comprehensive program to test for such illicit behavior, then the employer should be deemed in compliance with this requirement, unless the employer has “actual knowledge” of on-duty drug or alcohol use. It is unfair to hold an employer accountable for illegal acts performed by an employee, where an employer has no ability to determine the sobriety of the employee.⁹ This is another example of the potential for inconsistent regulations that would result from OSHA extending the applicability of the Proposed Standard to the transportation of explosives by for-hire motor carriers already subject to comprehensive DOT regulations.
- General Provisions - Explosives Hazards [1910.109(c)(1)(ix)] – This provision prohibits the presence of flammable cleaning solvents in facilities containing explosives and provides another example of why the commercial transportation of explosives should be excluded from the requirements of the Proposed Standard. Many motor carriers use their own terminals to consolidate shipments and transfer packages from one truck to another.

⁸ See 49 CFR Part 382.

⁹ See 49 CFR § 382.307 (embracing the concept of “reasonable suspicion” that an employee has violated the drug and alcohol prohibitions).

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

If a consignor is shipping a small amount of freight (e.g., 1 box or 2 drums), it would be inefficient to pay for an entire truck's capacity and the consignor may choose to hire a less-than-truckload carrier. Less-than-truckload carriers operate a network of terminals to facilitate freight transportation in a hub and spoke type system. This is similar to airline routes where a trip from New York to Phoenix may necessitate a stopover in Dallas. The difference between airlines and less-than-truckload carriers is that motor carriers do not necessarily know the transfer points that will be utilized at the time the trip begins. In addition, each leg of the trip is relatively short due to the number of miles a truck may operate under the DOT hours of service regulations. For example, a package that moves from Maryland to California will go through several terminals and be offloaded and reloaded onto different trucks several times on its way across the country. When the package leaves Maryland it will head west to Pittsburgh. Once it reaches Pittsburgh, it may head south to Cincinnati or continue west to Columbus. These loading and unloading events occur at company-owned terminals and are referred to as cross-dock operations. There is often no way to predict which terminals any given package will move through, as routes for traditional less-than-truckload carriers are constantly revised based on available space on outbound trucks, material compatibility and time constraints, as the freight moves through the carrier's system. Several of these companies operate more than 200 terminals, which are essentially docks upon which freight is transferred from one truck to another on its way to its final destination. In each of these circumstances, quantities of explosives and flammable cleaning solvents could wind up, temporarily, at a company-owned facility – although there would be no way to predict in advance whether or when this would occur. Moreover, some flammable cleaning solvents may be re-classed as consumer commodities. Under these circumstances, the motor carrier would have no way of knowing whether flammable cleaning solvents are being brought into a terminal and whether they will be present at the same time as a shipment of explosives. Notwithstanding, it is important to remember that while in transportation both the explosives and flammable cleaning solvents will be contained in DOT approved packaging designed to prevent the release of these materials. We are not aware of a single incident of flammable cleaning solvents being transported through a motor carrier facility that has led to an incident involving the detonation of explosives in transportation.

- General Provisions – Electrical Hazards [1910.109(c)(2)(i)] – The requirement to ensure that the primary electrical supply to a facility containing explosives can be disconnected at a safe remote location away from the facility would require motor carriers to modify the electrical systems of their terminal networks. The cost of doing so is prohibitive and has not been analyzed by OSHA. Many motor carriers operate hundreds of facilities and although they do not routinely possess explosives, they cannot predict when or if explosives will be transported through a specific facility. The cost of modifying the facility's electrical system so that the facility may receive a very limited amount of explosives far exceeds the revenue generated from transporting these low volume materials. As such, motor carriers will make a rational business decision and cease transporting these materials. This could create a significant problem for shippers of explosives.

**DRAFT Comments of the American Trucking Associations
OSHA-2007-0032**

- **General Provisions – Electrical Hazards [1910.109(c)(2)(ii)]** – This provision would require motor carriers to evacuate their terminals in which explosives are being transferred (and potentially trucks transporting explosives) in the event of an approaching electrical storm. This is another example of why OSHA must exempt commercial transportation of explosives from the scope of this standard. It is impracticable to apply this provision to motor carriers. The proposed evacuation requirements would virtually shut down the transportation of freight throughout the country. Electrical storms are common, especially during the summer months, if motor carriers have to evacuate their terminals every time an electrical storm approaches, then all freight (not just explosives) would cease to move. Again if this requirement applies to motor carrier terminals, then motor carriers would cease to transport explosives through their terminal networks. Moreover, the proposal does not define the term “facility.” If OSHA determines that individual trucks fall within the definition of a facility, then it would be virtually impossible to transport explosives by truck. Is the driver supposed to pull over on the side of a road during a thunder storm and simply run away from the truck? How would the driver reconcile the attendance requirements with the requirement to leave the truck and move to a safe remote location? Has OSHA analyzed the number of employee injuries that have resulted from the detonation of explosives being cross-docked at a terminal or transported in a truck during an electrical storm? Finally, has OSHA considered the potential liability that employers would bear from sending their employees outside of a sheltered building to face an electrical storm?
- **General Provisions – Fire and Explosion Prevention (Open Flames)**
[1910.109(c)(3)(iii)(A)] – ATA supports the requirement to ensure that open flames are not permitted within 50 feet of explosives or facilities containing explosives. This requirement is similar to the DOT regulation that requires motor carriers to exercise extreme care during loading or unloading of any Class I explosive to keep fire away and to prevent persons in the vicinity from smoking, lighting matches, or carrying any flame or lighted cigar, pipe or cigarette.¹⁰ The proposed OSHA requirement, however, goes further than the DOT regulation in that it establishes a violation for the mere presence of matches or lighters. We fail to see how employee safety is improved by creating a violation for the possession of unlit matches within 50 feet of a closed package containing explosives.

Further, the NPRM goes beyond the DOT regulation by including trucks transporting explosives that are not in the process of loading and unloading. If read literally, the motor carrier would be in violation of this regulation each time a truck transporting explosives passes within 50 feet of a car with passengers that are smoking. While it is clear that explosives in DOT packages inside a truck are not at risk from lit cigarettes located outside the truck, if applied to motor carriers transporting explosives, compliance with this provision would be impossible. This is another

¹⁰ See 49 CFR § 397.13

**DRAFT Comments of the American Trucking Associations
OSHA-2007-0032**

example of the unique circumstances surrounding the transportation of hazardous materials, including explosives, and further evidence that OSHA should exclude transportation of explosives by motor carriers from the scope of this standard.

- General Provisions – Fire and Explosion Prevention (Refueling)
[1910.109(c)(3)(ii)(D)] – This provision would prohibit motor carrier refueling operations within 50 feet of a facility containing explosives. If applied to motor carrier terminals, this provision could force centrally-fueled fleets to relocate their fuel facilities. The cost associated with digging up tanks, piping and moving fuel dispensers would be astronomical and has not been included in OSHA's analysis of the Proposed Standard. Moreover, we are not aware of a single incident involving the detonation of explosives caused by a refueling accident.
- General Provisions – Labels [1910.109(c)(5)] – The preamble discusses the ability to use DOT-approved labels to comply with the Hazard Communication Standard; however, this section of the standard does not affirmatively state that labels meeting the requirements of 49 CFR §172.411 may be substituted for the GHS labels set forth in this section of the proposed standard.
- Storage of Ammonium Nitrate – Applicability [1910.109(d)] – This section of the NPRM applies to the storage of more than 1,000 pounds of ammonium nitrate to be used in the manufacture of explosives.¹¹ A for-hire motor carrier would have no way of knowing how a particular shipment will be used by the person receiving the materials. This provision of the standard further evidences that OSHA should allow DOT to exclusively regulate the transportation of explosives by motor carriers.

The storage requirements in the Proposed Standard if applied to for-hire motor carriers, could force numerous trucking terminals to adjust their building height, eliminate basements, reinforce walls, install ventilation systems, modify roofs, change flooring materials, and install lightening protection. These facility modifications are not minor and OSHA has not provided a cost estimate for motor carrier terminals to make these modifications. Notwithstanding the failure to include an analysis of these costs, it is clear that if OSHA applies these storage provisions to motor carriers transporting ammonium nitrate (or other explosives), the costs associated with modifying the existing motor carrier terminal network would far exceed the revenues generated from the transportation of these hazardous materials.

- Transportation of Explosives – General Provisions [1910.109(e)(1)] --

Subparagraph (i) requires the employer to ensure that no employe smokes, carries matches or any other flame producing device, or carries any firearms cartridges

¹¹ Motor carriers do not store ammonium nitrate for extended periods of time; some may temporarily store these materials to facilitate load consolidation, to await the opening of a customer's business prior to delivery, or to transfer the materials from one truck to another.

**DRAFT Comments of the American Trucking Associations
OSHA-2007-0032**

within 25 feet of a vehicle containing explosives. While it is reasonable to prohibit employees from smoking in the vicinity of explosives, this requirement should not apply to drivers that are operating a truck where the cargo is separated from the driver compartment. Moreover, as discussed above, the prohibition on carrying unlit matches or cigarette lighters makes little sense, as we are unaware of an explosion that has been caused by the possession of these articles.

Subparagraph (ii) requires the employer to ensure that no employee drives, loads or unloads a vehicle containing explosives in an "unsafe manner." Throughout the preamble OSHA makes clear that it wishes to avoid duplicative regulations. This subparagraph is duplicative of existing DOT regulations and adds no additional substantive protections. In addition, this general requirement to prohibit the transportation of explosives in an unsafe manner is vague and will lead to subjective enforcement actions.

Subparagraph (iii) requires the employer to ensure that explosives are not transferred from one vehicle to another without informing local fire and police departments.¹² This requirement is unnecessary and impracticable for commercial motor carriers to implement. Considering that these types of transfers occur at motor carrier terminals across the country everyday without incident, we see no reason to impose this burden.¹³ Moreover, the routine (almost daily) notification of these government officials will not enhance employee safety and will consume resources of both the regulated industry and the emergency response community. Finally, we are concerned with the ability of for-hire motor carriers to comply with this notification requirement, especially where DOT regulations permit the reclassification of an explosive article as a Class 9 material. Air bag components and seat belt pretensioners are examples of explosives that are not transported in a manner that would inform the motor carrier that they are handling an explosive, making it virtually impossible for motor carriers to comply with this provision.

In the case of Department of Defense ("DOD") explosives shipments, the proposed notification requirement violates the National Industrial Security Program Operating Manual, which prohibits carrier personnel from sharing any information regarding a secret-level shipment with any person who does not possess a DOD-sponsored secret clearance and has a need to know.

Subparagraph (iv) prohibits repair work on a vehicle containing explosives, other than emergency repairs that do not present a source of ignition, The Proposed Standard

¹² This proposed requirement goes far beyond the existing DOT requirement, which prohibits the transfer of Division 1.1, 1.2, and 1.3 explosives on any public road except in case of emergency. See 49 CFR § 177.835(j).

¹³ In circumstances where a driver must transfer explosives due to equipment malfunctions, the driver will not be at a fixed terminal location and may not know the appropriate regulatory authority to contact.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

does not define the term "emergency repairs" and may be interpreted in a manner that prohibits the repair of a flat tire or the replacement of a marker light on a trailer without first offloading explosive cargo. If interpreted in this manner, the provision would increase the number of loading and unloading events.¹⁴ This prohibition should be clarified to apply only to repairs that present a significant source of ignition in close proximity to the explosive cargo (e.g., welding operations on the loaded trailer). We also question how this provision might apply to vehicles equipped with airbags - since airbags contain explosive components?

Subparagraph (v) prohibits the transportation of detonators with other explosives on the same vehicle, unless packaged, segregated, and transported in accordance with the regulations of DOT (49 CFR 177.835(g)). This is another example of an unnecessary duplicative requirement. Clearly OSHA has recognized that the DOT segregation requirements applicable to the transportation of explosives provide an adequate level of safety. For this reason, for-hire motor carriers that are already subject to the DOT hazardous materials regulations should be excluded from this standard. Duplicative OSHA regulations, even if consistent with DOT's requirements, are unnecessary and could lead to excessive fines for the regulated community because the same activity could result in enforcement actions from multiple enforcement agencies.

Subparagraph (vii) requires explosives kept at a truck terminal for delivery or forwarding to be kept in a manner that minimizes risk to employees. This provision of the standard does not enumerate any additional substantive requirements for motor carriers and is therefore unnecessary. The requirement to keep explosives in a manner that minimizes risk to employees already exists in OSHA law under the general duty clause. Moreover, we are unsure as to how a regulatory agency will measure whether the manner in which storage that is incidental to transportation occurs and the degree to which such temporary storage will minimize risk to employees. This is a very subjective standard that will be difficult to enforce. Recognizing that the elimination of all risk is not possible, we are concerned as to how OSHA will interpret this provision in an enforcement context.

Subparagraph (viii) requires employers to ensure that the driver or other employee attending the vehicle is knowledgeable about the nature and hazards of the explosives contained in the vehicle and the procedures for handling emergency situations. This provision of the standard is duplicative for motor carriers, as DOT's training requirements applicable to hazmat employees already require these individuals to

¹⁴ For example, if a trailer that is loaded with explosives has a hole in the roof and rain is expected, most carriers would want to temporarily fix the hole by patching the roof of the trailer to avoid a total loss of the cargo. The Proposed Standard does not clearly indicate whether this type of repair may be performed without first unloading the trailer.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

receive function specific training that goes beyond the training proposed in the NPRM.¹⁵

- Transportation of Explosives – Vehicle (Specifications) [1910.109(e)(2)(i)] -- This provision of the Proposed Standard would require employers to make substantial changes to the fleet of commercial motor vehicles. While DOT already requires the use of close-fitting floors and the portion of the interior *in contact with the load* to be lined with non-metallic material or non-ferrous metals, the Proposed Standard substantially expands these requirements beyond Division 1.1, 1.2, and 1.3 materials and would require retrofits of *any exposed spark producing metal on the inside of the vehicle body*.¹⁶ This aspect of the Proposed Standard could require a retrofit of numerous vehicles, as many carriers have made a decision not to transport Division 1.1, 1.2, and 1.3 materials, but do transport other explosive materials.

Most truck trailers or small delivery vans contain metal-framed walls and doors and while these portions of the trailers do not come in contact with the load, they would require modification under the Proposed Standard. This aspect of the NPRM would be prohibitively expensive and lead to many for-hire motor carriers exiting the business of transporting explosives. DOT's regulations covering vehicles has led to an impressive track record in the protection of the public and employees from injuries resulting from the transportation of explosives. OSHA should not apply this aspect of the standard to for-hire motor vehicles that are already subject to the DOT regulations discussed herein.

- Transportation of Explosives – Vehicle (Markings) [1910.109(e)(2)(ii)] - DOT markings should be the only markings required for commercial motor vehicles transporting explosives. To the extent that OSHA will require vehicle markings, ATA supports the use of the existing DOT markings with appropriate cross-references to the DOT regulations to ensure consistency.
- Transportation of Explosives – Vehicles (Open Body) [1910.109(e)(2)(iii)] – This provision would require employers to ensure that open-bodied vehicles containing explosives are protected with flameproof and moisture-proof tarpaulins and that explosives are not loaded above the sides of the vehicle. We assume that this provision is designed to apply to the transportation of explosives in pick-up trucks; however, the use of the undefined phrase "open-bodied vehicles" will impact the transportation of explosives by commercial motor vehicle.¹⁷ The trucking industry

¹⁵ See 49 CFR Part 172, subpart H.

¹⁶ See 49 CFR § 177.835.

¹⁷ Note the transportation of missiles for the Department of Defense occurs on flatbeds (without sides) to facilitate the side loading of these materials. The Proposed Standard would interfere with this practice and could prevent the expeditious transportation of these mission-critical weapons or require the invention and deployment of specialized loading and unloading equipment.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

uses forklifts to load and unload trailers. In most cases the freight spends very little time on the forklift, which is primarily used for cross dock operations. To the extent that the phrase open-bodied vehicle applies to these machines, the requirement to use tarpaulins is not practical. Moreover, the requirement to ensure that the explosives are not loaded above the sides of the vehicle is impossible to comply with, as forklifts do not have sides.

- Transportation of Explosives – Vehicles (Fire Extinguishers) [1910.109(e)(2)(iv) and (v)] – This provision would require employers to equip the vehicle with at least two fire extinguishers with a minimum rating of 4-A:40-B:C. This provision is more stringent than the existing DOT requirement to carry a fire extinguisher that is readily accessible for use.¹⁸ We question the need to have and maintain more than one fire extinguisher on the truck. While we support the DOT requirement to have a fire extinguisher, the proposed OSHA requirement seems excessive, especially in light of proposed section 1910.109(c)(3)(ii)(A), which requires employers to ensure that employees do not fight a fire that is in imminent danger of contact with explosives. This apparent inconsistency will complicate employers' efforts to properly train drivers on emergency response measures to be taken in the event of a truck fire. We also note that OSHA has not quantified the cost of applying this requirement across the motor carrier industry.
- Transportation of Explosives – Vehicles (Condition) [1910.109(e)(2)(vi)] – This provision would require employers to ensure that vehicles used to transport explosives are maintained in good working order. This requirement again is duplicative of existing DOT regulations and is further evidence that OSHA should not apply this standard to commercial motor carriers that transport explosives in accordance with DOT regulations.¹⁹
- Transportation of Explosives – Operation of Vehicles (Driver Qualifications) [1910.109(c)(3)(i)(A) and (B)] – These provisions require employers to ensure that only qualified individuals transport explosives and are duplicative of existing procedures employed by motor carriers. Motor carriers cannot allow an employee to operate a truck, unless that individual has the appropriate credentials (*i.e.*, commercial drivers license with a hazardous materials endorsement). Indeed, existing DOT regulations require motor carrier employers to periodically examine driver credentials.²⁰ If OSHA extends this requirement to individuals that operate forklifts or airport ground service equipment, hundreds of thousands of would now have to obtain commercial drivers licenses with hazardous materials endorsements. The cost of each of these government-issued credentials is more than \$100 for each individual.

¹⁸ See 49 CFR § 393.95.

¹⁹ See 49 CFR Part 396.

²⁰ See 49 CFR Part 391, generally and 49 CFR § 391.25, requiring a periodic review of driving records.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

The consequence of this huge increase in the population of employees requiring commercial drivers licenses with hazardous materials endorsements would be felt across not only the transportation industry, but in warehousing and other industries and within the law enforcement agencies that are responsible for conducting the required criminal background checks for such employees.

- Transportation of Explosives – Operation of Vehicles (Parking)
[1910.109(e)(3)(i)(C)] – This provision would prohibit a vehicle containing explosives from parking on any public street in close proximity to any place of employment. This provision as applied to for-hire motor carriers is unworkable and if enacted would require shippers to utilize dedicated trucks with driver teams for direct transportation from origin to destination. Less than truckload carriers or package and delivery carriers would be unable to utilize their terminal networks and would be unable to schedule other freight deliveries, if explosives were on the truck. This will dramatically increase the cost of transporting small quantities of explosives. Moreover, strict compliance with this provision would prevent trucks from refueling at truck stops, obtaining meals while en route, or complying with DOT's hours of service requirements mandating driver rest intervals.
- Transportation of Explosives – Operation of Vehicles (Cargo Segregation)
[1910.109(e)(3)(i)(D)] – This provision would prevent motor carriers from transporting certain other materials (e.g., spark-producing metal, spark-producing tools, oils, matches, firearms, electric storage batteries, flammable substances, acids, oxidizers or corrosive compounds) in the body of any vehicle containing explosives, unless the carrying of such dangerous articles and the explosives complies with DOT regulations.²¹ The fact that for-hire motor carriers already are subject to DOT regulations governing the transportation of explosives and the specific hazardous materials segregation requirements is further evidence that OSHA need not apply this standard to those for-hire motor carriers that transport explosives subject to the DOT regulations. Moreover, OSHA fails to recognize that motor carriers have no way of knowing whether they are transporting spark-producing metal, spark-producing tools, oils, matches, electric storage batteries, flammable substances, acids, oxidizers or corrosive compounds, as many shipments that fall within these categories are exempt from the hazardous materials shipping paper requirements.
- Transportation of Explosives – Operation of Vehicles (Authorized Recipients)
[1910.109(e)(3)(i)(E)] – This provision would require motor carriers to ensure that deliveries of explosives are made only to authorized employees. This provision is problematic, as for-hire motor carriers will deliver freight to the designated consignee; however, there is no way for a motor carrier to ensure that the specific individual at the consignee's facility is "authorized" to receive the explosives. We also are unclear as to what the term "authorized" means. Will authorized individuals be required to possess a specific license or permit? Will they have some type of

²¹ See 49 CFR §§ 177.835, 177.848.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

government issued identification card? Will it be sufficient for a driver delivering explosives to merely inquire if the employee is employed by the consignee? Will a uniform suffice? Will delivery logs or some other written receipt be required? What if the authorized individual is unavailable – would the carrier have to drive around with the explosives until the individual is able to accept delivery?

- Transportation of Explosives – Operation of Vehicles (Attendance Requirements) [1910.109(e)(3)(ii)] – This provision requires motor carriers to ensure that vehicles containing Division 1.1, 1.2, or 1.3 explosives at the employer's worksite or facility is attended at all times by the driver or other responsible person. DOT regulations set forth attendance requirements for motor vehicles that contain Division 1.1, 1.2 or 1.3 explosives.²² DOT regulations also require motor carriers to draft and implement a written security plan that, among other things, addresses facility security.²³ The Proposed Standard, however, is duplicative and to some extent goes beyond DOT's attendance requirements by applying the requirements to vehicles that are located on the property of the motor carrier, shipper or consignee, or at a safe haven.
- Use of explosives for blasting [1910.109(f)] – Motor carriers do not ordinarily use explosives for blasting and, therefore, we do not offer comments on the provisions set forth in this section of the Proposed Standard.
- Blasting Agents, water gels, slurries and emulsions [1910.109(g)] – We reiterate our concerns over the scope of the term "bulk delivery vehicles" and request that OSHA modify this definition to make clear that the term does not apply to for-hire motor carrier transportation operations. Applying the term "bulk delivery vehicles" to commercial motor vehicles or forklifts used to load and unload trucks would create compliance problems for the for-hire trucking industry. For example, ensuring that the vehicles have enclosed bodies would require motor carriers to replace the forklifts currently used for loading and unloading general freight, including explosives.
- Small Arms Ammunition [1910.109(h)(2)]; Small Arms Ammunition Primers [1910.109(h)(4)]; – These two provisions would require for-hire motor carriers to ensure that small arms ammunition and primers are separated from flammable liquids, flammable solids, and oxidizing materials, by a fire barrier wall with at least one hour rating or by a distance of at least 25 feet. This requirement is impractical as applied to the commercial transportation of these materials. It is not cost effective for a motor carrier to erect a fire barrier to handle the relatively small percentage of freight that falls within this category. As such, most motor carriers that operate terminal networks will no longer transport this type of freight.

²² See 49 CFR § 397.5.

²³ See 49 CFR Part 172, subpart I.

DRAFT Comments of the American Trucking Associations
OSHA-2007-0032

Similarly, when applied to individual trucks, these expanded requirements could result in the need for dedicated shipments of these hazardous materials. Existing DOT regulations allow these materials to be loaded, transported or stored together during the course of transportation, provided that they are separated in a manner that, in the event of leakage from packages under conditions normally incident to transportation, commingling of the hazardous materials would not occur.²⁴ The proposed standard amounts to an outright prohibition on transporting these hazardous materials in the same truck. The preamble to the rule contains no analysis as to incidents that have occurred that warrant the revision of the DOT segregation requirements. In the absence of such an analysis, we believe that OSHA's decision to preclude transportation of these materials in the same truck is arbitrary and capricious.

D. Regulatory Flexibility Analysis. The preamble to the NPRM indicates that OSHA has determined that this action is not a significant regulatory action and that the Proposed Standard is anticipated to generate a maximum of \$1.5 million in annual regulatory costs.²⁵ If for-hire motor carriers are subject to the provisions of the Proposed Standard, then this cost estimate is incorrect by several orders of magnitude. While OSHA characterizes this NPRM as primarily an update and clarification of the existing standard, OSHA has never applied and enforced this standard in the for-hire motor carrier industry. Indeed, the issue of overlapping jurisdiction between OSHA and DOT has been evolving. As such, the Proposed Standard, as written, sets forth numerous new regulatory requirements that have never been applied to for-hire motor carriers.

The requirement to develop new training materials and retrain motor carrier hazardous materials employees to comply with the provisions of the rule would result in significant costs to the industry. Designing or revising the existing training programs to incorporate the provisions of the Proposed Standard, including more restrictive segregation requirements, loading and unloading procedures, evacuation procedures, recognition of explosive materials that are not labeled as explosives, law enforcement notification procedures, modifications emergency response procedures, will require numerous hours to plan and implement. In addition, once a training program is designed, actual training will have to be provided to facility managers, dispatchers and literally hundreds of thousands of drivers and dockworkers. We are unable to estimate these costs, since we do not know how many motor carriers transport explosives subject to the Proposed Standard; however, OSHA must complete this cost estimate prior to applying the Proposed Standard to for-hire motor carriers, many of whom are small businesses. We note that one large carrier estimates the training costs associated with the NPRM would exceed \$1.1 million dollars.

²⁴ See 49 CFR Part 177, subpart C.

²⁵ See 72 *Federal Register* at 18828/3.

**DRAFT Comments of the American Trucking Associations
OSHA-2007-0032**

Other costs associated with this rule require modification to facilities, such as the modification of electrical systems to facilitate remote disconnection of electrical supply, installation of ventilation systems and lightening protection, potential modification of ceiling heights, reinforcement of walls, and the elimination of basements. Considering the thousands of motor carrier terminals spread out across the country, the costs associated with these modifications are exorbitant and may require OSHA to reclassify this rule as a significant regulatory action within the meaning of Executive Order 12866.

The Proposed Standard, if applied to for-hire motor carriers, also would require the expenditure of significant sums of money to address vehicle requirements. OSHA has not included the cost of modifying thousands of vehicles to eliminate exposed metal.²⁶ Nor has the agency included the cost of purchasing additional fire extinguishers that meet the requirements of the Proposed Standard.²⁷ In addition, the costs of modifying forklifts to accommodate use of tarps and to construct sides to contain containerized cargo have not been analyzed.

The Proposed Standard also would significantly increase operating costs for for-hire motor carriers. No where in the rule does OSHA estimate the costs of using dedicated trucks to comply with the segregation requirements or the cost of verifying that consignees are authorized to receive explosives. OSHA did not quantify the cost of utilizing team drivers to comply with the attendance requirements and the prohibition on parking in close proximity to a place of employment. OSHA failed to consider the cost of developing and implementing procedures to identify explosive materials that are re-classed and not offered for transportation as explosives. Finally, OSHA did not consider the cost of shutting down terminals in the event of an electrical storm.²⁸

OSHA also must estimate the *benefits* of applying the Proposed Standard to for-hire motor carriers. How many employee injuries will be avoided by expanding the Proposed Standard into the for-hire motor carrier industry? Based on the number of past incidents involving explosives, it is clear that the costs of applying the Proposed Standard to the for-hire transportation of explosives far exceed the benefits.

* * * * *

²⁶ Although trailer design is not uniform throughout the trucking industry and the extent of the modifications that would be required under the Proposed Standard will vary by trailer type, we estimate that on average the cost of modifying each trailer will be approximately \$1,000. Because explosives represent less than one-tenth of one percent of the freight transported, it is impractical to dedicate specific equipment for explosives use. As such, a carrier that wishes to continue transporting explosives may have to retrofit its entire fleet.

²⁷ One large motor carrier estimates the cost it will incur from the fire extinguishers requirements to be \$3.2 million.

²⁸ The cost evacuating a terminal that is part of an airport would cost several million dollars per event.

**DRAFT Comments of the American Trucking Associations
OSHA-2007-0032**

For the reasons set forth herein, we strongly recommend that OSHA revise section 1910.109(a)(3) to make clear that the Proposed Standard does not apply to "transportation and loading, unloading and storage incidental to transportation, when performed by for-hire motor carriers acting pursuant to applicable United States Department of Transportation regulations."

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

Respectfully submitted,

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17
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Good stuff.



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ADDITIONAL COMMENTS: _____
