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Transportation Security Administration

**49 CFR Parts 1520 and 1580
Rail Transportation Security; Proposed
Rule**

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

49 CFR Parts 1520 and 1580

[Docket No. TSA-2006-26514]

RIN 1652-AA51

Rail Transportation Security

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposal would enhance the security of our Nation's rail transportation system. The Transportation Security Administration (TSA) proposes security requirements for freight railroad carriers; intercity, commuter, and short-haul passenger train service providers; rail transit systems; and rail operations at certain, fixed-site facilities that ship or receive specified hazardous materials by rail. This rule proposes to codify the scope of TSA's existing inspection program and to require regulated parties to allow TSA and Department of Homeland Security (DHS) officials to enter, inspect, and test property, facilities, and records relevant to rail security. This rule also proposes that regulated parties designate rail security coordinators and report significant security concerns to DHS.

TSA further proposes that freight rail carriers and certain facilities handling hazardous materials be equipped to report location and shipping information to TSA upon request and to implement chain of custody requirements to ensure a positive and secure exchange of specified hazardous materials. TSA also proposes to clarify and extend the sensitive security information (SSI) protections to cover certain information associated with rail transportation.

This proposal would allow TSA to enhance rail security by coordinating its activities with other Federal agencies, which would also avoid duplicative inspections and minimize the compliance burden on the regulated parties. This proposed rule is intended to augment existing rail transportation laws and regulations that the Department of Transportation (DOT) administers. In today's edition of the *Federal Register*, the Pipeline and Hazardous Materials Safety Administration (PHMSA) is publishing an NPRM proposing to revise the current requirements in the Hazardous Materials Regulations applicable to the safe and secure transportation of

hazardous materials transported in commerce by rail.

DATES: Submit comments by February 20, 2007.

ADDRESSES: You may submit comments, identified by the TSA docket number to this rulemaking, using any one of the following methods:

Comments Filed Electronically: You may submit comments through the docket Web site at <http://dms.dot.gov>. You may also submit comments through the Federal eRulemaking portal at <http://www.regulations.gov>.

Comments Submitted by Mail, Fax, or In Person: Address or deliver your written, signed comments to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001; Fax: 202-493-2251.

See **SUPPLEMENTARY INFORMATION** for format and other information about comment submissions.

FOR FURTHER INFORMATION CONTACT: *For questions related to rail security:* Lisa Pena, Transportation Sector Network Management, Freight Rail Security, TSA-28, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202-4220; telephone (571) 227-4414; facsimile (571) 227-1923; e-mail lisa.pena@dhs.gov.

For legal questions: David H. Kasminoff, Office of Chief Counsel, TSA-2, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202-4220; telephone (571) 227-3583; facsimile (571) 227-1378; e-mail david.kasminoff@dhs.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

TSA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from this rulemaking action. See **ADDRESSES** above for information on where to submit comments.

With each comment, please include your name and address, identify the docket number at the beginning of your comments, and give the reason for each comment. The most helpful comments reference a specific portion of the rulemaking, explain the reason for any recommended change, and include supporting data. You may submit comments and material electronically, in person, by mail, or fax as provided under **ADDRESSES**, but please submit your comments and material by only one means. If you submit comments by mail or delivery, submit them in two copies, in an unbound format, no larger

than 8.5 by 11 inches, suitable for copying and electronic filing.

If you want TSA to acknowledge receipt of comments submitted by mail, include with your comments a self-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

TSA will file in the public docket all comments received by TSA, except for comments containing confidential information and sensitive security information (SSI)¹. TSA will consider all comments received on or before the closing date for comments and will consider comments filed late to the extent practicable. The docket is available for public inspection before and after the comment closing date.

Handling of Confidential or Proprietary Information and Sensitive Security Information (SSI) Submitted in Public Comments

Do not submit comments that include trade secrets, confidential commercial or financial information, or SSI to the public regulatory docket. Please submit such comments separately from other comments on the rulemaking. Comments containing this type of information should be appropriately marked as containing such information and submitted by mail to the address listed in **FOR FURTHER INFORMATION CONTACT** section.

Upon receipt of such comments, TSA will not place the comments in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. TSA will hold them in a separate file to which the public does not have access, and place a note in the public docket that TSA has received such materials from the commenter. If TSA receives a request to examine or copy this information, TSA will treat it as any other request under the Freedom of Information Act (FOIA) (5 U.S.C. 552) and DHS' FOIA regulation found in 6 CFR part 5.

Reviewing Comments in the Docket

Please be aware that anyone is able to search the electronic form of all comments received 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.).

¹ Sensitive Security Information (SSI) is information obtained or developed in the conduct of security activities, the disclosure of which would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The protection of SSI is governed by 49 CFR part 1520.

You may review the applicable Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477), or you may visit <http://dms.dot.gov>. See also TSA's Systems of Records Notice 006, 68 FR 49503 (August 18, 2003).

You may review the comments in the public docket by visiting the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office is located on the plaza level of the Nassif Building, at the Department of Transportation address previously provided under **ADDRESSES**. Also, you may review public dockets on the Internet at <http://dms.dot.gov>.

Availability of Rulemaking Document

You can get an electronic copy using the Internet by (1) Searching the Department of Transportation's electronic Docket Management System (DMS) web page (<http://dms.dot.gov/search/>);

(2) Accessing the Government Printing Office's web page at <http://www.gpoaccess.gov/fr/index.html>; or

(3) Visiting TSA's Security Regulations web page at <http://www.tsa.gov> and accessing the link for "Research Center" at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Be sure to identify the docket number of this rulemaking.

Abbreviations and Terms Used in This Document

AEI—Automatic Equipment Identification
 Amtrak—National Railroad Passenger Corporation
 CBP—Bureau of Customs and Border Protection
 FRA—Federal Railroad Administration
 FTA—Federal Transit Administration
 GPS—Global Positioning System
 HMR—Hazardous Materials Regulations
 HSPD—Homeland Security Presidential Directive
 HTUA—High Threat Urban Area
 IED—Improvised Explosive Device
 MOU—Memorandum of Understanding
 OA—State Safety Oversight Agency
 PHMSA—Pipeline and Hazardous Materials Safety Administration
 PIH—Material Poisonous by Inhalation (PIH is another term for TIH)
 RFID—Radio Frequency Identification
 RSC—Rail Security Coordinator
 SAFETEA—LU—Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users
 SD—Security Directive
 SSI—Sensitive Security Information
 STB—Surface Transportation Board

TIH—Toxic Inhalation Hazard (TIH is another term for PIH)
 UASI—Urban Areas Security Initiative

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I. Background and Purpose

A. Summary of Proposed Requirements

TSA proposes security regulations that would cover a broad spectrum of the rail transportation sector, including freight railroad carriers, passenger railroad carriers, rail transit systems, and rail operations at certain facilities that ship or receive specified categories and quantities of hazardous materials. TSA proposes these regulations to enhance the security of rail transportation and to address potential security threats to rail transportation. TSA intends for these proposed regulations to build upon existing Department of Transportation (DOT) procedures and requirements.

TSA's proposal is also intended to augment a DOT proposal to revise the

current requirements in the Hazardous Materials Regulations applicable to the safe and secure transportation of hazardous materials transported in commerce by rail. In this regard, in today's edition of the **Federal Register**, PHMSA is publishing an NPRM proposing to require railroad carriers to compile annual data on specified shipments of hazardous materials, use the data to analyze safety and security risks along rail transportation routes where those materials are transported, assess alternative routing options, and make routing decisions based on those assessments. PHMSA's proposal would also clarify its current security plan requirements to address en route storage, delays in transit, delivery notification, and impose additional security inspection requirements for hazardous materials shipments.

TSA's rule proposes to apply several general requirements to all freight and passenger railroad carriers, certain facilities that ship or receive specified hazardous materials by rail, and rail transit systems:

- *Rail Security Coordinator*. Covered entities must designate a rail security coordinator (RSC) and at least one alternate RSC to be available to TSA on a twenty-four hour, seven day per week basis to serve as primary contact for receipt of intelligence information and other security-related activities.

- *Reporting*. Covered entities must immediately report incidents, potential threats, and significant security concerns to TSA.

- *TSA Inspection*. Covered entities must allow TSA and DHS officials working with TSA to enter and conduct inspections, tests, and such other duties to carry out TSA's statutory responsibilities. This may include copying of records.

- *Sensitive Security Information*. This rule clarifies and extends the protection afforded to sensitive security information (SSI) in rail transportation and further identifies covered persons to include railroad carriers, certain rail operations at facilities, and rail transit systems.

The rule also proposes to apply additional requirements to freight railroad carriers and certain facilities that ship or receive specified hazardous materials by rail:

- *Location and Shipping Information*. Covered entities must provide to TSA, upon request, the location and shipping information of rail cars within their physical custody or control that contain a specified category and quantity of hazardous material. The information must be provided to TSA no later than one hour after receiving the request.

• *Chain of Custody and Control.* Covered entities must provide for a secure chain of custody and control of rail cars containing a specified quantity and type of hazardous material. TSA proposes three categories and quantities of specified hazardous materials to which the proposed requirements in this NPRM would apply. The definitions are taken from DOT's Hazardous Materials Regulations (49 CFR Parts 171–180), as follows:

- (1) A rail car containing more than 2,268 kg (5,000 lbs) of a Division 1.1, 1.2, or 1.3 (explosive) material, as defined in 49 CFR 173.50;
- (2) A tank car containing a material poisonous by inhalation as defined in 49 CFR 171.8, including Division 2.3 gases poisonous by inhalation, as set forth in 49 CFR 173.115 (c) and Division 6.1 liquids meeting the defining criteria in 49 CFR 173.132(a)(1)(iii) and assigned to hazard zone A or hazard

zone B in accordance with 49 CFR 173.133(a), other than residue; and (3) A rail car containing a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403. Appendix B to proposed part 1580, reproduced as Table 1 below, presents a brief summary of the proposed security measures required for the different categories of rail transportation entities that this rule would govern.

TABLE 1.—TSA RAIL SECURITY NPRM SUMMARY

Proposed security measure and rule section	Freight railroad carriers NOT transporting specified hazardous materials	Freight railroad carriers transporting specified hazardous materials (1580.100(b))	Rail operations at certain facilities that ship (i.e., offer, prepare, or load for transportation) hazardous materials	Rail operations at certain facilities that receive or unload hazardous materials within HTUA	Passenger railroad carriers and rail transit systems	Certain other rail operations (private, business/office, circus, tourist, historic, excursion)
Allow TSA to inspect (1580.5) Appoint rail security coordinator (1580.101 freight; 1580.201 passenger).	X X	X X	X X	X X	X X	X Only if notified in writing that security threat exists
Report significant security concerns (1580.105 freight; 1580.203 passenger).	X	X	X	X	X	X
Provide location and shipping information for rail cars containing specified hazardous materials if requested (1580.103).		X	X	X		
Chain of custody and control requirements for transport of specified hazardous materials that are or may be in HTUA (1580.107).		X	X	X		

B. Basis for the Proposed Rule

In developing this rule, TSA sought to identify and address threats to rail transportation. With respect to passenger rail, TSA recognizes that passenger railroad carriers, commuter operations, and subway systems are high consequence targets in terms of potential loss of life and economic disruption. They carry large numbers of people in a confined environment, offer the opportunity for specific populations to be targeted at particular destinations, and often have stations located below or adjacent to high profile government buildings, major office complexes, and iconic structures. Terrorist bombings since 1995 highlight the need for improved government access to, and monitoring of, transportation of passengers by rail. Terrorists have attacked the Tokyo subway system (1995); areas in and around the Moscow subway system (2000, 2001, and 2004); Madrid commuter trains (2004); the London Underground system (2005); and the train system in Mumbai

(formerly known as Bombay), India (2006).

TSA also considered the threats that face freight rail transportation. Due to the open infrastructure of the rail transportation system, freight trains can be particularly vulnerable to attack. Currently, rail carriers and shippers lack positive chain of custody and control procedures for rail cars as they move through the transportation system (e.g., as entities load the rail cars at originating facilities, as carriers transport the cars over the tracks, and as entities unload the cars at receiving facilities). This can present a significant vulnerability. Whenever entities stop rail cars in transit and interchange them without appropriate security measures, their practices can create security vulnerabilities. Freight trains transporting hazardous materials are of even more concern, because an attack on those trains (e.g., through the use of improvised explosive devices (IEDs) ²)

² An IED is a device fabricated in an improvised manner that incorporates in its design explosives or destructive, lethal, noxious, pyrotechnic, or

could result in the release of hazardous materials.

TSA is taking a risk-based approach by focusing on shipments of certain hazardous materials at this time. Thus, this rulemaking is focused on establishing chain of custody and control procedures for rail cars that pose the greatest security vulnerability. While an IED attached to any rail car (such as a car transporting coal or household appliances) would obviously cause major damage to that car, and its contents upon detonation, the more likely scenario is that terrorists would target a rail car containing certain hazardous materials in order to inflict the most damage in terms of loss of life and property, and economic effect.

To determine which hazardous materials to identify in this proposed regulation, TSA looked to the hazardous materials that the Pipeline and Hazardous Materials Safety Administration (PHMSA) identified in

incendiary chemicals. It generally includes a power supply, a switch or timer, and a detonator or initiator.

its HM-232 rule.³ From the list in HM-232, TSA identified three categories⁴ of hazardous materials that pose the greatest risk: materials that are poisonous by inhalation (PIH),⁵ explosive, and radioactive. In this proposed rule, TSA applies specific requirements to certain carriers and facilities that deal with these materials.

PHMSA considers the phrases “material poisonous by inhalation,” “poisonous inhalation hazard,” and “toxic inhalation hazard” to be synonymous and interchangeable. However, PHMSA referred to such material in the HM-232 rule text exclusively by the term “material poisonous by inhalation.” See 49 CFR 172.800(a)(3). In this NPRM, TSA uses a subset of the HM-232 list as the criterion for portions of this rule, and so this rule uses the term PIH (and also “material poisonous by inhalation”) to maintain consistency with the PHMSA HM-232 rule.

Each of these three hazardous materials presents serious risks. The release of PIH materials in a densely populated urban area would have catastrophic consequences. Such a release would endanger significant numbers of people. An example of this was seen in the January 6, 2005, rail accident in Graniteville, South Carolina. A Norfolk Southern Railway Company freight train carrying chlorine was unexpectedly diverted from the main track onto a rail spur. The train struck a standing train on the rail spur, derailing three locomotives and sixteen rail cars and rupturing a tank car carrying chlorine. Even in this sparsely populated area, the collision resulted in fatal injuries to eight citizens and one railroad employee, injuries to 630 people, and the evacuation of 5,400 local residents. Damages to equipment and track totaled more than \$2.3 million. While the accident was not the result of a terrorist attack, it nonetheless illustrates the danger of transporting PIH materials and the damage that can result from a release.

Although the number of rail shipments carrying explosives and radioactive materials is relatively low, a release of these materials could cause serious and devastating harm. If

terrorists detonated certain explosives⁶ at critical points in the transportation cycle, they could cause significant loss of life, damage to infrastructure, and harm to the national economy. If terrorists perpetrated an attack against a rail car transporting certain radioactive materials,⁷ they could endanger a significant number of people as well as disrupt the supply chain as a result of contamination.

The proposed rule will address the above-identified threats to rail transportation. The provisions in this proposed rule, including those allowing for TSA inspections and those requiring the designation of Rail Security Coordinators and the reporting of suspicious incidents, will improve TSA's ability to inspect rail operations and communicate with railroads and rail facilities. This will provide TSA and DHS with better information and monitoring capabilities concerning potential transportation security incidents involving rail travel. Also, the requirements related to hazardous materials, such as additional monitoring and protection of certain rail cars and increased availability of location and tracking information for certain rail cars, will decrease the vulnerabilities of these hazardous materials shipments to attack. Through these measures, TSA will significantly increase its domain awareness regarding rail security. TSA will continue to work with all involved entities to improve rail security.

II. Statutory and Regulatory Authorities

A. TSA Authorities To Regulate Rail Security

TSA has the primary federal role in enhancing security for all modes of transportation. Under the Aviation and Transportation Security Act (ATSA)⁸ and delegated authority from the Secretary of Homeland Security, TSA has broad responsibility and authority for “security in all modes of transportation * * * including security responsibilities * * * over modes of transportation that are exercised by the Department of Transportation.”⁹

⁶Explosives in Class 1 are divided into six divisions. However, as discussed in section III.A. of this preamble, TSA proposes to apply subpart B to part 1580 only to rail cars containing more than 2,268 kg (5,000 lbs) of a Division 1.1, 1.2, or 1.3 explosive material.

⁷See 49 CFR 173, subpart H.

⁸Pub. L. 107-71, 115 Stat. 597 (November 19, 2001).

⁹See 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. Section 403(2) of the Homeland Security Act (HSA) of 2002, Pub. L. 107-296, 116 Stat. 2315 (2002), transferred all functions of TSA, including those of the Secretary of Transportation and the

TSA has additional authorities as well. TSA is specifically empowered to develop policies, strategies, and plans for dealing with threats to transportation.¹⁰ As part of its security mission, TSA is responsible for assessing intelligence and other information to identify individuals who pose a threat to transportation security and to coordinate countermeasures with other Federal agencies to address such threats.¹¹ TSA enforces security-related regulations and requirements,¹² ensures the adequacy of security measures for the transportation of cargo,¹³ oversees the implementation and ensures the adequacy of security measures at transportation facilities,¹⁴ and carries out other appropriate duties relating to transportation security.¹⁵ TSA has broad regulatory authority to achieve ATSA's objectives, and may issue, rescind, and revise such regulations as are necessary to carry out TSA functions.¹⁶ TSA is also charged with serving as the primary liaison for transportation security to the intelligence and law enforcement communities.¹⁷

TSA's authority with respect to transportation security is comprehensive and supported with specific powers related to the development and enforcement of regulations, SDs, security plans, and other requirements. Accordingly, under this authority, TSA may assess a security risk for any mode of transportation, develop security measures for dealing with that risk, and enforce compliance with those measures.

On December 17, 2003, the President issued Homeland Security Presidential Directive 7 (HSPD-7, Critical Infrastructure Identification, Prioritization, and Protection), which “establishes a national policy for Federal departments and agencies to identify and prioritize United States critical infrastructure and key resources and to protect them from terrorist attacks.”¹⁸ In recognition of the lead

Under Secretary of Transportation of Security related to TSA, 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 with respect to TSA, including that in section 403(2) of the HSA.

¹⁰49 U.S.C. 114(f)(3).

¹¹49 U.S.C. 114(f)(1)-(5); (h)(1)-(4).

¹²49 U.S.C. 114(f)(7).

¹³49 U.S.C. 114(f)(10).

¹⁴49 U.S.C. 114(f)(11).

¹⁵49 U.S.C. 114(f)(15).

¹⁶49 U.S.C. 114(l)(1).

¹⁷49 U.S.C. 114(f)(1) and (5).

¹⁸HSPD-7, Paragraph 1.

³See Section II.B. of this preamble for a detailed discussion of the HM-232 rule.

⁴TSA also identified specified quantities of those hazardous materials. See Section I.B. of this preamble or 49 CFR 1580.100(b) for a list of the quantities.

⁵PIH 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 during transportation. See 69 FR 50988, 49 CFR 171.8, 173.115, and 173.132.

role that DHS has for transportation security, and consistent with the powers that ATSA grants to TSA, the directive provides that the roles and responsibilities of the Secretary of DHS include coordinating protection activities for “transportation systems, including mass transit, aviation, maritime, ground/surface, and rail and pipeline systems.”¹⁹ In furtherance of this coordination process, HSPD-7 provides that DHS and DOT will “collaborate on all matters relating to transportation security and transportation infrastructure protection.”²⁰

To ensure that this collaboration occurs, DHS and DOT entered into a Memorandum of Understanding (MOU) on September 28, 2004. In accordance with the September 2004 MOU, both Departments share responsibility for rail and hazardous materials transportation security. The two Departments consult and coordinate on security-related rail and hazardous materials transportation requirements to ensure consistency with overall security policy goals and objectives and to ensure that the Federal agencies do not confront the regulated industry with inconsistent security guidance or requirements. The close coordination that has led to these proposed regulations is consistent with the MOU.

On August 9, 2006, PHMSA and TSA signed an annex to the September 28, 2004 DOT-DHS Memorandum of Understanding (MOU) on Roles and Responsibilities. The purpose of the annex is to delineate clear lines of authority and responsibility and promote communication, efficiency, and non-duplication of effort through cooperation and collaboration in the area of hazardous materials transportation security based on existing legal authorities and core competencies. The annex acknowledges that DHS has lead authority and primary responsibility for security activities in all modes of transportation, and notes that TSA is the lead Federal entity for transportation security, including hazardous materials security. Similarly, on September 28, 2006, FRA and TSA signed an annex to address each agency’s roles and responsibilities for rail transportation security. The FRA-TSA annex recognizes that TSA acts as the lead Federal entity for transportation security generally and rail security in particular. The annex also recognizes that FRA has authority over every area of railroad safety (including security), and that FRA enforces PHMSA’s

hazardous material regulations. The FRA-TSA annex includes procedures for coordinating (1) planning, inspection, training, and enforcement activities; (2) criticality and vulnerability assessments and security reviews; (3) communicating with affected stakeholders; and (4) use of personnel and resources.

TSA’s proposed requirements are designed to strengthen the existing regulatory scheme. TSA developed these proposed regulations, which are consistent with DOT’s regulations, through close coordination with DOT. The discussion below explains the current and proposed DOT requirements and how TSA’s proposed rule would fit into the regulatory framework DOT has established.

B. Department of Transportation Regulation of Rail Security

DOT regulates and oversees rail security through three of its modal administrations: The Pipeline and Hazardous Materials Safety Administration (PHMSA), the Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA).

The Federal hazardous materials transportation law (Federal hazmat law),²¹ authorizes the Secretary of Transportation to establish regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.²² The Secretary of Transportation has delegated this authority to PHMSA.²³ See 49 CFR 1.53; see 49 CFR parts 171–180. PHMSA has issued several rulemakings addressing rail security under this authority.

On March 25, 2003, PHMSA published a final rule, referred to as HM-232, which requires covered persons to develop and implement security plans. Covered persons include those who offer certain hazardous materials for transportation in commerce and those who transport

certain hazardous materials in commerce.²⁴ 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.²⁵ 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. HM-232 requires covered persons to perform an assessment of the transportation security risks associated with the materials they handle and to implement methods for addressing those risks. At a minimum, the security plan must address personnel security, prevention of unauthorized access, en route security, and training of employees.

Other PHMSA regulations seek to reduce the risks to safety and security of leaving loaded rail cars unattended for long periods of time. Pursuant to 49 CFR 174.14 and 174.16, a carrier must forward each shipment of hazardous materials “promptly and within 48 hours (Saturday, Sundays, and holidays excluded)” after the carrier accepts the shipment at the originating point or the carrier receives the shipment at any yard, transfer station, or interchange point. Where there is only biweekly or weekly service, the carrier must forward a shipment of hazardous materials in the first available train. Additionally, carriers are prohibited from holding, subject to forwarding orders, tank cars

²¹ 49 U.S.C. 5101 et seq., as amended by sec. 1711 of the Homeland Security Act of 2002, (Pub. L. 107-296, Nov. 25, 2002) and Title VII of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, Aug. 10, 2005).

²² A hazardous material is defined as a substance or material, or a group or class of material, (including an explosive; radioactive material; infectious substance; flammable or combustible liquid, solid, or gas; toxic, oxidizing, or corrosive material; and compressed gas) when transported in a particular amount or form that the Secretary of Transportation determines may pose an unreasonable risk to health and safety or property. See 49 U.S.C. 5102(2) and 5103(a).

²³ PHMSA is the Federal agency charged with protecting the Nation from the risks to life, health, property, and the environment inherent in the commercial transportation of hazardous materials by all modes of transportation, including pipelines.

²⁴ 68 FR 14510. See 49 CFR 172.800, 172.802, and 172.804. PHMSA amended HM-232 with HM-240 (DOT Docket No. PHMSA-2005-22208, 70 FR 73156 (December 5, 2005)). HM-240 revised terminology, definitions, and requirements for consistency with the Hazardous Materials Safety and Security Reauthorization Act of 2005, Title VII of Pub. L. 109-59, 119 Stat. 1144 (August 10, 2005).

²⁵ Under the Hazardous Materials Regulations, placards are required for hazardous materials that pose significant transportation risks. Placards use colors, symbols, numbers and text. This is part of DOT’s system of hazard communication. The system notifies emergency responders and those who must handle the packages in the course of their employment how to handle the items in transportation and in the event of an accident.

¹⁹ HSPD-7, Paragraph 15.

²⁰ HSPD-7, Paragraph 22(h).

loaded with Division 2.1 (flammable gas), Division 2.3 (poisonous gas) or Class 3 (flammable liquid) materials.

PHMSA, in consultation with the Federal Railroad Administration (FRA) and TSA, has recently proposed to revise the current requirements in the hazardous materials regulations (HMR) applicable to the safe and secure transportation of hazardous materials transported in commerce by freight rail (Route Analysis NPRM). Among other things, PHMSA is proposing to require freight railroad carriers to compile annual data on specified shipments of hazardous materials; use the data to analyze safety and security risks along rail transportation routes where those materials are transported; assess alternative routing options; and make routing decisions based on those assessments.

FRA, the agency within DOT responsible for railroad safety, administers the Federal railroad safety laws, which provide FRA with authority over "every area of railroad safety."²⁶ 49 U.S.C. 20103(a). The agency has issued a wide range of safety regulations. In addition, FRA enforces PHMSA's hazardous materials regulations, including the HM-232 provisions requiring security plans. *See* 49 CFR 1.49.

The FTA provides financial assistance to support a variety of locally planned, constructed, and operated public transportation systems throughout the United States. Under 49 CFR part 659, FTA manages State Safety Oversight for Rail Fixed Guideway Systems.²⁷ The regulation requires states to oversee the safety and security of rail fixed guideway systems²⁸ through designated

²⁶ The term "Federal railroad safety laws" means the provisions of law generally at 49 U.S.C. subtitle V, part A or 49 U.S.C. chapter 51 or 57 and the rules, regulations, orders, and standards issued under any of those provisions. *See* Pub. L. 103-272 (1994).

²⁷ In 1991, Congress required, for the first time, that FTA establish a program providing for the State-conducted oversight of the safety and security of rail systems not regulated by FRA. *See* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, Sec. 3029, 49 U.S.C. 5330. FTA published its final rule adopting a new part 659, Rail Fixed Guideway Systems; State Safety Oversight, on December 27, 1995 (60 FR 67034); the final rule went into effect on January 1996. FTA published a revision of the final rule on April 29, 2005 (70 FR 22562) to add clarifying sections, further specify what the State must require to monitor safety and security on non-FRA rail systems, and incorporate into the body of the regulation material previously incorporated by reference.

²⁸ FTA defines a rail fixed guideway system in 49 CFR 659.5 to mean any light, heavy, rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that: (1) Is not regulated by FRA; and (2) Is included in FTA's calculation of fixed guideway route miles or receives funding

Oversight Agencies (OAs).²⁹ The OAs must require the transit agencies to develop and implement written system safety program plans and system security plans³⁰ and to conduct annual reviews of their plans.³¹ Additionally, the OAs must require transit agencies to develop and document a process for the performance of on-going internal safety and security reviews in their system safety program plans.³² Finally, the OA must require each rail transit system under its responsibility to notify the OA within two hours of an accident or other incident meeting specified parameters, including loss of life, injuries requiring immediate medical attention, property damage to rail transit vehicles or facilities of \$25,000 or more, evacuation due to life safety, collision at a grade crossing, a main line derailment, or a collision between rail transit vehicles.³³

III. TSA's Proposed Rail Security Requirements

TSA has designed this rule so that it would build on DOT's existing regulatory scheme. This rule would augment existing and proposed PHMSA requirements, address security vulnerabilities in the freight rail regulatory scheme, and complement the DOT regulatory scheme regarding passenger rail and mass transit.

A. Comparison of TSA's Proposed Rule With the DOT Regulatory Scheme

First, TSA's NPRM would expand the scope of pre-shipment inspections of rail cars containing hazardous materials. Existing PHMSA regulations require freight railroad carriers to perform a safety inspection at the ground level of each rail car containing hazardous materials.³⁴ The proposed PHMSA Route Analysis rule would require carriers to also inspect for signs of tampering with rail cars (including closures and seals) during the pre-shipment inspection (*e.g.*, look for IEDs,

under FTA's formula program for urbanized areas (49 U.S.C. 5336); or (3) Has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336).

²⁹ *See* 49 CFR 659.1.

³⁰ *See* 49 CFR 659.17 and 659.21. For a list of the required elements for each plan, *see* 49 CFR 659.19 and 659.23.

³¹ *See* 49 CFR 659.25.

³² *See* 49 CFR 659.27.

³³ *See* 49 CFR 659.33.

³⁴ Pursuant to 49 CFR 174.9, a carrier must inspect at ground level for required markings, labels, placards, securement of closures, and leakage. A "ground level" inspection is an inspection performed with the railroad employee inspecting the rail car while standing level with the car, without the employee climbing on top of the car.

suspicious items, or any other items that do not belong).³⁵

TSA's NPRM would expand these inspections even further. Existing and proposed DOT regulations include pre-shipment inspections for railroad carriers; however, they do not require security-specific inspections for rail hazardous materials shippers. TSA's proposal would require certain rail hazardous materials shippers to physically inspect a rail car from a security perspective (including closures and seals) before transferring custody of a rail car to a freight railroad carrier. Shippers would have to inspect for signs of tampering; for any other signs that the security of the car may have been compromised; and for suspicious items that do not belong, including the presence of an IED.

Second, TSA's NPRM would address other security vulnerabilities that currently exist in the freight rail regulatory scheme. Current regulations do not include chain of custody requirements and, therefore, current regulations do not address security vulnerabilities for hazmat cars in transit or at interchanges. To address this issue, TSA proposes chain of custody requirements, including requirements for monitored and protected transfer locations, and documented transfers. In addition, current regulations do not contain requirements for rail car location reporting and, therefore, do not address the Federal Government's need for prompt, critical information if it becomes necessary to reroute, stop, or otherwise protect shipments and populations to address specific security threats or incidents. To address this issue, TSA proposes rail car location and information reporting requirements.

Third, this NPRM would complement the existing DOT regulatory scheme for passenger and rail mass transit. This NPRM would enhance oversight of rail fixed guideway systems. FTA's regulations, at 49 CFR part 659, direct rail transit agencies and OAs to conduct security reviews. FTA does not oversee these reviews. This proposed rule would augment these requirements. TSA inspectors would provide the FTA and responsible State agencies with a field presence, which has not existed previously, to monitor and assess

³⁵ PHMSA intends for these requirements to address those situations where unauthorized individuals attempt to cause a security incident by tampering with rail cars (*e.g.*, introducing an IED to a car to detonate an explosion or to cause a hazardous materials release).

compliance with security requirements.³⁶

TSA's NPRM would also complement the existing DOT regulatory scheme for passenger and rail mass transit by allowing TSA inspections, requiring the designation and use of RSCs, and requiring the reporting of threats and significant security concerns. TSA's proposed requirements would enhance the agency's ability to maximize its domain awareness and recognize possible national trends involving security issues. As a complement to FRA's exercise of its safety authority over covered passenger rail operations involving "every area of railroad safety" (see 49 U.S.C. 20103(a)), and FTA's oversight of rail fixed guideway systems (see 49 U.S.C. 5330 and 49 CFR part 659), TSA would assess threats to security, monitor the state of awareness and readiness throughout the passenger rail and rail mass transit sectors, determine the adequacy of an owner or operator's security measures, and identify security gaps.

B. Scope and Applicability

Consistent with ATSA's broad authorities and with the fact that terrorists may target any part of the rail transportation system, this NPRM would impose requirements on all types of rail operations, including freight railroad carriers; intercity, commuter, and short-haul railroad passenger train service; and rail transit systems. The rule would also apply to rail hazardous materials shippers that offer, prepare, or load for transportation in commerce by rail one or more of the specified categories and quantities of hazardous materials. Also, the rule would apply to rail hazardous materials receivers that receive or unload the specified hazardous materials by rail in a High Threat Urban Area (HTUA).³⁷ In addition, the rule would cover the operation of private rail cars that are on or connected to the general railroad system of transportation and tourist, scenic, historic, and excursion operations, whether on or off the general railroad system of transportation.

³⁶ Moreover, since TSA's inspection authority over rail transit systems is not limited to rail fixed guideway systems receiving or seeking to receive funds under FTA's formula program for urbanized areas and is therefore broader than the scope of coverage of FTA's regulation (49 CFR part 659), TSA may be able to share information on assessments of the security of rail transit systems not currently subject to OA security reviews.

³⁷ The applicability of certain provisions of this proposed rule depends on which hazardous materials are involved and whether the materials are located in HTUAs. For a discussion of these issues, see sections III.A.5. and III.A.6. of the preamble.

With respect to freight railroad carriers and rail hazardous materials facilities, an important issue relating to the scope of the rule is which activities are transportation-related and, therefore, within TSA's jurisdiction. This section of the preamble discusses the scope of the applicability of the proposed rule to freight railroad operators, rail hazardous materials shippers, rail hazardous materials receivers, and passenger railroad carriers. It also identifies activities that are transportation-related and, therefore, within the scope of the proposed rule. TSA defines the term "transportation," as related to security purposes, more broadly than PHMSA defines the term, as related to safety purposes.

1. Freight Railroad Carriers

This NPRM proposes requirements that apply to all freight railroad carriers, except for those carriers whose entire operations are confined to an industrial installation. The proposed rule would not apply to, for example, a plant railroad carrier in a steel mill that serves only the needs of the plant itself and does not go beyond the plant's boundaries. Of course, even where a railroad carrier operates outside the general system of transportation, other railroad carriers that are part of that general system may enter the first railroad carrier's property. For example, a major railroad carrier may enter a chemical or auto plant via an industrial lead to pick up or set out rail cars. In such cases, the railroad carrier that is part of the general system would remain part of the general system while inside the installation, and TSA's proposed regulations would continue to cover all of its activities. Moreover, although TSA would not directly regulate the transportation operations of the railroad carrier located inside the installation that take place solely for the carrier's own corporate purpose, TSA would assert its security authority over all security matters involving that point of connection, to the extent the general system railroad carrier is engaging in transportation activities with the installation railroad carrier at a point of connection to the general system.

The applicability of the proposed freight railroad carrier requirements vary depending on whether the carrier transports specified categories and quantities of hazardous materials and whether these materials are or may be located in HTUAs. The regulation would, however, require all freight railroad carriers (regardless of whether they transport any hazardous materials), as well as freight railroad carriers

hosting passenger operations,³⁸ to allow TSA inspections, have an RSC, and report significant security concerns.

TSA's statutory authority over the security of freight rail transportation is co-extensive with FRA's authority over freight railroad safety; accordingly, TSA is proposing to make subject to this rule all freight railroad carriers that are subject to the jurisdiction of FRA. With respect to freight railroads, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use. See 49 U.S.C. 20102. Moreover, by delegation from the Secretary of Transportation, FRA has authority to enforce the Federal hazmat laws, especially with regard to rail transportation of hazardous materials, and has both regulatory and enforcement authority under the Federal railroad safety laws. See 49 CFR 1.49.³⁹

2. Rail Operations at Certain Fixed-Site Facilities

The requirements of this NPRM will apply to rail hazardous materials shippers and receivers. Specifically, TSA proposes that shippers and receivers be subject to TSA inspection, have RSCs, report significant security concerns, provide location and shipping information for specified hazardous materials, and provide a secure chain of custody and control for specified hazardous materials. For purposes of this NPRM, TSA uses the following definitions: Rail hazardous materials shippers are facilities that are connected to the general railroad system of transportation and offer, prepare, or load for transportation by rail one or more of the specified categories and quantities of the hazardous materials listed in § 1580.100(b) of the NPRM. Rail hazardous materials receivers are facilities that are connected to the general railroad system of transportation and that receive or unload from transportation by rail one or more of the specified categories and quantities of the hazardous materials listed in § 1580.100(b) of the NPRM. Both definitions exclude facilities that the Federal government operates.

TSA's statutory authority under ATSA extends to rail hazardous materials shippers and receivers. In addition to the authorities described in

³⁸ The term "hosting" refers to the situation where a passenger operation receives trackage rights to operate over track that another freight or passenger railroad carrier owns or operates.

³⁹ See 49 CFR part 209, Appendix A for FRA's detailed jurisdiction policy statement.

Section II.A. of this preamble, TSA carries out such other duties and exercises such other powers relating to transportation security, as the Assistant Secretary considers appropriate, to the extent authorized by law.⁴⁰ More specifically, TSA is empowered to ensure the adequacy of security measures for the transportation of cargo.⁴¹ ATSA does not limit TSA's authority to protecting the security of cargo only while it is on a particular conveyance, but rather extends it to the entire transportation system, including facilities.

This proposed rule covers only those hazardous materials facilities that: (1) Are connected to the general rail system of transportation, and (2) offer, prepare, load, receive, and/or unload for or from transportation by rail, specified hazardous materials. Hazardous materials shippers load rail cars that freight railroad carriers pick up for transport. The rail cars may travel anywhere in the general transportation system, including in and near high population areas, critical infrastructure, and other critical areas. Sometimes loaded rail cars will remain for some time at the shipper's facility awaiting pickup from the carrier. Whether being loaded at facilities or awaiting pickup at facilities, these rail cars could endanger surrounding areas. Under ATSA, TSA has authority to ensure the adequacy of security measures at the transportation-related areas of these facilities. This includes authority to inspect those areas used for transportation security activities. This would include, for example, control rooms or offices where security activities are initiated or monitored.

TSA used a risk-based approach in determining the rail hazardous materials facilities to which this rulemaking would apply. The highest risk exists from the rail transport of the specified hazardous materials when those rail cars are in or near an HTUA. TSA decided to use the HTUA listing to define those areas for which this rulemaking would provide additional security measures. A rail car departing any rail hazardous materials facility could enter an HTUA. TSA notes that, as to rail hazardous materials facilities receiving or unloading hazardous materials, the highest risk is at those facilities that are located within an HTUA. Therefore, TSA proposes that the regulation cover all rail hazardous materials facilities that receive or

unload, within an HTUA, one or more of the specified hazardous materials.⁴²

3. Passenger Rail (including Rail Transit Systems)

TSA's authority is not limited to FRA's jurisdiction over passenger rail and, therefore, includes rail transit systems. TSA's authority is also not circumscribed by FTA's jurisdiction. Therefore, the proposed rule would apply to all passenger railroad carriers within FRA's statutory jurisdiction (including tourist, scenic, historic, and excursion operations), and all rail transit systems (including light rail, heavy rail, rapid transit, monorail, inclined planes, funiculars, cable cars, trolleys, and automated guideways) within FTA's statutory jurisdiction, and other passenger rail systems.

TSA proposes to apply this rule to all railroad carriers that operate passenger train service, provide commuter or other short-haul passenger train service in a metropolitan or suburban area, or host the operations of such passenger train service. Under the provisions of the proposed rule, TSA would regulate as a passenger railroad carrier any public authority that indirectly provided passenger train service by contracting out the actual operation to another railroad carrier or independent contractor. Although the public authority would ultimately be responsible for designating and using an RSC, allowing TSA to conduct inspections or tests, and reporting significant security concerns, the railroad carrier or other independent contractor that operates the authority's passenger rail service would be required to fulfill all applicable responsibilities with respect to rail transportation security planning, including implementation.

The proposed rule would cover freight railroad carriers that host the operations of passenger train service over its lines, but that neither provide nor operate passenger train service itself. The proposal would also cover passenger railroad carriers that, in addition to operating or providing their own passenger train service, host the operations of other passenger railroad operations. TSA recognizes that under the proposed rule, the host freight and passenger railroad carriers would already be subject to the provisions of the rule (e.g., subject to TSA inspection,

required to have rail security coordinators, and required to report significant security concerns) independent of their additional role as hosts to passenger train service. Nevertheless, based upon the unique operational relationship between the host railroad carrier and the passenger operation, as well as the specific nature of a particular security situation, one of the railroad carriers may be better suited to assume primary compliance responsibility under the proposed rule. TSA expects that a railroad carrier that operates passenger train service over the line of a host railroad carrier would review all of the RSC and security concern reporting requirements of the host railroad carrier and that both the host carrier and the passenger operation would coordinate their respective roles in fulfilling these requirements. Accordingly, if there were a significant security concern involving a hosted passenger operation, TSA would accept one jointly-submitted report from both carriers, rather than separate reports from each carrier.

TSA recognizes that host railroad carriers already bear certain significant safety and security responsibilities. For example, pursuant to FRA emergency preparedness regulations, host railroad carriers must have procedures for making emergency responder notifications, be capable of rendering assistance to the involved passenger railroad carriers during emergency situations, and address any physical and operating characteristics of their rail lines that may affect the safety of these railroad operations (such as evacuating passengers from a train stalled in a tunnel or on an elevated structure). See 49 CFR part 239.

TSA's proposal to cover rail transit systems would build upon DOT's existing regulatory scheme. A rail transit system is generally subject to the jurisdiction of FTA, FRA, or both; the determining factor for jurisdiction is whether the transit system is connected to the general railroad system of transportation. For rail transit systems that are not connected to the general system, the applicable DOT requirements include FTA's State Safety Oversight for Rail Fixed Guideway Systems regulations.⁴³ For transit systems that are connected to the general railroad system, FRA may exercise jurisdiction (see 49 CFR part 209, Appendix A for a detailed

⁴² Note that PHMSA's regulations do not apply after the delivering carrier departs the facility. See 49 CFR 171.1(c)(3) and 171.8 TSA's proposal to cover the transportation-related areas of the rail hazardous materials facilities that receive or unload the subject rail cars in the HTUA would extend beyond that time.

⁴³ See discussion in Section III.C. of this preamble.

⁴⁰ 49 U.S.C. 114(f)(15).

⁴¹ 49 U.S.C. 114(f)(10).

discussion).⁴⁴ For those rapid transit systems that are connected to the general system in such a way to warrant exercise of FRA's jurisdiction, only those portions of the rapid transit system that are connected to the general system will generally be subject to FRA's rules. For those rapid transit systems that are not sufficiently connected to the general railroad system to warrant FRA's exercise of jurisdiction, FTA's rules will apply.

TSA's authority over rail transit systems is not limited to rail fixed guideway systems receiving or seeking to receive funds under FTA's grant program, and is therefore broader than the scope of coverage of FTA's regulation (49 CFR part 659). Accordingly, TSA's authority extends to all rail transit systems regardless of whether the system is subject to regulation by FTA, FRA, or neither agency.

4. Other Rail Operations

Some of the requirements in this NPRM would apply to tourist, scenic, historic, and excursion passenger rail systems. Specifically, these types of operations would be subject to inspection by TSA and DHS officials and would be required to report significant security concerns. See proposed 49 CFR 1580.5 and 1580.203. In addition, these operations would be subject to the NPRM's requirement to designate and use an RSC if TSA notifies the operation in writing that a security threat exists concerning that operation. See proposed 49 CFR 1580.201. TSA is including this requirement, because tourist, scenic, historic, and excursion operations are potential terrorist targets, and so there may be some situations where TSA wishes to inspect these operations to assess their security.

With two exceptions, FRA exercises jurisdiction over tourist, scenic, and excursion railroad operations whether or not they are conducted on the general railroad system. The exceptions are: (1) Operations of less than 24-inch gage, which, historically, have never been considered railroads under the Federal railroad safety laws; and (2) operations that are off the general railroad system of transportation and "insular."⁴⁵ See

⁴⁴ FTA's rules on rail fixed guideway systems do not apply to any rapid transit systems or portions thereof subject to FRA's rules.

⁴⁵ Insularity is an issue only with regard to tourist operations over trackage outside of the general system used exclusively for such operations. FRA considers a tourist operation to be insular if its operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of any member of the public except a business guest, a licensee of the tourist operation

Appendix A to 49 CFR part 209. A tourist operation is not part of the general system when the operation is conducted on track used exclusively for tourist operation purposes. If a tourist operation conducted off the general system is insular, FRA does not exercise jurisdiction over it, and none of FRA's rules apply. If a tourist operation conducted off the general system is not insular, FRA exercises jurisdiction over the operation, and some of FRA's rules (*i.e.*, those that specifically apply beyond the general system to such operations) will apply.⁴⁶

TSA also proposes that the operators of private cars, including business or office cars and circus trains that are on or connected to the general railroad system of transportation, allow TSA to inspect and be required to report significant security concerns. TSA believes that a private car operation that hauls passengers should perform a basic level of security preparedness planning consistent with the planning of other passenger train operations. TSA recognizes the fact that private rail cars do not haul as many passengers as these other operations and, therefore, these rail cars constitute a less attractive target for terrorists. Moreover, TSA recognizes that host railroads, such as National Railroad Passenger Corporation (Amtrak) and commuter railroads, often haul private cars, and these hosts would already be required to have RSCs, who can serve as a point of contact with TSA while the host is hauling the private cars.

Finally, TSA seeks comment on whether there are financial, operational, or other factors that are unique to the operation of tourist, scenic, historic, and excursion passenger rail systems or the operation of private rail cars and if so, what those factors are.

5. Specified Hazardous Materials

Certain provisions of this proposed rulemaking (*i.e.*, the ones allowing TSA inspections, requiring the designation of RSCs, and requiring reporting of significant security concerns) apply to freight railroad carriers regardless of

or an affiliated entity, or a trespasser would be affected by the operations. A tourist operation will not be considered insular if one or more of the following exists on its line: (1) A public highway-rail crossing that is in use; (2) An at-grade rail crossing that is in use; (3) A bridge over a public road or waters used for commercial navigation; or (4) A common corridor with a railroad, *i.e.*, its operations are within 30 feet of those of any railroad.

⁴⁶ For example, FRA's rules on accident reporting, steam locomotives, and grade crossing signals apply to these non-insular tourist operations (see 49 CFR 225.3, 230.2 and 234.3), as do all of FRA's procedural rules (49 CFR parts 209, 211, and 216) and the Federal railroad safety statutes themselves.

whether they transport hazardous materials. However, some provisions of the NPRM (*i.e.*, the ones requiring entities to provide location and shipping information and to provide a secure chain of custody and control) apply only to the rail hazardous materials shippers and receivers and freight railroad carriers that handle specified categories and quantities of hazardous materials. Generally, the specified chemicals are those that are "poisonous by inhalation," certain explosives, and radioactive materials. Proposed section 1580.100(b), lists these materials and applicable quantities:

(1) A rail car containing more than 2,268 kg (5,000 lbs) of a Division 1.1, 1.2, or 1.3 (explosive) material, as defined in 49 CFR 173.50.

(2) A tank car containing a material poisonous by inhalation as defined in 49 CFR 171.8, including Division 2.3 gases poisonous by inhalation, as set forth in 49 CFR 173.115(c) and Division 6.1 liquids meeting the defining criteria in 49 CFR 173.132(a)(1)(iii) and assigned to hazard zone A or hazard zone B in accordance with 49 CFR 173.133(a), other than residue; and

(3) A rail car containing a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403.

DOT's Hazardous Materials Regulations define the term "material poisonous by inhalation" in 49 CFR 171.8. Materials poisonous by inhalation, also called poison inhalation hazard (PIH) materials, are gases or volatile liquids that are toxic to humans when inhaled. Specific classification criteria for PIH gases are in 49 CFR 173.115(c) and 173.116(a); classification criteria for PIH liquids are in 49 CFR 173.132(a)(1)(iii) and 173.133(a).

PHMSA defines "radioactive material" to mean a material containing radionuclides where both the activity concentration and the total activity in the consignment exceed the values specified in the table in 49 CFR 173.436 or values derived according to the instructions in 49 CFR 173.433. See 49 CFR 173.403. A highway route controlled quantity refers to a quantity in a single package that exceeds one of the following amounts: 3,000 times the A1 value of the radionuclides, as specified in 49 CFR 173.435 for special form Class 7 (radioactive) material; 3,000 times the A2 value of the radionuclides, as specified in 49 CFR 173.435 for normal form Class 7 (radioactive) material; or 1,000 TBq (27,000 Ci), whichever is least.

Under the HMR, an "explosive" refers to "any substance or article, including a device, which is designed to function by

explosion (*i.e.*, an extremely rapid release of gas and heat) or which, by chemical reaction within itself, is able to function in a similar manner even if not designed to function by explosion, unless the substance or article is otherwise classed under the [HMR].” See 49 CFR 173.50. The term includes a pyrotechnic substance or article, unless the substance or article is otherwise classed under the HMR. Explosives in Class 1 are divided into six divisions. However, based upon the relative explosive hazards of the explosives in these divisions, TSA proposes to apply subpart B of part 1580 to explosives in rail cars containing more than 2,268 kg (5,000 lbs) only in Divisions 1.1., 1.2, and 1.3. Division 1.1 consists of explosives that have a mass explosion hazard. A mass explosion is one which affects almost the entire load instantaneously. Division 1.2 consists of explosives that have a projection hazard but not a mass explosion hazard. Division 1.3 consists of explosives that have a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard. See 49 CFR 173.50.

TSA, PHMSA, and FRA have assessed the security vulnerabilities associated with the transportation of different types and classes of hazardous materials. In this NPRM, TSA has applied enhanced security requirements to the specified hazardous materials based on specific transportation scenarios. These scenarios depict how individuals could deliberately use hazardous materials to cause significant casualties and property damage. The materials and the quantities specified in proposed § 1580.100(b) present a significant rail transportation security risk and an attractive target for terrorists because of the potential for them to use these materials as weapons of mass effect. TSA continues to evaluate the security risks associated with the transportation of hazardous materials and may propose additional regulations including regulations pertaining to other materials or quantities of materials in the future.

The proposed rule excludes tank cars containing only residual amounts of the hazardous material. From a security perspective, it appears that the consequences of the release of residual PIH materials would be significantly less than the consequences of an incident involving a loaded tank car. TSA seeks comment on whether it should apply the requirements in this NPRM to fewer or additional hazardous materials or should extend the requirements to include tank cars containing residue. TSA also seeks

comment on whether there are other hazardous materials that could cause significant loss of life, transportation system disruption, or economic disruption and whether TSA should apply the requirements of this NPRM to those other materials. TSA will continue to evaluate whether it should expand or reduce the list of hazardous materials and whether it should make tank cars containing residue subject to the rule.

6. High Threat Urban Areas (HTUAs)

The proposed requirements for reporting shipping and location information and for providing a secure chain of custody are applicable to the transportation of specified hazardous material that is or may be in an HTUA. TSA is using the term HTUA and its definition to describe and delineate those geographic areas that warrant special consideration with respect to transportation security. In this NPRM, TSA derived its lists of HTUAs from the Urban Areas Security Initiative (UASI) program. TSA includes a list of HTUA in Appendix A to this NPRM. As well, the list is available on the DHS Web site: http://www.dhs.gov/dhspublic//interweb/assetlibrary/FY06_UASI_Eligibility_List.pdf.

First implemented in 2003, UASI is a risk-based methodology that is consistent with DHS’s national risk management efforts for homeland security. DHS identified UASI areas as HTUAs if they had populations greater than 100,000 and had reported threat data during the past fiscal year. Currently, DHS has identified 46 HTUAs based on risk assessments considering three variables: (1) Threat, or the likelihood of a type of attack that might be attempted; (2) vulnerability, or the likelihood that an attacker would succeed; and (3) consequence, or the impact of an attack occurring. Each HTUA consists of a city limit or combined adjacent city limits, plus a 10-mile buffer zone extending from the city border(s). Appendix A to this proposed rule contains the 46 Urban Areas that were eligible to apply for the FY 2006 UASI Program. TSA proposes to use the FY 2006 list of Urban Areas for this rule. TSA has evaluated the security issues for rail transportation of specific hazardous material and believes that the results of the FY 2006 UASI risk model are an appropriate methodology for this rulemaking. As proposed, if DHS makes any changes in subsequent years to the FY 2006 list, those changes will not affect the TSA list in Appendix A unless TSA subsequently amends the list.

DHS evaluated these HTUAs for two separate, but complementary, types of risk: asset-based risk and

geographically-based risk. Considered together, these two calculations provide an estimate of total terrorism risk. This is accomplished using a common risk model that is internally consistent across all homeland security grant allocations. Under this model, asset-based risk is a function of the combined risks of terrorism to potential targets within a geographic area. In comparison, geographically-based risk is derived from certain prevailing attributes or characteristics intrinsic to a geographical area, such as a border, that may contribute to its risk of terrorism.

In May 2005, DHS held a meeting with stakeholders to solicit input and feedback on the risk formula. Attendees included key representatives from 12 States and urban areas, as well as representatives from national and international associations of police, emergency managers, city chiefs, and fire chiefs. The current risk model reflects the recommendations of the stakeholders who attended the May 2005 meeting. Additional information about the risk methodology is available at the following Web site: http://www.ojp.usdoj.gov/odp/docs/FY_2006_UASI_Program_Explanation_Paper_011805.doc.

TSA is currently conducting vulnerability assessments of the transportation of PIH materials through the UASI HTUAs. Through these assessments, TSA has identified operational practices and conditions that may compromise transportation security. TSA has addressed some of the major practices and conditions in this rulemaking, including the lack of positive and secure exchange of custody and control of rail cars containing hazardous materials and the lack of secure storage of these materials at transportation facilities.

TSA is soliciting comment on the adoption of the DHS HTUAs for this proposed rule, and seeks comment on appropriate criteria to use to determine those areas where freight railroad carriers and rail hazardous materials shippers and receivers should be subject to additional security requirements. If TSA decides in the final rule to use HTUAs as the basis for imposing additional security requirements, TSA will continue studying the patterns of rail transportation across the nation and may revise the list of HTUAs established by DHS for FY 2006, as appropriate.

C. Requirements

1. Sensitive Security Information (SSI)

Section 114(s) of title 49 of the United States Code requires TSA to promulgate

regulations governing the protection of sensitive security information (SSI). SSI includes information that would be detrimental to transportation security if publicly disclosed. TSA's SSI regulation, 49 CFR part 1520, establishes certain requirements for the recognition, identification, handling, and dissemination of SSI, including restrictions on disclosure and civil penalties for violations of those restrictions.

Although 49 CFR part 1520 primarily covers aviation and maritime security-related information, vulnerability assessments and threat information related to all modes of transportation are considered SSI under 49 CFR 1520.5(b)(5) and 1520.5(b)(7) and must be protected and handled in accordance with 49 CFR part 1520. However, because certain other information created in connection with this proposed rule would be detrimental to transportation security if publicly disclosed, TSA is proposing to amend 49 CFR part 1520 to more directly protect information related to the rail sector. This rulemaking would add railroad carriers, rail hazardous materials shippers, rail hazardous materials receivers, and rail transit systems as covered persons under part 1520 and explicitly require them to restrict the distribution, disclosure, and availability of SSI to persons with a need to know, and refer all requests for SSI by other persons to TSA or the applicable component or agency within DOT or DHS.

The NPRM would amend part 1520 to clarify that any review, audit, or other examination of the security of a railroad, railroad carrier, rail facility, rail hazardous materials shipper, rail hazardous materials receiver, rail transit system, or rail transit facility that is directed, created, held, funded, or approved by DOT or DHS, or that will be provided to DOT or DHS in support of a Federal security program, is SSI. The NPRM would also amend part 1520 to cover certain details of security inspections or investigations involving rail transportation security; specific details of rail transportation security measures; security training materials for persons carrying out rail transportation security measures required or recommended by DHS or DOT; lists of identifying information of personnel having unescorted access to a rail secure area; and lists identifying critical rail infrastructure assets. TSA seeks comment on whether it should protect as SSI under part 1520 any other information that may be created under this rule.

2. TSA Inspections

TSA is proposing that all entities covered by this proposed regulation allow TSA to inspect their facilities without advance notice. TSA will conduct inspections in a reasonable manner consistent with TSA guidance for its inspectors. In enacting ATSA, Congress recognized the importance of security for all forms of transportation and related infrastructure and, in establishing TSA, conferred upon it responsibility for security in all modes of transportation. The United States rail network is a vital link in the Nation's transportation system and is critical to the economy, national defense, and public health. Amtrak, the Alaska Railroad Corporation, commuter railroads, and rail transit systems provide passenger rail service to millions of passengers yearly. Approximately 40 percent of all intercity freight goes by rail, including 64 percent of the coal that electric utilities use to produce power.

Maintaining a safe and secure rail transportation system is essential. TSA must be able to inspect at any time in order to carry out its security-related statutory and regulatory authorities, including the following authorities in 49 U.S.C. 114(f):

- (2) assess threats to transportation;
- (7) enforce security-related regulations and requirements;
- (9) inspect, maintain, and test security facilities, equipment, and systems;
- (10) ensure the adequacy of security measures for the transportation of cargo;
- (11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities; and
- (15) carry out such other duties, and exercise such other powers, relating to transportation security as the Assistant Secretary considers appropriate, to the extent authorized by law.

As noted above, under this proposal, TSA's inspection authority also covers rail hazardous materials facilities that offer, prepare, or load for transportation by rail certain specified categories and quantities of hazardous materials, as well as facilities that receive or unload these materials from transportation by rail in a HTUA. In this regard, TSA's authority over transportation security explicitly covers the transportation of cargo.⁴⁷ The law does not limit TSA to protecting the security of cargo only while it is on a particular vehicle of transportation, but extends to the entire

⁴⁷ 49 U.S.C. 114(f)(10) empowers the Assistant Secretary of Homeland Security for TSA to "ensure the adequacy of security measures for the transportation of cargo."

transportation system. The statute references TSA's responsibility to protect security facilities and transportation facilities.⁴⁸ Thus, to the extent that a hazardous materials site covered by the applicability section of this proposed regulation has specific facilities for transportation, such as loading areas, TSA's authority to inspect these facilities is explicit.

More importantly, because the transportation system may be compromised by the introduction of an IED or other destructive instrument, the authority for transportation security necessarily includes authority to inspect, as necessary, the facilities that offer, prepare, load, receive, or unload certain hazardous materials that travel in rail transportation, if that packaging might be vulnerable to compromise. Limiting TSA's authority to inspect the security of cargo only after it is being transported would negate TSA's ability to protect the transportation system effectively. Accordingly, TSA's authority extends to rail hazardous materials facility points of entry of cargo going into the transportation system.

3. Designation of Rail Security Coordinators (RSCs)

Except as noted below, in §§ 1580.101 and 1580.201, TSA is proposing to require each railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, and rail transit system covered within the scope of part 1580 (*see* proposed § 1580.1), at the corporate level, to designate and use an RSC to serve as the point of contact with TSA on security matters and communications with TSA concerning the railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, or rail transit system's security initiatives. The RSC and any alternate RSC(s) should be officials with overall responsibility, management, and/or oversight of security operations and/or police operations. The RSC may therefore have responsibility for several rail hazardous materials facilities covered by the proposed rule which are owned and operated by one corporation. TSA would require either the RSC, or an alternate RSC, to be available to TSA on a 24 hour a day basis. In addition, TSA would require the RSC, or an alternate RSC, to provide current contact information to TSA and to coordinate security practices and procedures with appropriate law enforcement and emergency response agencies. As part of TSA's coordinated approach to rail security, TSA would provide the names

⁴⁸ 49 U.S.C. 114(f)(9) and 114(f)(11).

and contact information of the RSCs to DOT and its modal administrations for use in their investigative, inspection, and compliance activities.

When appropriate to carry out a regulatory requirement, including the provisions of an SD, the RSC would also be responsible for working with other entities to coordinate implementation of security measures. Those other entities involved in the security of the rail operation might include freight railroad carriers hosting passenger operations, owners of rail stations used by passenger operations, law enforcement agencies, and emergency response agencies. TSA understands that many railroads operate through a very large number of local and State jurisdictions, and it would be impracticable for the railroad to meet with every one. This NPRM would not require the RSC to do so. TSA expects that the railroad would reach out to those most likely to need to respond to a security incident.

At a minimum, TSA anticipates that the railroad carriers, rail hazardous materials shippers, rail hazardous materials receivers, and rail transit systems would be able to quickly and accurately assess a security situation and then notify the appropriate law enforcement and emergency response agencies. In addition, TSA expects that the coordination effort would include the following elements: the offering of information to the appropriate agencies (as applicable) on the locations of railroad carrier facilities, rail hazardous materials shipper and receiver facilities, and rail transit facilities; access to railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, and rail transit agency equipment; and communications interface. Where a railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, or rail transit system requested TSA's assistance or notified TSA that its RSC was having difficulty coordinating security practices or procedures, TSA would intervene, as appropriate, to assist.

To the maximum extent feasible, TSA anticipates that railroad carriers, rail hazardous materials shippers, rail hazardous materials receivers, and rail transit systems would not need to establish a new company or corporate division or infrastructure to carry out the responsibilities of the RSC and would not need to hire new employees to serve exclusively as RSCs. Rather, TSA expects that the proposal would result in only an incremental increase in the job duties of existing employees who have related functions. Moreover, in many instances, the related job

functions involve compliance with existing Federal requirements.

TSA anticipates that certain rail hazardous materials shippers and receivers, particularly the smaller ones, would employ the services of the individual who serves as the manager of safety, health, and environment. This individual traditionally oversees regulatory compliance with the requirements of Federal agencies such as the Occupational Safety and Health Administration and the Environmental Protection Agency. Other rail hazardous materials shippers and receivers, particularly the larger companies, may employ an individual to serve exclusively in the role of the RSC. In the case of rail hazardous materials facilities that are also subject to the maritime security regime required by the Maritime Transportation Security Act of 2002, as codified in 46 U.S.C. Chapter 701, the individual who serves as the Federal Maritime Security Coordinator or the Facility Security Officer may also fulfill the duties of the RSC. See 33 CFR parts 101–106.

TSA anticipates that Class I and larger Class II railroad carriers⁴⁹ would likely employ the services of the chief of the railroad police. Smaller railroad carriers would likely select the operating officer responsible for safety compliance and liaison with FRA. In this regard, FRA requires freight and passenger railroad carriers to telephonically report to the National Response Center certain types of accidents/incidents, such as the death of a rail passenger or railroad carrier employee, a train accident that results in serious injury to two or more train crewmembers or passengers requiring their admission to a hospital, or a train accident resulting in a preliminary damage estimate of \$150,000 to railroad and non-railroad property. See 49 CFR

⁴⁹ For purposes of accounting and reporting, the Surface Transportation Board (STB) groups freight railroad carriers into the following three classes:

Class I: Carriers having annual carrier operating revenues of \$250 million or more after applying the railroad revenue deflator formula.

Class II: Carriers having annual carrier operating revenues of less than \$250 million but in excess of \$250 million after applying the railroad revenue of deflator formula.

Class III: Carriers having annual carrier operating revenues of \$250 million or less after applying the railroad revenue deflator formula.

See 49 CFR 1201, Subpart A. The railroad revenue deflator formula is based on the Railroad Freight Price Index developed by the Bureau of Labor Statistics. The formula is as follows:

$$\text{Current Year's Revenues} \times \left(\frac{1991 \text{ Average Index}}{\text{Current Year's Average Index}} \right)$$

The STB is an economic regulatory agency that Congress charged with the fundamental missions of resolving railroad rate and service disputes and reviewing proposed railroad mergers. See ICC Termination Act of 1995, Pub. L. 104–88, 109 Stat. 803 (December 31, 1995).

225.9. PHMSA regulations require immediate reports by the person in physical possession of the hazardous materials to the National Response Center of certain types of hazardous materials incidents, such as the death or serious injury of a person as a direct result of a hazardous material or fire, breakage, spillage, or suspected radioactive contamination occurring that involves a radioactive material. See 49 CFR 171.15. In addition, under 49 CFR 659.33, a rail transit agency must notify the OA within two hours of certain incidents involving a rail transit vehicle or occurring on rail transit property.

TSA has crafted this RSC proposal as a performance standard, and TSA expects that each railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, and rail transit system will provide its RSC with the information necessary to perform its job duties. The proposal does not include a training requirement. However, TSA seeks comment on whether the final rule or another rulemaking should include such a requirement. In this regard, TSA seeks comment on what training methods railroad carriers, rail hazardous materials facilities, and rail transit facilities could use to meet this requirement. For example, should TSA require specific training as it does in aviation for aircraft operator Ground Security Coordinators? See 49 CFR 1544.233. Should TSA require training once or mandate it on a recurrent basis? Should TSA develop specific guidance or a curriculum for such a training program?

Under the proposed rule, the requirement to designate and use an RSC does not apply to the operation of private rail cars, including business/office cars and circus trains, or to tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation, unless TSA notifies the owner or operator in writing that a security threat exists concerning that operation. Such notifications, and lists of specific private rail car owners and operators that TSA has required to appoint an RSC, would be protected as SSI threat information under § 1520.5(b)(7).

In reaching the decision to exclude the above types of operations, TSA considered their relative security risk, which TSA treated as a function of three variables: *threat*, or the likelihood of a type of attack that might be attempted; *vulnerability*, or the likelihood that an attacker would succeed; and *consequence*, or the impact of an attack occurring. While TSA believes that a

private car operation should be held to the same basic level of security preparedness planning as other passenger train operations, TSA intends to take into account the financial burden that TSA would impose if it required private car owners and operators to conform to the requirements of proposed §§ 1580.101 and 1580.201. Moreover, TSA recognizes that host railroads such as Amtrak and commuter railroads often haul private cars, and these hosts often impose their own security requirements on the operation of the private cars. Pursuant to proposed § 1580.201, TSA would already require host railroads to have an RSC to serve as the primary contact for intelligence information and security-related activities and communications with TSA; the private car passengers would benefit from this requirement even if private rail car owners and operators did not designate their own RSCs. In addition, in the case of non-revenue passengers, including employees and guests of railroad carriers who travel in business and office cars and passengers traveling on circus trains, the railroad carriers would provide for their safety and security in accordance with existing operating procedures and protocols relating to normal freight train operations.

With respect to tourist, scenic, historic, and excursion operations, TSA analyzed the security risk and also considered the financial, operational, and other factors unique to such railroad carriers. At this time, TSA concludes that these operations do not need to appoint RSCs, unless TSA notifies them to do so.

4. Location and Shipping Information for Certain Rail Cars

This rule proposes that freight railroad carriers transporting the specified categories and quantities of hazardous materials and certain rail hazardous materials shippers and receivers must provide information to TSA, upon request, on the location of rail cars. This requirement grew out of an August 16, 2004 notice and request for comments that PHMSA and TSA issued. The notice, entitled "Hazardous Materials: Enhancing Rail Transportation Security for Toxic Inhalation Hazard Material," addressed the need for enhanced security requirements for the rail transportation of hazardous materials posing a PIH hazard. See 69 FR 50988. The purpose of the location reporting requirement is not to track a rail tank car to ascertain if it is off course, but rather to determine how close it may be to a target city or other potential target. Based upon the

intelligence information received, TSA may wish to know, for example, how many rail tank cars carrying a particular TIH material are headed toward, or currently located within 10 miles of, a specified potential target.

The August 2004 Notice indicated that DOT and DHS were considering whether they should require communication or tracking requirements, such as satellite tracking of rail cars and real-time monitoring of tank car or track conditions for rail shipments of PIH materials. In addition, the Notice suggested that DOT and DHS were considering reporting requirements in the event that PIH shipments are not delivered within specified time periods.

Currently, there are no regulations that include communication, location, or tracking requirements for hazardous materials shipments by rail. While offerors and transporters of PIH materials may elect to implement communication, location, or tracking measures as part of the security plans they develop in accordance with subpart I of part 172 of the HMR, such measures are not mandatory.

Some commenters to the August 2004 Notice questioned whether the tracking of rail shipments of PIH materials has a security benefit. They suggested that the probability that a rail car will be moved off the rail network is extremely remote and, further, that tracking rail cars to determine if they are off course has no value from a security perspective. Although some commenters expressed concerns about the reliability of tracking systems and the ease with which some systems could be compromised, several commenters suggested that since the railroad industry already has the capability to track rail cars, the existing system should be supplemented, not replaced, and any mandated tracking requirements should provide for flexibility in choosing different technologies.

DHS believes that information concerning the location of certain hazardous materials should be readily available to industry and the Federal Government, particularly during elevated threat situations. Such information would be critical to decisions concerning possible rerouting, stopping, or otherwise protecting shipments and populations to address specific security threats or incidents. Freight railroad carriers currently have the capability to locate a rail car's last reported location using the Automatic Equipment Identification (AEI) tag and

reader system,⁵⁰ as well as current location using two-way radio or cellular telephone. Rail hazardous materials facilities already maintain sufficient information concerning the contents and location of hazardous materials under their physical custody and control, whether for proprietary reasons or to comply with DOT hazardous materials regulations, and can provide the information to the Federal Government in an expeditious manner.

Based upon TSA's consideration of the security vulnerabilities associated with the transportation of different types and classes of hazardous materials, the proposed rule would add location and shipping information requirements, focusing upon the three types and quantities of hazardous materials that TSA has concluded pose a significant transportation security risk.

This rule would require covered freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers to report the location and shipping information of these rail cars when TSA requests such information.⁵¹ Certain PIH location and shipping information is already protected as SSI under a 49 CFR 1520.5(b)(16) determination by TSA. TSA will evaluate the location and shipping information provided under this rule on a case-by-case basis, and may determine that such information is SSI under 49 CFR 1520.5(b)(16). TSA is seeking comment on whether TSA should amend § 1520.5(b) to routinely cover such information as SSI. Data elements to be included in these rail car reports include the rail car's identification, lading, location, and transportation status. As noted above, TSA anticipates that this information is readily available from existing car location management and waybill databases.

The proposed rule would establish a performance standard that requires the regulated entity to be able to provide the requested information in the timeframe specified, without mandating a particular technology or system protocol for obtaining it. Accordingly, as discussed further in the Section-by-Section Analysis for § 1580.103 below, while certain larger freight railroad carriers would choose to meet the requirement by using AEI Tags, smaller carriers that rarely haul rail cars

⁵⁰ AEI tags are discussed in the Section-by-Section Analysis of proposed 49 CFR 1580.103.

⁵¹ TSA's proposed requirement that carriers, shippers, and receivers submit car location and shipping information to TSA for rail security purposes would be in addition to any Bureau of Customs and Border Protection (CBP) information submission requirements.

containing the specified hazardous materials may elect to obtain the requested location and shipping information merely by calling the train crew on a two-way radio or cellular telephone. Rail hazardous materials facilities, depending on the number of rail cars currently containing one or more of the listed hazardous materials, may employ a sophisticated computer program (as appropriate) or simply assign an employee to physically count the rail cars containing the product and gather the requested information for each rail car. If the carrier, shipper, or receiver provides the location and shipping information to TSA within one hour of receiving the request and does so using one of the five approved methods, the carrier or facility would be in full compliance with the proposed regulation.

TSA recognizes that the ability of the freight railroad industry to track billions of dollars of equipment and cargo is crucial for good customer service and efficient rail operations, and seeks comment from rail tank car manufacturers, rail tank car owners, freight railroad carriers, and the insurance industry on the feasibility and potential future uses of Global Positioning Systems⁵² (GPS) to track rail cars. TSA requests information on the anticipated economic impact on rail car owners and freight railroad carriers in terms of the costs of manufacture, installation, maintenance, and service of GPS tracking systems and devices. In addition, TSA seeks information on the anticipated security benefits that would result from equipping rail tank cars with technologies that incorporate chemical sensors and open hatch detection into GPS-based location and messaging systems to immediately notify concerned parties of potential leaks or unauthorized access of the rail car. TSA also requests comment on the business use considerations, including the anticipated benefits for fleet management, protection of business proprietary data, and whether freight railroad carriers using GPS tracking systems would likely receive insurance premium reductions.

5. Reporting Significant Security Concerns

The threats to transportation security present a new paradigm for intelligence collection, analysis, and application. For most of its history, the United States has focused its intelligence resources on

the military and political establishments of foreign states. In the aftermath of the September 11, 2001 attacks, the focus areas for intelligence collection activities have expanded markedly.

Detecting terrorist activities entails piecing together seemingly unrelated or minor observations, encounters, and incidents and analyzing information from other sources to identify indications of planning and preparation for an attack. The terrorist threat and the rail mode's vulnerability have unfortunately been well demonstrated by multiple attacks throughout the world. In this environment, reports from railroad carriers, rail hazardous materials shippers and receivers, and rail transit systems are essential to the detection of indications of terrorist planning and preparation activities. Seemingly disconnected or disparate reports of suspicious or unusual activities, if timely and effectively analyzed in the context of broader information derived from the intelligence community, may provide the insight necessary to prevent a terrorist attack.

Essential to achieving this objective is the enhancement and expansion of the means to detect indicators of terrorist surveillance, planning, and preparation activities and to identify suspicious persons at and near rail cars, stations, terminals, facilities, and other infrastructure. A critical component of this effort is timely reporting of incidents and other matters of security concern.

TSA would require all entities covered by this NPRM to report significant security concerns to TSA. Significant security concerns encompass incidents, suspicious activities, and threat information including, but not limited to the following incidents: interference with the train crew; bomb threats—both specific and non-specific; reports or discovery of suspicious items which result in the disruption of operations; suspicious activity occurring onboard a train that results in a disruption of operations; discharge, discovery, or seizure of a firearm or other deadly weapon on a train or in a station or terminal; information relating to the possible surveillance of a train or rail facility; correspondence received by the railroad carrier or rail transit system operator indicating a potential threat to rail transportation; disruption of train operations, including derailments and accidents, the cause of which appears suspicious or the result of suspected criminal activity; and any major breaches of security at a rail facility. These requirements will ensure that systems are put in place that will

increase domain awareness and allow TSA to be aware of possible national trends. These requirements would not supersede existing requirements to report incidents to State or local first responders or other authorities.

a. *Passenger Railroad Carriers and Rail Transit Systems.* To inform and enable detailed, cross-functional analysis of developing threats, proposed § 1580.203 would require the passenger railroad carrier and rail transit system to immediately report potential threats and significant security concerns to TSA. TSA recognizes that rail transit agencies operate under an existing regulatory requirement to report certain types of incidents to State OAs. Pursuant to 49 CFR 659.33, the rail transit agency must notify the OA within two hours of an incident involving a rail transit vehicle or occurring on rail transit property where, among other parameters, a fatality results, injuries require medical attention for two or more persons away from the scene, or property damage equals or exceeds \$25,000. These matters may also prompt the reporting requirement under this proposed rule.

Any limited overlap of information that this reporting requirement would create would be neither an unnecessary duplication of effort nor a burdensome requirement. Proposed § 1580.203 covers a much broader scope of security concerns than the existing reporting requirements at 49 CFR 659.33 or pursuant to FTA grant programs. The distinction reflects the different focus of TSA and the State OAs. State OAs seek to track and record significant incidents, whether malicious or accidental, that result in loss of life, multiple significant injuries, or substantial property damage. The purpose is to create a historical record for later assessment of whether corrective action should be taken. TSA seeks to obtain a stream of information for analysis purposes. With broader collection of information, the Transportation Security Intelligence Service and DHS Office of Intelligence and Analysis will be better able to identify trends or patterns that may indicate terrorist planning and preparation activities. The proposed requirement for the reporting of potential threats and significant security concerns would provide essential material for this vital effort.

Additionally, rail transit agencies may have reporting requirements deriving from grant programs that FTA administers. These programs may require rail transit agencies to provide accounting and statistical reports on a variety of matters to the National Transit Database on a specified basis, such as monthly. Again, any partial overlap of information covered in the two reporting requirements would not result in an unnecessary duplication of effort

⁵² A Global Positioning System is a satellite-based system that can pinpoint any position on earth—any time and in any weather—and then use receivers to process the satellite signals to determine a location.

or a burdensome requirement. Through the National Transit Database, FTA seeks to maintain a comprehensive profile of public transportation systems in the United States. FTA gathers information on the full spectrum of activities involved in transit operations, including accounting matters, passenger volume, distances covered, safety records, and criminal activity. Proposed § 1580.203 would require a much more focused report intended to generate an information stream essential to identify trends or patterns that may indicate terrorist activity including surveillance, planning, and preparation. The resulting data, analyzed in the context of transportation and homeland security intelligence products and of material generated by the broader intelligence community, would provide the foundation for focused detection, deterrence, and prevention activities.

Proposed § 1580.203 would apply to tourist, scenic, historic, and excursion operations as well as other passenger rail operations. In deciding whether to apply this provision to these passenger railroad operators, TSA considered the protocols, such as immediately reporting a concern or incident to appropriate law enforcement authorities, that any prudent owner or operator of a tourist, scenic, historic, or excursion railroad should follow if faced with a security threat or concern. The proposed reporting requirement merely adds DHS as an additional recipient of this information. TSA seeks comments from these passenger railroad carriers and their associations to determine if there are financial, operational, or other factors that may be unique to such passenger railroad operations that justify modifying or eliminating the proposed reporting requirement applicable to these operations.

b. *Freight Rail Including Rail Hazardous Materials Shippers and Rail Hazardous Materials Receivers.* Proposed § 1580.105 would require freight railroad carriers and covered rail hazardous materials shippers and receivers to immediately report potential threats and significant security concerns to TSA. In the face of unpredictable and rapidly changing threats to rail carriers and facilities, detection, prevention, and deterrence depend upon strong intelligence focused on the terrorist as well as the means for carrying out the threat.

Proposed § 1580.105 covers a much broader scope of security concerns than other existing reporting requirements, such as the FRA requirement in 49 CFR 225.9 that railroad carriers report certain types of accidents/incidents telephonically to the National Response

Center.⁵³ The distinction reflects the different focus of TSA and FRA. FRA seeks to track and record significant incidents, whether malicious or accidental, that result in loss of life, multiple significant injuries, or substantial property damage. The purpose is to create a historical record for later assessment of whether corrective action should be taken. In contrast, TSA seeks to obtain a stream of information that it can analyze to identify trends or patterns that may indicate terrorist planning and preparation activities. The broader collection of information will better enable the Transportation Security Intelligence Service and DHS Office of Intelligence and Analysis to identify trends or patterns that may indicate terrorist planning and preparation activities. The proposed requirement for immediate reporting of potential threats and significant security concerns would provide essential material for this vital effort.

6. Chain of Custody and Control

This NPRM proposes that certain freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers eliminate practices that leave hazardous materials unattended, thereby creating the potential for significant transportation security incidents. TSA's analysis indicates that there is a security vulnerability to HTUAs from freight railroad carriers leaving unattended rail cars, and in some cases entire trains, carrying one or more of the specified hazardous materials, for eventual pickup by another railroad carrier or by the consignee rail hazardous materials receiver. There is also a security vulnerability when rail hazardous materials shippers load rail cars with hazardous materials and leave the cars unattended, for pickup by the railroad carrier. Often these cars are left unattended in a non-secure area and thus may be vulnerable to tampering. These situations create opportunities for individuals to compromise the security of rail cars transporting PIH, explosive, or radioactive material, such as through the introduction of an IED.

As discussed above, the highest risk occurs when a rail car is in or near an area of high population density. In applying a risk-based approach, TSA is proposing that the chain of custody requirements apply to railroad carriers

when they conduct a transfer within an HTUA, or when they conduct a transfer with rail cars that may subsequently enter an HTUA. Finally, railroad carriers would apply these measures when delivering a car to a rail hazardous materials receiver within an HTUA. In this way, the rail car would be protected during transportation from someone attaching an IED or otherwise compromising the car when it could be used to endanger the HTUA.

TSA is applying its risk-based approach for rail hazardous materials shippers and receivers as well. Rail hazardous materials facilities that offer, prepare, or load the specified hazardous materials typically receive residue cars from railroad carriers. TSA is not proposing to apply the enhanced custody and control procedures to residue cars at this time, although TSA is requesting comment on whether the rule should do so. See section III.A. of this preamble. The proposed rule would require hazardous materials shippers to apply the enhanced custody and control procedures starting at the time they load the car. At this point, the facility can be reasonably assured that the car has not been compromised. After this point, the facility would have to protect the car from unauthorized access and apply the other measures in proposed § 1580.107, to provide assurance that the car will not present a risk when it is transported. These provisions would apply to rail hazardous materials shippers that offer, prepare, or load the specified hazardous materials, regardless of whether the facility is in an HTUA. Once the car leaves the facility, it would be difficult or impossible to determine whether the car would pass through an HTUA before reaching its destination, and so all of these cars must be protected.

TSA would require rail hazardous materials facilities within HTUAs that receive or unload cars with the specified hazardous materials to apply the enhanced chain of custody and control measures from the time they accept the car from the railroad carrier until the time they unload the car. This continues the protection of HTUAs from rail cars containing the specified hazardous materials.

The requirements of proposed § 1580.107 are further described in the Section-by-Section Analysis, below.

⁵³ The FRA reporting requirement set forth in 49 CFR 225.9 is discussed in greater detail in section III.B. above. As also noted in section III.B., PHMSA requires immediate reports to the National Response Center of certain types of hazardous materials incidents. See 49 CFR 171.15.

IV. Section-By-Section Analysis of Proposed Rule

Part 1520—Protection of Sensitive Security Information

Section 1520.3 Terms Used in This Part

This rule proposes to amend 49 CFR 1520.3 by adding a number of new definitions. TSA is adding these definitions to the SSI regulation to clarify terms that appear in proposed part 1580. This includes “rail hazardous materials shipper,” “rail hazardous materials receiver,” “rail facility,” “rail secure area,” “rail transit facility,” “rail transit system or rail fixed guideway system,” “railroad,” and “railroad carrier.” In addition to explaining the meaning of these terms by referencing proposed 49 CFR 1580.3 and the United States Code (USC) (as applicable), the definitions make clear that they apply in the context of rail transportation.

The rule would also clarify the scope of the definition of “vulnerability assessment” to specifically include rail security assessments. The proposed revision would expressly include the examination of a railroad, railroad carrier, rail facility, rail hazardous materials facility, rail transit system, or rail transit facility.

TSA would add these six additional categories of rail security entities and facilities to the definition of “vulnerability assessment” to clarify that all types of rail-related vulnerability assessments constitute SSI. TSA seeks comment on whether this proposal is appropriate in its coverage of which vulnerability assessments warrant SSI treatment. TSA may revise this definition based upon comments received.

Section 1520.5 Sensitive Security Information

TSA proposes to modify the language in 49 CFR 1520.5(b)(6)(i) related to inspections and investigations of alleged regulatory violations. The proposal would expand the current provision so that it applies in the context of all forms of rail transportation, including freight and passenger railroad carriers, rail hazardous materials shippers, rail hazardous materials receivers, and rail transit systems.

Section 1520.5(b)(8) of the current SSI regulation defines details of aviation or maritime security measures as SSI, whether applied directly by the Federal government or another person. The proposed revision to 49 CFR 1520.5(b)(8) would expand this provision to cover specific details of transportation security measures

applied in rail transportation, whether applied directly by the Federal Government or another person.

Section 1520.5(b)(10) of the current SSI regulation states that training materials created or obtained to train persons who carry out aviation or maritime security measures required or recommended by DHS or DOT are SSI. The proposed revision to 49 CFR 1520.5(b)(10) would expand this provision to cover training materials for persons who carry out rail transportation security measures. These types of materials contain descriptions of security measures or countermeasures that a terrorist or other criminal could use to determine how to defeat security procedures.

Section 1520.5(b)(11) of the current SSI regulation is intended to safeguard lists of information about the identities of individuals who hold certain positions with aviation or maritime security responsibilities. The proposed revision to 49 CFR 1520.5(b)(11)(i)(A) would expand this provision to safeguard lists of information about the identities of individuals having unescorted access to a rail secure area at a rail hazardous materials shipper or receiver. Terrorists or other criminals might attempt to target these types of individuals in order to obtain unauthorized access to a rail secure area. Accordingly, lists of information that identify these individuals as having unescorted access to a rail secure area must be protected as SSI.

Section 1520.5(b)(12) of the current SSI regulation designates as SSI certain lists of critical aviation or maritime infrastructure assets prepared by Federal, State, or local government agencies. Specifically, the current provision covers any list identifying systems, facilities, or other assets, whether physical or virtual, so vital to the transportation system that the incapacity or destruction of such assets would have a debilitating impact on transportation security. The proposed revision to 49 CFR 1520.5(b)(12) would expand this provision to safeguard lists of critical infrastructure assets information concerning the rail transportation system, including rail hazardous materials shipper and receiver facilities. The expanded definition, however, would continue to cover this information as SSI only if the list is either prepared by DHS or DOT or is prepared by a State or local government agency and is submitted to DHS or DOT.

Section 1520.7 Covered Persons

Persons covered under 49 CFR 1520.7 of the current SSI regulation include:

airport operators; aircraft operators; foreign air carriers; indirect air carriers; persons who received SSI as part of a legal enforcement action; persons for whom a vulnerability assessment had been directed, created, held, funded, or approved by DHS or DOT; and persons employed by, contracted to, or acting for any of the persons listed above.

The proposed revision to 49 CFR 1520.7 would expand the coverage of the SSI regulation by adding a new paragraph (n) to address railroad carriers, rail hazardous materials shippers, rail hazardous materials receivers, and rail transit systems subject to the requirements of proposed part 1580. In this regard, TSA notes that the scope of proposed part 1580 addresses: (1) Freight and other non-passenger railroad carriers operating rolling equipment; (2) rail hazardous materials shippers (as that term is defined in proposed 49 CFR 1580.3); (3) rail hazardous materials receivers (as that term is defined in proposed 49 CFR 1580.3); (4) railroad carriers that operate or provide intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), including public authorities operating passenger train service; (5) passenger or freight railroad carriers hosting the operation of passenger train service; (6) tourist, scenic, historic, and excursion rail operators, whether operating on or off the general railroad system of transportation; (7) private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation; and (8) rail transit systems, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems. However, these entities and rail operations would have access to SSI only to the extent that they have a “need to know” the information under § 1520.11.

Part 1580—Rail Transportation Security Subpart A—General

Section 1580.1 Scope

TSA proposes that parts of this rule apply to all types of rail operations, including freight railroad carriers; intercity, commuter, and short-haul railroad passenger train service; and rail mass transit systems. Further, in addition to applying to all freight railroad carriers, the proposal also includes additional requirements for railroad carriers that transport hazardous materials. The NPRM would also apply to rail operations at certain

fixed-site transportation facilities, including (1) rail hazardous materials shippers that offer, prepare, or load for transportation in commerce by rail one or more of the specified hazardous materials and (2) rail hazardous materials receivers located within an HTUA that receives or unloads from transportation in commerce by rail one or more of the specified hazardous materials. The NPRM also covers the operation of private rail cars on or connected to the general railroad system of transportation and tourist, scenic, historic, and excursion operations, whether on or off the general railroad system of transportation.

Section 1580.3 Terms Used In This Part

This section contains a set of definitions to introduce the regulations. TSA intends these definitions to clarify the meaning of important terms as they are used in the proposed rule. Some of the definitions involve new or fundamental concepts, which require further discussion.

The term “general railroad system of transportation” is derived from FRA’s “Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws,” which appears in Appendix A to 49 CFR part 209, as in effect on October 1, 2005. FRA uses the term to describe the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas.

The term “heavy rail transit” means service provided by self-propelled electric railcars, typically drawing power from a third rail, operating in separate rights-of-way in multiple cars; also referred to as subways, metros, or regional rail. The term “light rail transit” means service provided by self-propelled electric railcars, typically drawing power from an overhead wire, operating in either exclusive or non-exclusive rights-of-way in single or multiple cars and with shorter distance trips and frequent stops; also referred to as streetcars, trolleys, and trams. “Rail transit system” or “Rail Fixed Guideway System” means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway. Two examples of a “rail fixed guideway system,” consistent with FTA’s use of the term in 49 CFR part 659, are heavy rail transit and light rail transit. However, TSA is using the term more broadly than FTA uses it in part 659. Specifically, TSA’s authority over “rail fixed guideway systems,” or rail transit systems, is not linked to whether

the system is regulated by FRA and is not limited to systems that receive or seek to receive funds under FTA’s grant program. Accordingly, as the terms “heavy rail transit” and “light rail transit” are used in proposed part 1580, TSA’s authority extends to all rail transit systems regardless of whether the system is subject to regulation by FTA or FRA or neither agency.

The term “rail hazardous materials receiver” means any facility that has a physical connection to the general railroad system of transportation and receives in transportation by rail or unloads from transportation by rail one or more of the categories and quantities of hazardous materials set forth in 49 CFR 1580.100(b), but does not include a facility owned or operated by a department, agency, or instrumentality of the Federal Government. For a facility to fall within the definition of a “rail hazardous materials receiver,” there must be a physical connection to the general railroad system of transportation, such as track used by a railroad carrier to enter the facility to drop off rail cars.

The term “rail hazardous materials shipper” means any facility that has a physical connection to the general railroad system of transportation and offers, prepares, or loads for transportation by rail one or more of the categories and quantities of hazardous materials set forth in 49 CFR 1580.100(b), but does not include a facility owned or operated by a department, agency, or instrumentality of the Federal Government. The term includes companies that load or otherwise prepare tank cars for rail transportation in commerce. For a facility to fall within the definition of a “rail hazardous materials shipper,” there must be a physical connection to the general railroad system of transportation, such as track used by a railroad carrier to enter the facility to pick up rail cars. A facility is not a “rail hazardous materials shipper” if it only unloads or receives one or more of the categories and quantities of hazardous materials set forth in 49 CFR 1580.100(b).

The term “rail secure area” means a secure location(s) identified by an owner or operator of a rail hazardous materials shipper or rail hazardous materials receiver where security-related pre-transportation or transportation functions are performed or rail cars containing the categories and quantities of hazardous materials set forth in 49 CFR 1580.100(b) are prepared, loaded, stored, and/or unloaded. The standards for a secure area are the same for all rail hazardous

materials shippers and receivers regardless of whether the facility is offering or receiving the hazardous material. Secure areas must have physical security measures in place, which could include fencing, lighting, or monitoring by a signaling system (such as a video system, sensing equipment, or mechanical equipment). If the owner or operator employs a signaling system, an employee or authorized representative of the owner or operator must be located either in the immediate area of the rail car or at a remote location within the facility (such as a control room) in order to observe the system.

The terms “transportation or transport” mean, in the context of freight rail, the movement of property, including loading, unloading, and storage. In the context of passenger rail, the terms mean the movement of people, boarding, and disembarking incident to that movement. As noted earlier, TSA has broad authority under ATSA to regulate the security of all modes of transportation, including rail transportation. In this regard, TSA’s statutory authority is not limited by PHMSA’s determination as to which functions are pre-transportation or transportation functions for purposes of the applicability of the hazardous materials laws and regulations (*see* 49 CFR 171.8). Under its broad authority, when TSA develops policies, strategies, and plans to address threats to transportation, it must consider the security of the entire transportation system. Because of the vulnerability of the transportation system to the introduction of an IED or other destructive instrument, TSA’s security authority extends beyond freight railroad carriers (regardless of whether they transport hazardous materials) and also includes rail hazardous materials shippers before they offer the rail cars—while the rail cars are being stored incidental to movement and during preparation and loading—and rail hazardous materials facilities after delivery, during unloading, and while the rail cars are being stored. In addition, TSA’s security authority over passenger railroad carriers and rail transit systems is no less extensive than FRA’s statutory authority over railroad safety matters or FTA’s authority over State-conducted oversight of the safety and security of rail fixed guideway systems.

Section 1580.5 Inspection Authority

Pursuant to 49 U.S.C. 114, TSA has authority to inspect for compliance with applicable statutory and regulatory requirements. This proposed rule

notifies the public of TSA's broad statutory authority to inspect and codifies the scope of TSA's existing inspection program as it relates to rail security.

Sections 1580.5(a) and (b) state that railroad carriers, covered rail hazardous materials shippers or receivers, and transit systems must allow TSA and DHS officials working with TSA (such as representatives from DHS's Office of Infrastructure Protection) to make inspections or tests at any time or place to carry out its statutory or regulatory authorities. Proposed 49 CFR 1580.5(b) would require the carrier, shipper, receiver, or transit system to allow any authorized TSA and DHS officials to enter and be present within any area or conveyance without access media or identification media issued or approved by a railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, or transit system owner or operator, in order to inspect or test compliance, or perform other such duties as TSA may direct. This section would also set forth affirmative duties on railroad carriers, rail hazardous materials shippers, rail hazardous materials receivers, and transit system owners and operators to cooperate with and allow the inspections and tests and the copying of records, irrespective of the media on which they are stored. As to the location of the inspections, TSA must be able to inspect at every location where TSA is carrying out activities under ATSA.

In addition to inspecting for compliance with specific regulations, TSA can conduct general security assessments. TSA's authority with respect to transportation security is comprehensive and supported with specific powers to assess threats to transportation security; monitor the state of awareness and readiness throughout the rail sector; determine the adequacy of an owner or operator's transportation-related security measures; and identify security gaps. TSA, for example, could inspect and evaluate for emerging or potential security threats based on intelligence indicators to determine whether the owner or operator's strategies and security measures are likely to deter these threats. If TSA identifies security deficiencies, TSA could initiate appropriate action to enhance rail security such as counseling the railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, or rail transit system owner or operator; coordinating with other Federal, State, or local agencies to correct the deficiency; or conducting rulemakings to require enhanced security measures.

If TSA, in the course of an inspection identifies evidence of non-compliance with a DOT regulation, TSA would provide the information to the appropriate DOT modal administration for action.⁵⁴ In this regard, TSA would not directly enforce DOT security rules and would not initiate safety inspections.

An inherent part of TSA and DHS officials' performing security assessments and inspecting for regulatory (including SD) compliance is obtaining copies of records. It is necessary, so that TSA can preserve the records for further review and, on occasion, use the records as evidence. TSA does not anticipate encountering difficulty on this issue, but is including explicit language in the proposed rule, clarifying that TSA has the authority to obtain and review copies of records, in order to avoid any confusion or misunderstanding.

TSA is aware that it must conduct its inspection activity in a reasonable manner, considering all of the relevant circumstances surrounding the rail operation. However, covered entities must provide TSA with access to inspect at any time, without notice, because unexpected urgent situations may arise. To the extent practicable, TSA will make arrangements for records reviews ahead of time and will schedule the inspections for normal business hours, to ensure that appropriate owner/operator personnel are available to assist and that the inspection does not interfere or cause undue disruption. Nevertheless, TSA will have to conduct some inspections and tests unannounced, to determine whether the owner or operator is in compliance when it does not know that TSA may be inspecting. Further, in the case of passenger rail (for example), TSA may sometimes inspect and test during peak traffic periods to ensure that owners and operators are in compliance with the security requirements, even during the busiest times. These peak periods would be those times when the largest portion of the traveling public is being protected by the security measures. Finally, specific threats, heightened periods of

⁵⁴ Since FRA enforces the Federal hazardous materials transportation law as it pertains to the shipment or transportation of hazardous materials by rail (49 U.S.C. 5101 *et seq.*, as amended by section 1711 of the Homeland Security Act of 2002, (Pub. L. 107-296, Nov. 25, 2002) and Title VII of the 2005 Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), (Pub. L. 109-59, Aug. 10, 2005)), if TSA determined that a railroad carrier or rail hazardous materials shipper had failed to develop and implement a security plan required by 49 CFR 172.800, TSA would inform FRA of the non-compliance.

alert, or other emergency situations may necessitate that TSA engage in inspection and test activities outside of normal business operating hours.

Proposed 49 CFR 1580.5(b) refers to copying of records, not just documents. Records may be kept in a number of formats, such as paper, microfilm, and electronic. All of these formats fall within the scope of proposed § 1580.5(b).

Regarding TSA and DHS officials working with TSA, TSA intends to use properly trained personnel to conduct inspections. These individuals would receive training on safety procedures to follow while aboard a conveyance or inside a terminal or facility, in addition to training on technical security requirements. Individuals performing these inspections would carry Federal government credentials identifying themselves as having official authority to inspect, and any covered entity wishing to authenticate the identity of an individual purporting to represent TSA would be able to contact appropriate TSA officials at TSA's headquarters and field locations. TSA maintains an operations center that stakeholders may contact on a 24 hour a day 7 days a week basis if they have concerns.

Proposed 49 CFR 1580.5(c) requires persons regulated under this rule to allow TSA representatives, and DHS officials working with TSA, the flexibility to gain access to any conveyance, facility, terminal, or infrastructure asset without holding access or identification media issued by the owner or operator, when the officials need to conduct a security assessment, compliance inspection, or test. The act of obtaining such media would provide personnel at the inspection or test location with an opportunity to identify and recognize TSA and DHS officials, thereby reducing or negating the value of the visit. As noted above, at times, TSA/DHS may find it necessary to make unannounced, anonymous visits to an area or conveyance, but would do so under very controlled conditions using personnel who are trained both in security and in railroad, hazardous materials facility, and transit workplace safety protocols.

Subpart B-Freight Rail Including Freight Railroad Carriers, Rail Hazardous Materials Shippers, Rail Hazardous Materials Receivers, and Private Cars

Section 1580.100 Applicability

TSA proposes to apply this subpart to all freight railroad carriers and to apply additional requirements to railroad

carriers that transport specified hazardous materials. The subpart would also apply to rail hazardous materials facilities that offer, prepare, or load for transportation in commerce by rail one or more of the enumerated categories and quantities of hazardous materials specified in 49 CFR 1580.100(b) and certain rail hazardous materials facilities located within an HTUA that receive in transportation by rail or unload from transportation by rail one or more of the enumerated categories and quantities of hazardous materials specified in 49 CFR 1580.100(b). In addition, this subpart would also cover the operation of private rail cars on or connected to the general railroad system of transportation.

Section 1580.101 Rail Security Coordinator

It is important that TSA have a point of contact with the operator for the exchange of vital security information. The proposed rule requires that each covered freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver have one RSC and one or more alternate RSCs. This would allow different people to be on call at different times, but would necessitate that at least one individual be available to TSA on a 24 hour a day 7 day a week basis. TSA anticipates that the freight railroad carriers generally will designate at the corporate level a lead RSC for the entire railroad operation and select other individuals who will assist in carrying out the job duties. In the case of rail hazardous materials shippers and receivers, TSA recognizes that the large companies may have many facilities that would be subject to this rule and would expect that the companies would designate one RSC at the corporate level and would choose other corporate employees to help implement the requirements of this rule at the covered facilities.

The proposal would permit an individual serving as an RSC to perform other duties in addition to those that TSA requires. That individual need not serve full-time as the RSC. TSA anticipates that this will particularly be the case for smaller freight railroads or rail hazardous materials facilities. Regardless of who is serving as the RSC on a given day, however, the carrier or facility would remain responsible if any official to whom the RSC security functions are delegated fails to perform them properly.

Section 1580.103 Location and Shipping Information for Certain Rail Cars

TSA proposes to require the following entities to provide TSA, upon request, with the location and other shipping information of rail cars containing the hazardous materials specified in 49 CFR 1580.100(b): (1) Freight railroad carriers transporting the specified hazardous materials; (2) rail hazardous materials shippers offering, preparing, or loading for transportation in commerce by rail the specified hazardous materials; and (3) rail hazardous materials facilities receiving in commerce by rail or unloading from transportation by rail the specified hazardous materials. As discussed below, TSA believes that carriers, shippers, and receivers have the capability of using existing systems and technologies to report on the locations and shipping information of certain high profile hazardous materials. TSA anticipates that reporting requests will be rare and often coincide with elevated threat situations or in response to a security incident.

Paragraph (b) states that each affected freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver must develop procedures to determine the location and shipping information required under paragraph (c) of this section for rail cars under their physical custody and control containing the specified hazardous materials. The procedures must enable the carrier or facility to provide the information to TSA within one hour of receiving the request. Because TSA's proposal is a performance-based system, TSA does not require carriers or facilities to use any specific technology to acquire the location of rail cars. However, TSA anticipates that covered entities will meet the standard by using existing technology, including radio frequency identification (RFID) tags,⁵⁵ network computer systems, and telecommunication systems such as cellular telephones. TSA also expects that certain freight rail carriers and rail hazardous materials facilities will adapt procedures currently used to comply with shipping paper retention requirements under DOT's hazardous materials regulations.⁵⁶

⁵⁵ RFID tags are small electronic devices designed to contain information that can be retrieved at a distance using a specialized reader. They are known in the industry as AEI tags.

⁵⁶ In pertinent part, the Federal hazmat law and regulations require rail shippers of hazardous materials to retain a copy of the shipping paper for a period of 2 years after the shipping paper is provided to a freight rail carrier and carriers to retain a copy of a shipping paper for a period of

With respect to freight railroad carriers to which this rule would apply, TSA notes that the industry may provide the Federal Government with the required location and shipping information using AEI tags.⁵⁷ The railroad industry uses a rail car and locomotive tracking system that employs AEI tags on most freight cars and locomotives in the United States and Canada. Freight railroad carriers use AEI information for confirming train consists and are beginning to use the AEI information to identify specific rail cars that have been flagged by wayside equipment defect detectors. AEI tagging is the current industry standard for rail cars.

Tracking and other types of communications systems enable freight railroad carriers to monitor a shipment while en route to its destination and to identify various service irregularities. Some types of tracking systems employ 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. DHS is currently evaluating the feasibility, costs, and benefits of proposals to develop certain communication and tracking capabilities for rail hazardous materials shipments. As discussed in section III.C.4. above, TSA is seeking comments on the feasibility of the freight rail industry using GPS tracking systems to determine the location of rail tank cars, including information on the anticipated costs and benefits of employing GPS technology for this purpose.

1 year after the date the shipping paper is received from the shipper. See 49 U.S.C. 5110; 49 CFR 172.201(e) and 174.24.

⁵⁷ An AEI tag system uses a series of track side readers that record the movement of rail cars as they pass by the reader. The readers then upload the car information to the railroad carrier's central data processing center, and the railroad carrier transmits this information to an industry-sponsored central databank. This central databank in turn supplies the car location information to other railroad carriers, rail car owners, and rail hazardous materials facilities.

Under paragraph (b), TSA would limit the potential scope of the requested location and shipping information to rail cars “within the physical custody and control” of the freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver; actual ownership of the rail car or the track on which the rail car is located is not relevant to determining which entity must provide the information to TSA. Accordingly, TSA would ask freight railroad carriers to provide information only for cars that have been accepted for, or are already in transportation; the term “accepted” means that the carrier has physically taken possession of a hazardous material for purposes of transporting it. TSA would ask rail hazardous materials facilities to report on rail cars physically located on their property that a railroad carrier has not offered or accepted for transportation.

Paragraph (c) of this section enumerates the minimum amount of information that the freight railroad carrier, the rail hazardous materials shipper, and the rail hazardous materials receiver must be able to provide to TSA upon request. This information consists of the rail car’s location, railroad milepost, and track designation (such as main track, secondary track, or division and subdivision); the time the freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver determined the rail car’s location; the rail car’s routing; a list of the total number of rail cars containing the designated hazardous material, broken down by proper shipping name, hazard class or division number, and identification number; each rail car’s initial and number; and transportation status.

In the case of freight railroad carriers, TSA would ordinarily request the rail car’s location broken down by city, county, and State as well as the railroad carrier’s designated milepost location. By contrast, in the case of hazardous material facilities, since TSA would already have the facility’s address, TSA would likely focus its request on discerning the total number of rail cars located at that facility and the types of hazardous materials contained in those rail cars. When TSA requests a freight railroad carrier to provide a rail car’s routing information, TSA intends to ask for information on the entire route, including point of origination, destination, and interchange points with other freight railroad carriers.

For each rail car containing one or more of the hazardous materials listed in proposed 49 CFR 1580.100(b), TSA would require the car report to contain

the proper shipping name, hazard class or division, and UN identification number assigned to the material in accordance with the Hazardous Materials Table in 49 CFR 172.101 (DOT’s HMRs), as well as the rail car’s unique identifying initial and number. “Transportation status” refers to whether the car is being prepared for transportation, in transportation, or out of transportation. By reviewing this location and shipping information and available intelligence information, TSA will be able to determine whether it needs to implement or order additional security measures to address a particular threat or threat assessment.

The proposed rule provides freight railroad carriers, rail hazardous materials shippers, or rail hazardous materials receivers with a maximum of one hour to report the location and shipping information for the specified rail car(s) to TSA or DHS officials. TSA recognizes that the potential magnitude of the information request, as well as unique operational considerations of the railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver, may justify additional time to respond. Accordingly, this proposal permits the carrier, shipper, or receiver to seek additional time to respond to a specific request. TSA/DHS will evaluate each request on a case-by-case basis.

While the proposed rule text provides a one-hour timeframe, TSA also requests comment on an alternative time proposal. Instead of a maximum of one hour, the alternative proposal would set the maximum time period for providing information at five (5) minutes or thirty (30) minutes, depending on the nature of the request. Freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers would have a maximum of five (5) minutes from the time of a TSA request to provide the location and shipping information for a specific rail car containing the specified categories and quantities of hazardous materials. Freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers would have a maximum of thirty (30) minutes from the time of a TSA request to provide the location and shipping information for all rail cars under its physical custody and control that contain one or more of the specified categories and quantities of hazardous materials.

We note that in an emergency, such as a specific threat against a particular train or a general threat involving the metropolitan area through which the train is operating, it may be critical for TSA to have this information very quickly to address threats to persons

and property. The more quickly we can receive this information, the more quickly we can direct that protective measure be implemented. We believe that existing and emerging technology can be used to achieve these timeframes. We request comments on how these shorter timeframes could be achieved, including the cost of compliance, and we are considering adopting these shorter time frames in the final rule.

The proposal also requires that freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers submit the data in a specific format but allows a choice of five different reporting options (unless another reporting method is approved in writing by TSA). TSA proposes to establish the one hour reporting timeframe and permit only a limited number of commonly used information reporting formats based upon the importance of timely information that TSA can quickly understand under exigent circumstances. However, TSA remains open to the possibility of being less prescriptive in the final rule. TSA seeks comment on what reporting timeframe would be reasonable. TSA also seeks comment on what reporting formats would allow carriers, shippers, and receivers to provide the information to the Federal Government in a user friendly, efficient, and cost effective manner yet consistent with the security need to receive and analyze the information quickly and accurately.

Section 1580.105 Reporting Significant Security Concerns

This rule proposes to require freight railroad carriers, rail hazardous materials shippers that offer, prepare, or load for transportation in commerce by rail one or more of the categories and quantities of hazardous materials set forth in proposed 49 CFR 1580.100(b), and rail hazardous materials receivers that receive in commerce by rail or unload one or more of the categories and quantities of hazardous materials set forth in proposed 49 CFR 1580.100(b) to immediately report potential threats or significant security concerns encompassing incidents, suspicious activities, and threat information. Incidents, activities, and information include, but are not limited to:

(1) Interference with the engineer, conductor, or other crewmember of a freight railroad train, such as an attempt to gain entry to the locomotive cab.

(2) Bomb threats, whether specific as to target, location, and timing, or non-specific.

(3) Reports or discovery of suspicious items that result in the disruption of rail

operations, such as evacuation of a conveyance or facility or the temporary halting of rail service due to the discovery of a large package inside a freight train locomotive. This disruption could also occur at a rail hazardous materials facility, which discovers a suspicious item within a rail secure area and delays the departure of a freight railroad carrier. Any individual may make the report or discovery; it need not come from an employee or authorized representative of the freight railroad carrier or rail hazardous materials facility.

(4) Suspicious activity occurring onboard a freight train or inside the facility of a freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver that results in a disruption of rail or facility operations, such as evacuation of a conveyance or facility or the temporary halting of rail service due to the discovery of a suspected IED. Again, this disruption could also occur at a rail hazardous materials facility that discovers a suspicious individual trespassing within a rail secure area and delays the departure of a freight railroad carrier.

(5) Suspicious activity observed at or around freight rail cars, facilities, or infrastructure used in the operation of the freight railroad, rail hazardous materials shipper, or rail hazardous materials receiver, whether observed by employees or authorized representatives of the railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver, or other individuals.

(6) Discharge, discovery, or seizure of a firearm or other deadly weapon on a freight train, in a station, terminal, storage facility or yard, rail secure area, or other location used in the operation of the freight railroad, rail hazardous materials shipper, or rail hazardous materials receiver, regardless of whether an individual legally possesses the firearm or deadly weapon.

(7) Indications of tampering with freight rail cars, whether located inside or outside the confines of a rail hazardous materials facility including signs that the security of the car may have been compromised or that an IED may be present.

(8) Information relating to the possible surveillance of a freight railroad train or facility, storage yard, rail hazardous materials shipper or receiver facility, or other location used in the operation of the freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver, regardless of whether the source of the information is an employee or authorized representative of the freight railroad

carrier, rail hazardous materials shipper, or rail hazardous materials receiver, or other individual.

(9) Correspondence received by the freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver indicating a potential threat to freight rail transportation or the rail hazardous materials facility.

(10) Other incidents involving breaches of the security of the freight railroad carrier or rail hazardous materials shipper or receiver's operations or facilities that could reasonably represent potential threats or significant security concerns.

The proposal would require freight railroad carriers and covered rail hazardous materials shippers and receivers to report the above types of concerns and threats to DHS/TSA in a manner that TSA prescribes. TSA seeks comment on the available methods of transmitting this information to TSA (such as electronically, telephonically), including anticipated costs of compliance. With respect to each concern or threat, the freight railroad carrier or covered rail hazardous materials shipper or receiver would have to report the following information, to the extent it was available and applicable, to DHS/TSA:

(1) Name of the reporting entity and contact information for communication by telephone and e-mail.

(2) The affected freight train, station, terminal, rail hazardous materials facility, or other rail facility or infrastructure.

(3) Identifying information on the affected freight train, including train line and route.

(4) The origination and route termination locations for the affected freight train.

(5) Current location of the affected freight train, with as much specificity as circumstances and available information permits.

(6) Description of the threat, incident, or activity affecting the freight train or rail facility or rail hazardous materials shipper or receiver.

(7) Names and other available biographical data of individuals purported to be involved in the threat, incident, or activity.

(8) Source of the threat information.

Possible sources of the information might include: a Federal (with the exception of DHS/TSA), State, or local government agency; a foreign government, to the extent there is no legal prohibition on the reporting of such information; an employee or authorized representative of the freight railroad carrier, rail hazardous materials shipper; or rail hazardous materials

receiver; another freight railroad carrier, rail hazardous materials shipper or receiver, passenger railroad carrier, or rail transit system; or a private individual.

Section 1580.107 Chain of Custody and Control Requirements

In this section, TSA proposes to require a secure chain of physical custody for rail cars containing one or more of the categories and quantities of hazardous materials set forth in proposed 49 CFR 1580.100(b). This section would impose analogous requirements on freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers.

In paragraph (a), TSA proposes that a rail hazardous materials shipper, regardless of whether it is physically located within an HTUA listed in Appendix A to part 1580, must satisfy the following requirements before it can transfer physical custody of a rail car containing the specified hazardous materials to a freight railroad carrier. First, the rail hazardous materials shipper must perform a physical security inspection of the rail car to ensure that no one has tampered with it or other compromised its security, including inspecting for IEDs and other items that do not belong. Second, the rail hazardous materials shipper must store or keep the rail car in an area with physical security measures in place during pre-transportation functions, including loading and temporary storage, until the freight railroad carrier assumes physical custody of the car. The physical security measures include such things as fencing, lighting, or video surveillance. Third, the rail hazardous materials shipper must document the transfer of custody to the freight railroad carrier, either in writing or electronically.

In paragraph (b), TSA proposes that a freight railroad carrier, regardless of whether the carrier is physically accepting the rail car at a rail hazardous materials shipper facility located outside or within an HTUA, must satisfy two requirements. First, the carrier must document the transfer of custody, either in writing or electronically. Second, the carrier must perform the security inspection that DOT is proposing to require under a new paragraph to 49 CFR 174.9.

In paragraph (c), TSA proposes requirements for certain rail car transfers occurring within an HTUA listed in Appendix A to part 1580. Specifically, TSA would require each delivering freight railroad carrier transferring physical custody of rail cars carrying one or more of the materials

listed in proposed 49 CFR 1580.100(b) to a receiving freight railroad carrier to ensure that the receiving carrier takes physical possession of the rail car before the delivering carrier leaves the interchange point. Both the delivering and receiving freight railroad carriers would be responsible for compliance under this paragraph for adopting and implementing procedures to ensure that the rail car is attended at all times during the physical transfer of custody. The procedures would include performance of the security inspection that DOT is proposing to require in 49 CFR 174.9. In addition, both freight railroad carriers must document the transfer of custody, either in writing or electronically. Paragraph (d) would apply the same requirements of paragraph (c) whenever a freight railroad carrier transfers or receives a rail car containing one or more of these materials if the rail car may subsequently enter an HTUA.

For purposes of paragraphs (c) and (d), the requirement “to ensure that the rail car is not left unattended at any time during the physical transfer of custody” means that the delivering and receiving freight railroad carriers would ensure that an employee or authorized representative of either of the railroad carriers attend to that rail car by being physically present and having an unobstructed view of the rail car prior to the delivering railroad carrier leaving the interchange point. While TSA expects that the attending employee would be the train conductor or a security guard, TSA is not specifying that any particular category of individuals needs to perform this job function and is not specifying that a freight carrier would have to use a hazmat employee (as the term is used in 49 CFR 171.8) to perform this job function. Moreover, to allow freight railroad carriers a maximum degree of flexibility in adopting and implementing procedures to meet the car attendance performance standard, this section does not specify a maximum number of rail cars permitted per attending employee (or authorized representative) or define how close that individual must be to the rail car while attending it. However, for purposes of compliance with this section, the freight railroad carriers must work together to implement procedures to ensure that individuals attend the rail car until the physical transfer of custody is complete. The requirement that an employee or authorized representative attend rail cars would be met where personnel are provided by or on behalf of a department, agency, or instrumentality

of the Federal Government to monitor or provide security for the rail car.

Paragraphs (c) and (d) would also require the receiving freight railroad carrier to perform a security inspection, which, as noted above, DOT is proposing in its NPRM. DOT’s HMR currently require freight railroad carriers to conduct a safety inspection of each car containing hazardous materials at ground level. *See* 49 CFR 174.9. However, safety-related inspections do not specifically address the possibility that a terrorist could introduce a foreign object on the tank car or the rail car chassis, the most pernicious being an IED. In the rulemaking that PHMSA is developing concurrent to TSA’s NPRM, PHMSA is proposing to increase the scope of the safety inspection to include a security inspection component for all rail cars carrying placarded loads of hazardous materials. The primary focus of the enhanced inspection would be to recognize an IED.

To guard against the possibility that an unauthorized individual could tamper with rail cars containing hazardous materials to precipitate an incident during transportation, such as detonation or release using an IED, PHMSA is proposing to require that freight railroad carriers’ pre-trip inspections of placarded rail cars include an inspection for signs of tampering with the rail car, including its seals and closures, and any item that does not belong, suspicious items, or IEDs. TSA will provide guidance to freight railroad carriers to train their employees on identifying IEDs and signs of tampering. Where a freight railroad carrier finds a foreign object or indication of tampering, the freight railroad carrier would be required to take appropriate actions to ensure that the security of the rail car and its contents have not been compromised before accepting the rail car for further movement. If PHMSA’s NPRM proposal to add a security inspection requirement to 49 CFR 174.9 is in effect as a regulation at the time TSA’s NPRM becomes a final rule, paragraphs (c) and (d) of this section would require the freight railroad carrier’s rail car attendance procedures to provide for a security inspection, in accordance with DOT’s HMR.

In paragraph (d), TSA requires the delivering and receiving freight railroad carriers involved in an interchange outside an HTUA of a rail car containing one or more of the quantities and categories of hazard materials set forth in 49 CFR 1580.100(b) to adopt and implement procedures to ensure that the rail car is attended during the physical transfer of custody for rail cars if the rail

car “may subsequently enter an HTUA.” The reason TSA is applying the chain of custody requirements to these interchanges outside the HTUA is to address the possibility that a terrorist would choose an unpopulated or isolated location on a railroad line to compromise the security of an unattended rail car, such as by attaching an IED to it. The rail car could then travel into an HTUA and a terrorist could detonate it, thereby using the car as a weapon of mass effect to cause significant casualties and property damage.

TSA intends that freight railroad carriers make the determination as to whether paragraph (d) is applicable based upon the route information reasonably available to them at the time the delivering railroad carrier transfers the rail car to the receiving railroad carrier. In this regard, TSA recognizes that, after a rail car has been interchanged, a change in route may become necessary resulting from a cause unknown and unforeseeable to either freight railroad carrier at the time of the interchange, such as a rockslide that blocks trackage located outside the HTUA. Accordingly, since the randomness and unpredictability of such a unique event occurring makes it unlikely that the rail car could be exploited by a terrorist, TSA would allow the unattended rail car to enter an HTUA without penalty to either freight railroad carrier. Of course, if the freight railroad carriers know in advance before the interchange that, for whatever reason, the rail car must be re-routed through an HTUA, this limited exception to the chain of custody requirements in paragraph (d) of this section would be inapplicable.

TSA is not proposing that carriers or facilities submit the transfer of custody documentation to TSA. TSA would only want the document if it requests it. Each freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver required to create this documentation must maintain a copy of the specified information or an electronic image thereof, and must make the record available, upon request, to TSA. TSA proposes in paragraph (h) of this section that the documentation be maintained for at least 60 calendar days.

TSA also is seeking comment on an alternative to the chain of custody requirements in proposed in paragraphs (c) and (d) for transfers between railroad carriers that occur outside of an HTUA. This alternative would not require freight railroad carriers to attend rail cars while the rail cars are being transferred. Under this alternative, TSA would only permit such unattended

transfers to occur if they take place in a low risk location, such as at an appropriate distance away from such locations as schools, hospitals, and nursing homes. The receiving railroad carrier would be required to conduct a security inspection of the rail car as provided in proposed paragraph (d) of this NPRM. In addition, both the transferring and the receiving railroad carrier would be required to document the physical transfer of custody as in proposed (c) and (d). TSA seeks comment on whether the potential security threat from this alternative warrants the inclusion of requirements to attend the car as now is in proposed paragraphs (c) and (d). TSA also invites comments on the appropriate criteria that TSA should use to define the term "low risk location," including comments on appropriate geographical distances and/or boundaries to define these locations.

In paragraph (e), TSA is proposing that freight railroad carriers delivering rail cars containing one or more of the quantities and categories of hazardous materials set forth in 49 CFR 1580.100(b) to a rail hazardous materials receiver located within an HTUA must ensure that an employee or authorized representative of the receiver is physically present to accept receipt of the car, unless the car is delivered to a secure area of the facility. Alternatively, the freight railroad carrier may use its own employees or authorized representatives to attend the rail car until the rail hazardous materials receiver accepts physical custody and control of the car. The freight railroad carrier must not depart the rail hazardous materials receiver until it has released the car to a hazardous materials facility employee or authorized representative or has secured the car in a secure area.

The standards for a rail secure area are the same for rail hazardous materials facilities regardless of whether the rail hazardous materials facility is receiving or offering the hazardous material. A "rail secure area" is defined in proposed 49 CFR 1580.3 as the portion of the "rail hazardous materials facility where security-related pre-transportation or transportation functions are performed or rail cars containing the categories and quantities of hazardous materials set forth in proposed 49 CFR 1580.100(b) are prepared, loaded, stored, and/or unloaded." As stated in proposed paragraph (i) of this section, secure areas must have physical security measures in place to prevent unauthorized access to rail cars that contain the specified categories and quantities of hazardous materials. These

measures could include fencing, lighting, or monitoring by a signaling system (such as a video system, sensing equipment, or mechanical equipment) that is observed by an employee or authorized representative of the rail hazardous materials shipper or receiver who is located either in the immediate area of the rail car or at a remote location within the facility such as a control room.

Paragraph (f) applies only to rail hazardous materials facilities located within an HTUA that receive from a freight railroad carrier or unload rail cars containing one or more of the quantities and categories of hazard materials set forth in proposed 49 CFR 1580.100(b). Consistent with the requirements placed upon freight railroad carriers by paragraph (e), the rail hazardous materials receiver must maintain positive control of the rail car during the physical transfer of custody, which involves not leaving the car unattended and placing the car in a secure area. The requirements for rail hazardous materials facilities that, in addition to receiving or unloading one or more of the hazardous materials referenced in paragraph (f), also offer, prepare, or load these materials for transportation by freight railroad carriers are set forth in paragraph (a) of this section. In accordance with paragraph (f), during unloading and temporary placement of the rail car, a rail hazardous materials receiver located within an HTUA must keep the rail car in a secure area with physical security measures in place, such as fencing, lighting, or video surveillance.

Paragraph (g) provides an exception to the security requirements contained in paragraph (a) for rail hazardous materials receivers located an HTUA, that in the normal course of their business do not offer, prepare, or load rail cars containing the categories and quantities of hazardous material set forth in proposed 49 CFR 1580.100(b) for transportation by rail. Rail hazardous materials facilities located outside an HTUA that routinely receive shipments of the specified categories and quantities of hazardous material, that receive and subsequently reject and return a rail car containing the hazardous material to the originating offeror or shipper are not, by virtue of rejecting and returning a shipment, required to meet the security requirements of paragraph (a). TSA is providing this exception, because the randomness and unpredictability of such an event makes it unlikely that a terrorist could exploit the rail car and use it as a weapon of mass effect. However, the freight railroad carrier

receiving the rejected rail car would still be subject to the requirements of this section.

Paragraph (j) allows any rail hazardous materials receiver located within an HTUA to apply for a waiver from some or all of the chain of custody requirements if the receiver believes, based upon the operational characteristics and geographical location of its facility, that the potential security threat of its facility is insufficient to warrant application of the chain of custody requirements in paragraph (f). In considering whether to grant a waiver, TSA would analyze factors that relate to the potential security threat. The factors include: (1) The quantities and types of all hazardous materials that the rail hazardous materials receiver typically receives or unloads; (2) the receiver's geographical location in relationship to populated areas, which includes both daytime office building populations and populations in residential neighborhoods; (3) the receiver facility's immediate proximity to entities that may be attractive targets, such as other businesses (including other hazardous materials facilities), residential homes and apartment buildings, elementary schools, hospitals, nursing homes, assisted living facilities, and sports stadiums; (4) any information regarding threats to the facility; and (5) any other circumstances unique to that receiver's activities that would demonstrate that these activities present a low security risk. For instance, if a requester were to present an analysis showing that, due to the topography of the area, a release of the hazardous material would be unlikely to cause a significant danger to persons in the area, TSA would consider that information as a factor in considering whether to grant or deny the waiver. After reviewing a rail hazardous materials receiver's application for a waiver, and consulting as necessary and appropriate with other Federal, State, and local governmental agencies, TSA would send a written decision to the receiver.

Section 1580.109 Preemptive Effect

Section 20106 of title 49 of the U.S.C. provides that all regulations prescribed by the Secretary of Homeland Security related to railroad security matters preempt any State law, regulation, or order covering the same subject matter. A State may, however, adopt or continue an additional or more stringent regulation when that provision is: (1) Necessary to eliminate or reduce an essentially local security hazard; (2) not incompatible with a Federal law, regulation, or order; and (3) does not

unreasonably burden interstate commerce. *Id.*

Proposed § 1580.109 informs the public of the preemptive effect of proposed 49 CFR 1580.107 regarding chain of custody and control requirements for rail cars containing the categories and quantities of hazardous materials set forth in proposed 49 CFR 1580.100(b). In the past, TSA has not included regulatory text about preemptive effect in its regulations. The absence of such a provision in a Federal regulation does not necessarily indicate that TSA does not intend to preempt State or local regulations. However, TSA has included such a provision in this proposed rule, so that its position regarding preemptive effect is clear.

Consistent with 49 U.S.C. 20106, TSA proposes to preempt any State or local laws regarding security measures during the physical transfer of custody and control of a rail car containing hazardous materials. We believe that such security measures must be subject to uniform national standards. This preemption would apply to all "hazardous materials" as defined in 49 CFR 171.8. It would be impractical and burdensome to the secure chain of physical custody and control process to require the regulated parties to develop multiple sets of procedures to comply with varying State and local requirements. TSA is aware that, if this final rule did not preempt State or local regulations regarding the chain of custody requirements in proposed § 1580.107, a freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver may need to comply with different requirements in different jurisdictions. This could require a substantial resource commitment, because it could necessitate instructing the individuals involved in carrying out chain of custody requirements in accordance with a multitude of different operating rules and practices, which could raise significant safety and security concerns. Carriers could also be required to vary the size and training qualifications of the train crew based upon the varying laws in each jurisdiction. Because rail transportation of hazardous materials frequently involves transportation across jurisdictions and because of the resources necessary to comply with potential and varying chain of custody requirements, TSA believes that subjecting carriers to additional state regulations in this area would likely place an unreasonable burden on interstate commerce. TSA seeks to avoid this result.

Although national uniformity, to the extent practicable, of laws, regulations,

and orders related to rail security is vitally important, TSA recognizes a need for emergency preparedness at the State and local level. Accordingly, TSA does not intend to preempt inspection activities conducted in furtherance of State and local laws or preempt requirements to appointment a RSC, or report significant security concerns.

As noted above, TSA does not intend to preempt the States from requiring freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers to designate a point of contact who the State could reach immediately concerning security or other emergency matters. In this regard, TSA does not intend to prevent the States from requiring the regulated parties to designate an individual as a point of contact in addition to the person(s) they select to serve as the corporate level RSC under proposed 49 CFR 1580.101. Since TSA recognizes the important security role of local law enforcement agencies, TSA also does not intend to preempt the States from requiring freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers to report potential threats and significant security concerns to the States in addition to these entities complying with TSA's reporting requirements. If an emergency situation develops, TSA expects that the first priority of the freight railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers would be to call 911 and follow the directions of the police and other first responders to the scene.

TSA seeks comment on the scope of the subject matter that this proposed rule would or would not preempt under 49 U.S.C. 20106.

Subpart C—Passenger Rail Including Passenger Railroad Carriers, Rail Transit Systems, Tourist, Scenic, Historic, and Excursion Operators, and Private Cars

Section 1580.200 Applicability

TSA proposes that this subpart apply to all types of passenger rail operations, including intercity, commuter, and short-haul railroad passenger train service, and rail mass transit systems. The subpart would also cover the operation of private rail cars on or connected to the general railroad system of transportation, and tourist, scenic, historic, and excursion operations, whether on or off the general railroad system of transportation.

Section 1580.201 Rail Security Coordinator

The proposed rule requires that each passenger railroad carrier and each rail transit system covered within the scope of part 1580 must have one or more RSCs. Owners and operators of private rail cars, including business/office cars, circus trains, tourist, scenic, historic, or excursion operations would only be required to designate an RSC if TSA specifically notified them in writing that a security threat exists concerning that operation.

As discussed in section III.B. above, the proposed rule would allow different people to be on call at different times, but would necessitate that at least one individual be available to TSA on a 24 hours, 7 days a week basis. TSA anticipates that the passenger railroad carriers and rail transit systems will generally designate a lead RSC at the corporate level for the entire rail operation and also select other individuals to assist in carrying out the job duties.

The proposal would also permit an individual serving as an RSC to perform other duties in addition to those that TSA requires; that individual need not serve full-time as the RSC. Particularly in the case of smaller passenger railroad or rail transit system operations, TSA anticipates that serving as the RSC will not be an individual's permanent full-time job. Regardless of who is serving in the role of the RSC on a given day, the passenger railroad carrier or rail transit system would remain responsible if any official to whom the RSC security functions are delegated fails to perform them properly.

The proposal applicable to passenger railroads and rail transit systems described in § 1580.201 would subsume the existing requirement in TSA's rail SDs that passenger rail operators designate and use a primary and alternate Security Coordinator and provide current name and contact information to TSA via email. However, this proposal would not change the requirements in the rail SDs that the Security Coordinator:

- Review with sufficient frequency, as practicable and appropriate, all security-related functions to ensure they are effective and consistent with all applicable rail passenger security measures, including the SDs.
- Upon learning of any instance of non-compliance with TSA-required security measures, immediately initiate corrective action.

Section 1580.203 Reporting Significant Security Concerns

Passenger railroad carriers and rail transit systems would be required to immediately report potential threats or significant security concerns encompassing incidents, suspicious activities, and threat information including, but not limited to:

(1) Interference with the crew of the passenger train or rail transit vehicle, such as by attempting to gain entry to the locomotive cab or crew compartment.

(2) Bomb threats, whether specific as to target, location, and timing, or non-specific.

(3) Reports or discovery of suspicious items that result in the disruption of passenger rail operations, such as evacuation of a conveyance or facility or the temporary halting of rail service.

(4) Suspicious activity occurring onboard a passenger train or rail transit vehicle or inside the facility of a passenger railroad carrier or rail transit system that results in a disruption of rail operations, such as evacuation of a conveyance or facility or the temporary halting of rail service due to the discovery of a suspected IED.

(5) Suspicious activity observed at or around passenger rail cars or rail transit vehicles, facilities, or infrastructure used in the operation of the passenger railroad or rail transit system, whether observed by employees or authorized representatives of the railroad carrier or rail transit system or other individuals.

(6) Discharge, discovery, or seizure of a firearm or other deadly weapon on a passenger train or rail transit vehicle or in a station, terminal, storage facility or yard, or other location used in the operation of the passenger railroad or rail transit system, regardless of whether an individual legally possesses the firearm or deadly weapon.

(7) Indications of tampering with passenger rail cars or rail transit vehicles, including signs that the security of the car or vehicle may have been compromised or an IED may be present.

(8) Information relating to the possible surveillance of a passenger train or rail transit vehicle or facility, storage yard, or other location used in the operation of the passenger railroad carrier or rail transit system, regardless of whether the source of the information is an employee or authorized representative of the passenger railroad carrier or rail transit system or other individual.

(9) Correspondence received by the passenger railroad carrier or rail transit system indicating a potential threat to passenger or freight rail transportation.

(10) Other incidents involving breaches of the security of the passenger railroad carrier or the rail transit system operations or facilities that could reasonably represent potential threats or significant security concerns.

The proposal would require passenger railroad carriers and rail transit systems to report the above types of concerns and threats to DHS/TSA in a manner that TSA prescribes. The final rule will provide details of the reporting process. With respect to each concern or threat, the passenger railroad carrier or rail transit system would have to report the following information, to the extent it was available and applicable, to DHS/TSA:

(1) Name of the reporting entity and contact information for communication by telephone and e-mail.

(2) Affected station, terminal, or other facility.

(3) Identifying information on the affected passenger train or rail transit vehicle, including the train number, train line, and route.

(4) The origination and route termination locations for the affected passenger train or rail transit vehicle.

(5) Current location of the affected passenger train or rail transit vehicle, with as much specificity as circumstances and available information permits.

(6) Description of the threat, incident, or activity affecting the passenger train or rail transit vehicle or facility.

(7) Names and other available biographical data of individuals purported to be involved in the threat, incident or activity.

(8) Source of the threat information.

Possible sources of the information might include: a Federal (with the exception of DHS/TSA), State, or local government agency; a foreign government, to the extent there is no legal prohibition on the reporting of such information; an employee or authorized representative of the passenger railroad carrier or rail transit system; another passenger railroad carrier or rail transit system or freight railroad carrier; or a private individual.

The requirements of the proposed rule do not supersede FTA's State Safety Oversight rules found at 49 CFR part 659. Some duplication of reporting may occur, as entities may have to report incidents to an OA under 49 CFR 659.33 and DHS under 49 CFR 1580.203 of the proposed rule. A suspected terrorist incident resulting in loss of life, injuries requiring medical attention, extensive property damage, and/or evacuation of rail transit system facilities would be subject to the proposed rule and to FTA's State Safety Oversight

requirements for accident reporting. Significantly though, the purposes of the reports differ dramatically. TSA needs information immediately on potential threat, suspicious activities, and security incidents for the purposes of comprehensive intelligence analysis, threat assessment, and allocation of security resources. The report to the OAs meets a more general need for situational awareness, particularly pertaining to safety conditions. In any event, the required reporting under the proposed rule and the reporting under 49 CFR 659.33 do not overlap extensively. Additionally, it is not unusual in the transportation sector generally and the passenger rail and rail transit mode in particular for carriers and systems to report matters to Federal and State regulatory entities. However, TSA invites comments on the matter.

V. Rulemaking Analyses and Notices

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 (E.O. 12866), Regulatory Planning and Review (58 FR 51735, October 4, 1993), directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation). The OMB A–4 Accounting Statement is located in the full regulatory evaluation.

In conducting these analyses, TSA determined:

(1) This rulemaking would not constitute an economically “significant regulatory action” as defined in the Executive Order.

(2) This rulemaking would have a yet to be determined impact on small businesses. We have conducted an Initial Regulatory Flexibility Analysis (IRFA) for comment.

(3) This rulemaking would not constitute a barrier to international trade.

(4) This rulemaking would not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

These analyses, available in the public docket, are summarized below. The reader is cautioned that we did not attempt to replicate precisely the regulatory language in this discussion of the proposed rule; the regulatory text, not the text of this evaluation, is legally binding. We invite comments on all aspects of the economic analysis. We will attempt to evaluate all regulatory evaluation comments submitted by the public; however, those comments with specific data sources or detailed information will be more useful in improving the impact analysis. If possible, evaluation comments should be clearly identified with the evaluation issue or section. Including page numbers or figure references with your comments will expedite the process and

ensure the issue is addressed by the most appropriate agency experts.

A. Executive Order 12866 Assessment (Regulatory Planning and Review)

Impact Summary

The proposed rule would address threats and vulnerabilities in the rail transportation sector. This summary provides a synopsis of the costs and benefits of the proposed rule.

Benefits of the Proposed Rule

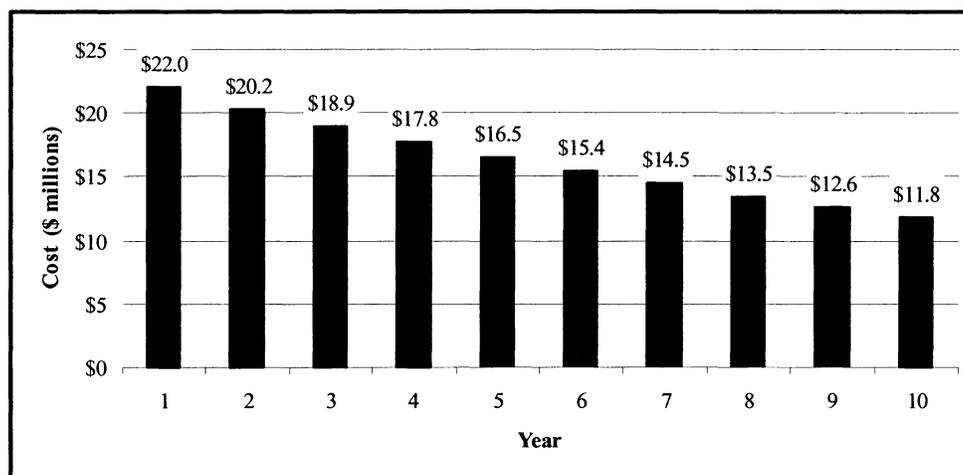
The proposed rule would enhance the security of rail transportation by: (1) Giving TSA and DHS the authority to conduct inspections in order to assess and mitigate threats to security; (2) providing TSA and DHS with a regulatory mechanism to locate rail cars containing certain hazardous materials; (3) mandating that rail hazardous materials facilities that ship or receive these materials conduct routine inspections of shipments; (4) creating a secure chain of custody requirement for the transfer of rail cars containing these materials; and (5) requiring certain rail

hazardous materials shipper and receiver facilities to store rail cars containing these hazardous materials in areas with physical security controls.

Costs of the Proposed Rule

The costs of the proposed rule would result primarily from the requirements for: (1) Rail carriers and rail hazardous materials shippers and receivers to establish secure chains of custody for hazardous materials covered by the NPRM; and (2) railroad carriers, rail hazardous materials shippers, and rail hazardous materials receivers to provide TSA and DHS with various pieces of information. TSA concluded that the total cost of the proposed rule, discounted at 7 percent, would range from \$152.8 million to \$173.9 million. See Figure 1 for the primary 10 year cost estimate, which equals \$163.3 when discounted at 7 percent. A detailed discussion of how TSA calculated this estimate and the range of estimates discussed above is available on the docket. The agency seeks comments on all cost estimates.

Figure 1: Total Cost of the Proposed Rule, Discounted 7 Percent



B. Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act (RFA) of 1980 requires that agencies perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. For purposes of the RFA, small entities include small businesses, not-for-profit organizations, and small governmental jurisdictions. Individuals and States are not included in the definition of a small entity.

This proposed rule would have a yet to be determined impact on small entities, as defined by the RFA. TSA, therefore, has prepared an Initial Regulatory Flexibility Analysis, which is available on the docket. TSA requests comments on this analysis.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that TSA consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget

(OMB) for each collection of information it conducts, sponsors, or requires through regulations.

This proposed rule contains new information collection activities subject to the PRA. Accordingly, TSA has submitted the following information requirements to OMB for its review.

Title: Rail Transportation Security.

Summary: This proposal would require: (1) Freight and passenger railroad carriers, rail transit systems, certain rail hazardous materials shipper and receiver facilities, tourist, scenic, historic, and excursion rail operations (whether operating on or off the general railroad system of transportation), and

private rail car operations (on or connected to the general railroad system of transportation) to allow TSA and DHS officials working with TSA to enter and be present within any area or within any conveyance to conduct inspections, tests, or to perform such other duties as TSA directs, including copying of records; (2) freight railroad carriers, certain rail hazardous materials shipper and receiver facilities, passenger railroad carriers, and rail mass transit systems to designate a rail security coordinator and at least one alternate rail security coordinator to be available to TSA on a 24 hours, 7 days a week basis to serve as primary contact for receipt of intelligence information and other security-related activities; (3) freight and passenger railroad carriers, certain rail hazardous materials shippers and receivers, passenger railroad carriers, rail mass transit systems, tourist, scenic, historic, and excursion rail operations (whether operating on or off the general railroad system of transportation), and private rail car operations (on or connected to the general railroad system of transportation) to immediately report potential threats and significant security concerns to DHS; (4) freight railroad carriers and certain rail hazardous materials shippers and receivers to provide for a secure chain of custody and control of rail cars containing a specified quantity and type of hazardous material; and (5) SSI protection to be extended to certain rail security information, with corresponding responsibilities of rail entities as covered persons under the SSI regulation.

Use of: This proposal would support the information needs of TSA to enhance security in the following modes of transportation: freight rail, including freight railroad carriers, rail hazardous materials facilities which offer, load, prepare, receive and/or unload certain types and quantities of hazardous materials, and private cars; passenger rail, including passenger railroad carriers such as intercity and commuter passenger rail operations, rail transit systems, tourist, scenic, historic, and excursion rail operations (whether operating on or off the general railroad system of transportation), and private rail car operations (on or connected to the general railroad system of transportation).

Respondents (including number of): The likely respondents to this proposed information requirement are an estimated 1,791 freight and passenger railroad carriers, rail transit systems, and rail hazardous materials shippers and receivers.

Frequency: TSA estimates each of the 949 freight and passenger railroad carrier, rail transit systems, and rail hazardous materials shippers and receivers will respond once to submit RSC information to TSA. Additionally, TSA estimates that each freight railroad carrier will respond anywhere from 1 to 36 times per year depending on the amount of PIH materials the carrier transports. This includes all requirements on freight railroad carriers in this proposal. TSA estimates that each passenger rail and rail transit entity will respond between 0 and 1,460 times per year. TSA estimates that each rail hazardous materials shipper and receiver facility will respond from 0 to 2 times per year. Thus, the annual frequency of information requirements is between 49,762 to 99,862.

Annual Burden Estimate: This proposal would result in an annual recordkeeping and reporting burden in the range of \$3,420,655 to \$6,576,955. Larger reporting burdens are anticipated for passenger rail systems due to higher estimates of suspicious incident reports.

TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirements by February 20, 2007. Direct the comments to the address listed in the **ADDRESSES** section of this document, and fax a copy of them to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS-TSA Desk Officer, at (202) 395-5806. A comment to OMB is most effective if OMB receives it within 30 days of publication. TSA will publish the OMB control number for this information collection in the **Federal Register** after OMB approves it.

As protection provided by the PRA, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. TSA has assessed the potential effect of this rulemaking and has determined that it will have only a domestic impact and therefore no effect on any trade-sensitive activity.

E. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

This rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply and TSA has not prepared a statement under the Act.

F. Executive Order 13132, Federalism

TSA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, entitled "Federalism," issued August 4, 1999. Executive Order 13132 requires TSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "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."

TSA proposes that this rule would preempt certain State, local, and tribal requirements, including any such requirements prescribing or restricting

security measures during the physical transfer of custody and control of a rail car containing hazardous materials. This is consistent with applicable statutes and with sound policy. Congress has enacted comprehensive Federal railroad laws (49 U.S.C. 20101 *et. seq.*), which mandate that “[l]aws, regulations and orders related to railroad safety and laws, regulations, and orders related to railroad security [] be nationally uniform to the extent practicable.” See 49 U.S.C. 20106. To achieve national uniformity, the Federal railroad laws “expressly preempt[] state authority to adopt safety rules, save for two exceptions.” See *Union Pacific Railroad Co. v. California Public Utilities Comm’n*, 346 F.3d 851, 858 (9th Cir. 2003); see also 49 U.S.C. 20106. A state may enact or continue in force a law related to railroad safety or security “until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement.” 49 U.S.C. 20106. “Even after such a federal regulation issues, a State may adopt a more stringent law when ‘necessary to eliminate or reduce an essentially local safety or security hazard’ if it ‘is not incompatible’ with the federal regulation and ‘does not unreasonably burden interstate commerce.’” *CSX Transportation, Inc. v. Williams*, 406 F.3d at 670–71; 49 U.S.C. 20106.

A primary security concern related to the rail transportation of hazardous materials is the prevention of a catastrophic release or explosion in proximity to densely populated areas, including urban areas and events or venues with large numbers of people in attendance. Also of major concern is the release or explosion of a rail car in proximity to iconic buildings, landmarks, or environmentally significant areas. These are national concerns that require a uniform national regulatory approach that does not require regulated parties to implement different measures in different jurisdictions across the nation. TSA is therefore proposing a nationally-uniform regulatory provision requiring chain of custody procedures. This would avoid the burden on interstate commerce that would result if multiple States and localities established their own chain of custody requirements.

Although proposed § 1580.107 would preempt State and local requirements addressing the same matters, TSA does not believe that the proposed custody and control requirements of this rulemaking would have an immediate

substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. The rule would not require any actions by States or localities. In addition, only one state has enacted a measure addressing chain of custody and control requirements for the rail transportation of hazardous materials.⁵⁸ Thus, it appears that the proposed rule would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment at this time. TSA invites comments from States and localities on whether promulgation of a final rule with the preemptive effects provided in proposed § 1580.109 would have substantial direct effects on States and localities. Additionally, TSA plans to consult with the States and/or their representatives during the public comment period concerning this proposed rule.

G. Environmental Analysis

TSA has reviewed this action under Department of Homeland Security (DHS) Management Directive 5100.1, Environmental Planning Program (effective April 19, 2006), which guides TSA compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f). We have determined that this proposal is covered by the following categorical exclusions (CATEX) listed in the DHS regulation, to wit: Number A3(a) (administrative and regulatory activities involving the promulgation of rules and the development of policies); paragraph A4 (information gathering and data analysis); paragraph A7(d) (conducting audits, surveys and data collection of a minimally intrusive nature, to include vulnerability, risk and structural integrity assessments of infrastructures); paragraph B3 (proposed activities and operations to be conducted in existing structures that are compatible with ongoing functions); and paragraph B11 (routine monitoring and surveillance activities that support homeland security, such as patrols, investigations and intelligence gathering).

Additionally, we have determined that this proposal meets the three conditions required for a CATEX to apply, as described in paragraph 3.2 (Conditions and Extraordinary Circumstances). The rule establishes new security requirements for rail transportation, to include: Requiring freight and passenger railroad carriers, rail transit systems, certain rail

hazardous materials shipper and receiver facilities, tourist, scenic, historic, and excursion rail operations (whether operating on or off the general railroad system of transportation), and private rail car operations (on or connected to the general railroad system of transportation) to give TSA officials and DHS officials working with TSA access to carry out security-related duties; requiring freight and passenger railroad carriers, certain rail hazardous materials shipper and receiver facilities, and rail transit systems to appoint and use rail security coordinators as TSA points of contact; requiring freight railroad carriers and certain rail hazardous materials shipper and receiver facilities to track and report the location of specified rail cars upon request; requiring improved security measures to protect certain railroad shipments; and extending the protection of the SSI program to rail transportation information.

H. Energy Impact Analysis

The energy impact of the notice has been assessed in accordance with the Energy Policy and Conservation Act (EPCA), Pub. L. 94–163, as amended (42 U.S.C. 6362). We have determined that this rulemaking is not a major regulatory action under the provisions of the EPCA. We also have analyzed this proposed rule under E.O. 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 18, 2001). We have determined that it is not a “significant energy action” under that order. While it is a “significant regulatory action” under E.O. 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, a Statement of Energy Effects is not required for this rule under E.O. 13211.

List of Subjects

49 CFR Part 1520

Air carriers, Aircraft, Airports, Maritime carriers, Rail hazardous materials receivers, Rail hazardous materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures, Vessels.

49 CFR Part 1580

Hazardous materials transportation, Mass transportation, Rail hazardous materials receivers, Rail hazardous

⁵⁸ California adopted the “Local Community Rail Security Act of 2006” on October 1, 2006.

materials shippers, Rail transit systems, Railroad carriers, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures.

The Proposed Rule

For the reasons set forth in the preamble, the Transportation Security Administration proposes to amend Chapter XII, of Title 49, Code of Federal Regulations, as follows:

Title 49—Transportation

Chapter XII—Transportation Security Administration, Department of Homeland Security

PART 1520—PROTECTION OF SENSITIVE SECURITY INFORMATION

1. The authority citation for part 1520 continues to read as follows:

Authority: 46 U.S.C. 70102–70106, 70117; 49 U.S.C. 114, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105.

2. In § 1520.3, add definitions of “Rail hazardous materials receiver,” “Rail hazardous materials shipper,” “Rail facility,” “Rail secure area,” “Rail transit facility,” “Rail transit system,” “Railroad,” and “Railroad carrier,” amend the definition of “Vulnerability assessment” to read as follows, and insert in alphabetical order:

§ 1520.3 Terms used in this part.

* * * * *

Rail facility means “rail facility” as defined in 49 CFR 1580.

Rail hazardous materials receiver means “rail hazardous materials receiver” as defined in 49 CFR 1580.3.

Rail hazardous materials shipper means “rail hazardous materials shipper” as defined in 49 CFR 1580.3.

Rail secure area means “rail secure area” as defined in 49 CFR 1580.3.

Rail transit facility means “rail transit facility” as defined in 49 CFR 1580.3.

Rail transit system or Rail Fixed Guideway System means “rail transit system” or “Rail Fixed Guideway System” as defined in 49 CFR 1580.3.

Railroad means “railroad” as defined in 49 U.S.C. 20102(1).

Railroad carrier means “railroad carrier” as defined in 49 U.S.C. 20102(2).

Vulnerability assessment means any review, audit, or other examination of the security of a transportation infrastructure asset; airport; maritime facility; port area; vessel; aircraft; railroad; railroad carrier, rail facility; train; rail hazardous materials shipper or receiver facility; rail transit system; rail transit facility; commercial motor vehicle; or pipeline; or a transportation-

related automated system or network, whether during the conception, planning, design, construction, operation, or decommissioning phase. A vulnerability assessment may include proposed, recommended, or directed actions or countermeasures to address security concerns.

* * * * *

3. In § 1520.5(b), revise paragraphs (b)(6)(i), (8) introductory text, (10), (11)(i)(A), and (12) introductory text to read as follows:

§ 1520.5 Sensitive security information.

* * * * *

(b) * * *

(6) * * *

(i) Details of any security inspection or investigation of an alleged violation of aviation, maritime, or rail transportation security requirements of Federal law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

* * * * *

(8) Security measures. Specific details of aviation, maritime, or rail transportation security measures, both operational and technical, whether applied directly by the Federal Government or another person, including—

* * * * *

(10) Security training materials. Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal Government or another person to carry out aviation, maritime, or rail transportation security measures required or recommended by DHS or DOT.

(11) * * *

(i) * * *

(A) Having unescorted access to a secure area of an airport, a rail secure area, or a secure or restricted area of a maritime facility, port area, or vessel;

(12) Critical aviation, maritime, or rail infrastructure asset information. Any list identifying systems or assets, whether physical or virtual, so vital to the aviation, maritime, or rail transportation system (including rail hazardous materials shippers and rail hazardous materials receivers) that the incapacity or destruction of such assets would have a debilitating impact on transportation security, if the list is—

* * * * *

4. In § 1520.7, add new paragraph (n) to read as follows:

§ 1520.7 Covered persons.

* * * * *

(n) Each railroad carrier, rail hazardous materials shipper, rail hazardous materials receiver, and rail transit system subject to the requirements of part 1580 of this chapter.

5. Add part 1580 to read as follows:

PART 1580—RAIL TRANSPORTATION SECURITY

Subpart A—General

Sec.

1580.1 Scope.

1580.3 Terms used in this part.

1580.5 Inspection authority.

Subpart B—Freight Rail Including Freight Railroad Carriers, Rail Hazardous Materials Shippers, Rail Hazardous Materials Receivers, and Private Cars

1580.100 Applicability.

1580.101 Rail security coordinator.

1580.103 Location and shipping information for certain rail cars.

1580.105 Reporting significant security concerns.

1580.107 Chain of custody and control requirements.

1580.109 Preemptive effect.

Subpart C—Passenger Rail Including Passenger Railroad Carriers, Rail Transit Systems, Tourist, Scenic, Historic and Excursion Operators, and Private Cars

1580.200 Applicability.

1580.201 Rail security coordinator.

1580.203 Reporting significant security concerns.

Appendix A to Part 1580—High Threat Urban Areas

Appendix B to Part 1580—Summary of the Applicability of Part 1580

Authority: 49 U.S.C. 114.

Subpart A—General

§ 1580.1 Scope.

Except as provided in paragraph (i) of this section, this part includes requirements for the following persons. Appendix B of this part summarizes the general requirements for each person, and the specific sections in this part provide detailed requirements.

(a) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(b) Each rail hazardous materials shipper that offers, prepares, or loads for transportation in commerce by rail one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) of this part.

(c) Each rail hazardous materials receiver, located within a High Threat Urban Area that receives in commerce by rail or unloads one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) of this part.

(d) Each passenger railroad carrier, including a carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(e) Each passenger or freight railroad carrier hosting an operation described in paragraph (d) of this section.

(f) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation.

(g) Operation of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(h) Each rail transit systems, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.

(i) This part does not apply to a freight railroad carrier that operates rolling equipment only on track inside an installation which is not part of the general railroad system of transportation.

§ 1580.3 Terms used in this part.

For purposes of this part:

Commuter passenger train service means “train, commuter” as defined in 49 CFR 238.5, and includes a railroad operation that ordinarily uses diesel or electric powered locomotives and railroad passenger cars to serve an urban area, its suburbs, and more distant outlying communities in the greater metropolitan area.

General railroad system of transportation means the network of standard gage track over which goods may be transported throughout the Nation and passengers may travel between cities and within metropolitan and suburban areas. (49 CFR part 209, Appendix A).

Hazardous material means “hazardous material” as defined in 49 CFR 171.8.

Heavy rail transit means service provided by self-propelled electric railcars, typically drawing power from a third rail, operating in separate rights-of-way in multiple cars; also referred to as subways, metros, or regional rail.

High Threat Urban Area (HTUA) means an area comprising one or more cities and surrounding areas including a 10 mile buffer zone, as listed in Appendix A of this part.

Improvised explosive device means a device fabricated in an improvised manner that incorporates explosives or destructive, lethal, noxious, pyrotechnic, or incendiary chemicals in its design, and generally includes a power supply, a switch or timer, and a detonator or initiator.

Intercity passenger train service means both “train, long-distance intercity passenger” and “train, short-distance intercity passenger” as defined in 49 CFR 238.5.

Light rail transit means service provided by self-propelled electric railcars, typically drawing power from an overhead wire, operating in either exclusive or non-exclusive rights-of-way in single or multiple cars and with shorter distance trips and frequent stops; also referred to as streetcars, trolleys, and trams.

Offers or offeror means:

(1) Any person who does either or both of the following:

(i) Performs, or is responsible for performing, any pre-transportation function for transportation of the hazardous material in commerce.

(ii) Tenders or makes the hazardous material available to a carrier for transportation in commerce.

(2) A carrier is not an offeror when it performs a function required as a condition of acceptance of a hazardous material for transportation in commerce (such as reviewing shipping papers, examining packages to ensure that they are in conformance with the hazardous materials regulations, or preparing shipping documentation for its own use) or when it transfers a hazardous material to another carrier for continued transportation in commerce without performing a pre-transportation function. (49 CFR 171.8)

Passenger car means rail rolling equipment intended to provide transportation for members of the general public and includes a self-propelled car designed to carry passengers, baggage, mail, or express. This term includes a passenger coach, cab car, and a Multiple Unit (MU) locomotive. In the context of articulated equipment, “passenger car” means that segment of the rail rolling equipment located between two trucks. This term does not include a private car. (49 CFR 238.5)

Passenger train means a train that transports or is available to transport members of the general public. (49 CFR 238.5)

Private car means rail rolling equipment that is used only for excursion, recreational, or private transportation purposes. A private car is not a passenger car. (49 CFR 238.5)

Rail facility means a location at which rail cargo or infrastructure assets are stored, cargo is transferred between conveyances and/or modes of transportation, where transportation command and control operations are performed, or maintenance operations are performed. The term also includes, but is not limited to, passenger stations and terminals, rail yards, crew management centers, dispatching centers, transportation terminals and stations, fueling centers, and telecommunication centers.

Rail hazardous materials receiver means any fixed-site facility that has a physical connection to the general railroad system of transportation and receives or unloads from transportation in commerce by rail one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) of this part, but does not include a facility owned or operated by a department, agency, or instrumentality of the Federal Government.

Rail hazardous materials shipper means any fixed-site facility that has a physical connection to the general railroad system of transportation and offers, prepares, or loads for transportation by rail one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) of this part, but does not include a facility owned or operated by a department, agency, or instrumentality of the Federal Government.

Rail secure area means a secure location(s) identified by a rail hazardous materials shipper or rail hazardous materials receiver where security-related pre-transportation or transportation functions are performed or rail cars containing the categories and quantities of hazardous materials set forth in § 1580.100(b) are prepared, loaded, stored, and/or unloaded.

Rail transit facility means rail transit stations, terminals, and locations at which rail transit infrastructure assets are stored, command and control operations are performed, or maintenance is performed. The term also includes rail yards, crew management centers, dispatching centers, transportation terminals and stations, fueling centers, and telecommunication centers.

Rail transit system or “Rail Fixed Guideway System” means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, cable car, trolley, or automated guideway.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including: Commuter or other short-haul railroad passenger

service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation. (49 U.S.C. 20102(1))

Railroad carrier means a person providing railroad transportation. (49 U.S.C. 20102(2))

Residue means the hazardous material remaining in a packaging, including a tank car, after its contents have been unloaded to the maximum extent practicable and before the packaging is either refilled or cleaned of hazardous material and purged to remove any hazardous vapors. (49 CFR 171.8)

Tourist, scenic, historic, or excursion operation means a railroad operation that carries passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations. (49 CFR 238.5)

Transportation or transport means the movement of property including loading, unloading, and storage. Transportation or transport also includes the movement of people, boarding, and disembarking incident to that movement.

§ 1580.5 Inspection authority.

(a) This section applies to the following:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper as defined in § 1580.3.

(3) Each rail hazardous materials receiver located within an HTUA.

(4) Each passenger railroad carrier, including a carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(5) Each passenger or freight railroad carrier hosting an operation described in paragraph (a)(4) of this section.

(6) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation.

(7) Operation of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(8) Each rail transit system.

(b) The persons described in paragraph (a) of this section must allow TSA and other authorized DHS officials, at any time and in a reasonable manner, without advance notice, to enter, inspect, and test property, facilities, equipment, operations, and to view, inspect, and copy records, as necessary to carry out TSA's security-related statutory or regulatory authorities, including its authority to—

(1) Assess threats to transportation;

(2) Enforce security-related regulations, directives, and requirements;

(3) Inspect, maintain, and test security facilities, equipment, and systems;

(4) Ensure the adequacy of security measures for the transportation of passengers and freight, including hazardous materials;

(5) Oversee the implementation, and ensure the adequacy, of security measures at rail yards, stations, terminals, transportation-related areas of rail hazardous materials shipper and receiver facilities, crew management centers, dispatch centers, telecommunication centers, and other transportation facilities and infrastructure;

(6) Review security plans; and

(7) Carry out such other duties, and exercise such other powers, relating to transportation security as the Assistant Secretary of Homeland Security for the TSA considers appropriate, to the extent authorized by law.

(c) TSA and DHS officials working with TSA, may enter, without advance notice, and be present within any area or within any conveyance without access media or identification media issued or approved by a railroad carrier, transit system owner or operator, rail hazardous materials shipper, or rail hazardous materials receiver in order to inspect or test compliance, or perform other such duties as TSA may direct.

Subpart B—Freight Rail Including Freight Railroad Carriers, Rail Hazardous Materials Shippers, Rail Hazardous Materials Receivers, and Private Cars

§ 1580.100 Applicability.

(a) *Applicability.* The requirements of this subpart apply to:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper as defined in section 1580.3.

(3) Each rail hazardous materials receiver located with an HTUA.

(4) Each freight railroad carrier hosting a passenger operation described in § 1580.1(d) of this part.

(5) Operation of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(b) *Hazardous materials.* The requirements of this subpart apply to:

(1) A rail car containing more than 2,268 kg (5,000 lbs) of a Division 1.1, 1.2, or 1.3 (explosive) material, as defined in 49 CFR 173.50;

(2) A tank car containing a material poisonous by inhalation as defined in 49 CFR 171.8, including Division 2.3 gases poisonous by inhalation, as set forth in 49 CFR 173.115(c) and Division 6.1 liquids meeting the defining criteria in 49 CFR 173.132(a)(1)(iii) and assigned to hazard zone A or hazard zone B in accordance with 49 CFR 173.133(a), other than residue; and

(3) A rail car containing a highway route-controlled quantity of a Class 7 (radioactive) material, as defined in 49 CFR 173.403.

§ 1580.101 Rail security coordinator.

(a) *Applicability.* This section applies to:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper as defined in § 1580.3.

(3) Each rail hazardous materials receiver located with an HTUA.

(4) Each freight railroad carrier hosting the passenger operations described in § 1580.1(d) of this part.

(5) Each private rail car operation, including business/office cars and circus trains, on or connected to the general railroad system of transportation, when notified by TSA, in writing, that a threat exists concerning that operation.

(b) Each person described in paragraph (a) of this section must designate and use a primary and at least one alternate Rail Security Coordinator (RSC).

(c) The RSC and alternate(s) must be appointed at the corporate level.

(d) Each freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver required to have an RSC must provide to TSA the

names, title, phone number(s), and e-mail address(es) of the RSCs and alternate RSCs, and must notify TSA within 7 calendar days when any of this information changes.

(e) Each freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver required to have an RSC must ensure that at least one RSC:

(1) Serves as the primary contact for intelligence information and security-related activities and communications with TSA. Any individual designated as an RSC may perform other duties in addition to those described in this section.

(2) Is available to TSA on a 24 hour a day 7 days a week basis.

(3) Coordinates security practices and procedures with appropriate law enforcement and emergency response agencies.

§ 1580.103 Location and shipping information for certain rail cars.

(a) *Applicability.* This section applies to:

(1) Each freight railroad carrier transporting one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) of this part.

(2) Each rail hazardous materials shipper as defined in § 1580.3.

(3) Each rail hazardous materials receiver located with an HTUA.

(b) Each person described in paragraph (a) of this section must have procedures in place to determine the location and shipping information for each rail car under its physical custody and control that contains one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) of this part.

(c) The location and shipping information required in paragraph (b) of this section must include the following:

(1) The rail car's current location by city, county, and state, including, for freight railroad carriers, the railroad milepost, track designation, and the time that the rail car's location was determined.

(2) The rail car's routing, if a freight railroad carrier.

(3) A list of the total number of rail cars containing the materials listed in § 1580.100(b) of this part, broken down by:

(i) The shipping name prescribed for the material in column 2 of the table in 49 CFR 172.101;

(ii) The hazard class or division number prescribed for the material in column 3 of the table in 49 CFR 172.101; and

(iii) The identification number prescribed for the material in column 4 of the table in 49 CFR 172.101.

(4) Each rail car's initial and number.

(5) Whether the rail car is in a train, rail yard, siding, rail spur, or rail hazardous materials shipper or receiver facility, including the name of the rail yard or siding designation.

(d) Upon request by TSA, each railroad carrier, each rail hazardous materials shipper, and each rail hazardous materials receiver must provide the location and shipping information to TSA no later than 1 hour after receiving the request, unless otherwise approved by TSA.

(e) The freight railroad carrier, rail hazardous materials shipper, and rail hazardous materials receiver must provide the requested location and shipping information to TSA by one of the following methods:

(1) Electronic data transmission in spreadsheet format.

(2) Electronic data transmission in Hyper Text Markup Language (HTML) format.

(3) Electronic data transmission in Extensible Markup Language (XML).

(4) Facsimile transmission of a hard copy spreadsheet in tabular format.

(5) Posting the information to a secure Web site address approved by TSA.

(6) Another format approved in writing by TSA.

§ 1580.105 Reporting significant security concerns.

(a) *Applicability.* This section applies to:

(1) Each freight railroad carrier that operates rolling equipment on track that is part of the general railroad system of transportation.

(2) Each rail hazardous materials shipper as defined in § 1580.3.

(3) Each rail hazardous materials receiver located with an HTUA.

(4) Each freight railroad carrier hosting a passenger operation described in § 1580.1(d) of this part.

(5) Operation of private cars, including business/office cars and circus, on or connected to the general railroad system of transportation trains.

(b) Each person described in paragraph (a) of this section must immediately report potential threats and significant security concerns to DHS in a manner prescribed by TSA.

(c) Potential threats or significant security concerns encompass incidents, suspicious activities, and threat information including, but not limited to, the following:

(1) Interference with the train crew.

(2) Bomb threats, specific and non-specific.

(3) Reports or discovery of suspicious items that result in the disruption of railroad operations.

(4) Suspicious activity occurring onboard a train or inside the facility of a freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver that results in a disruption of operations.

(5) Suspicious activity observed at or around rail cars, facilities, or infrastructure used in the operation of the railroad, rail hazardous materials shipper, or rail hazardous materials receiver.

(6) Discharge, discovery, or seizure of a firearm or other deadly weapon on a train, in a station, terminal, facility, or storage yard, or other location used in the operation of the railroad, rail hazardous materials shipper, or rail hazardous materials receiver.

(7) Indications of tampering with rail cars.

(8) Information relating to the possible surveillance of a train or facility, storage yard, or other location used in the operation of the railroad, rail hazardous materials shipper, or rail hazardous materials receiver.

(9) Correspondence received by the freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver indicating a potential threat.

(10) Other incidents involving breaches of the security of the freight railroad carrier's, rail hazardous materials shipper's, or rail hazardous materials receiver's operations or facilities.

(d) Information reported should include, as available and applicable:

(1) The name of the reporting freight railroad carrier, rail hazardous materials shipper, or rail hazardous materials receiver and contact information, including a telephone number or e-mail address.

(2) The affected train, station, terminal, rail hazardous materials facility, or other rail facility or infrastructure.

(3) Identifying information on the affected train, train line, and route.

(4) Origination and termination locations for the affected train, including departure and destination city and the rail line and route, as applicable.

(5) Current location of the affected train.

(6) Description of the threat, incident, or activity.

(7) The names and other available biographical data of individuals involved in the threat, incident, or activity.

(8) The source of any threat information.

§ 1580.107 Chain of custody and control requirements.

(a) *Within or outside of an HTUA, rail hazardous materials shipper transferring to carrier.* Except as provided in paragraph (e) of this section, at each location within or outside of an HTUA, a rail hazardous materials shipper transferring custody of a rail car containing one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) to a freight railroad carrier must:

(1) Physically inspect the rail car before loading for signs of tampering, including closures and seals; other signs that the security of the car may have been compromised; suspicious items or items that do not belong, including the presence of an improvised explosive device.

(2) Keep the rail car in a rail secure area from the time the security inspection required by paragraph (a)(1) of this section or by 49 CFR 173.31(d), whichever occurs first, until the freight railroad carrier takes physical custody of the rail car.

(3) Document the transfer of custody to the railroad carrier in writing or electronically.

(b) *Within or outside of an HTUA, carrier receiving from a rail hazardous materials shipper.* At each location within or outside of an HTUA where a freight railroad carrier receives from a rail hazardous materials shipper custody of a rail car containing one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b), the freight railroad carrier must document the transfer in writing or electronically and perform the required security inspection in accordance with 49 CFR 174.9.

(c) *Within an HTUA, carrier transferring to carrier.* Within an HTUA, whenever a rail car containing one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) is transferred from one freight railroad carrier to another, each freight railroad carrier must adopt and carry out procedures to ensure that the rail car is not left unattended at any time during the physical transfer of custody. These procedures must include the receiving freight railroad carrier performing the required security inspection in accordance with 49 CFR 174.9. Both the transferring and the receiving railroad carrier must document the transfer in writing or electronically.

(d) *Outside of an HTUA, carrier transferring to carrier.* Outside an HTUA, whenever a rail car containing one or more of the categories and quantities of hazardous materials set

forth in § 1580.100(b) is transferred from one freight railroad carrier to another, and the rail car containing this hazardous material may subsequently enter an HTUA, each freight railroad carrier must adopt and carry out procedures to ensure that the rail car is not left unattended at any time during the physical transfer of custody. These procedures must include the receiving railroad carrier performing the required security inspection in accordance with 49 CFR 174.9. Both the transferring and the receiving railroad carrier must document the transfer of custody in writing or electronically.

(e) *Within an HTUA, carrier transferring to rail hazardous materials receiver.* A freight railroad carrier delivering a rail car containing one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) to a rail hazardous materials receiver located within an HTUA must not leave the rail car unattended in a non-secure area until the rail hazardous materials receiver accepts custody of the rail car. Both the railroad carrier and the rail hazardous materials receiver must document the transfer of custody in writing or electronically.

(f) *Within an HTUA, rail hazardous materials receiver receiving from carrier.* Except as provided in paragraph (j) of this section, a rail hazardous materials receiver located within an HTUA that receives a rail car containing one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) from a freight railroad carrier must:

(1) Ensure that the rail hazardous materials receiver or railroad carrier maintains positive control of the rail car during the physical transfer of custody of the rail car.

(2) Keep the rail car in a rail secure area until the car is unloaded.

(3) Document the transfer of custody from the railroad carrier in writing or electronically.

(g) *Within or outside of an HTUA, rail hazardous materials receiver rejecting car.* This section does not apply to a rail hazardous materials receiver that does not routinely offer, prepare, or load for transportation by rail one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b). If such a receiver rejects and returns a rail car containing one or more of the categories and quantities of hazardous materials set forth in § 1580.100(b) to the originating offeror or shipper, the requirements of this section do not apply to the receiver. The requirements of this section do apply to any railroad

carrier to which the receiver transfers custody of the rail car.

(h) *Document retention.* The documents required under this section must be maintained for at least 60 calendar days and made available to TSA upon request.

(i) *Rail secure area.* The rail hazardous materials shipper and the rail hazardous materials receiver must use physical security measures to ensure that no unauthorized person gains access to the rail secure area.

(j) *Waivers for rail hazardous materials receivers.* A rail hazardous materials receiver located within an HTUA may request from TSA a waiver from some or all of the requirements of this section if the receiver demonstrates that the potential threat from its activities is insufficient to warrant compliance with this section. TSA will consider all relevant circumstances, including—

(1) The amounts and types of all hazardous materials received.

(2) The geography of the area surrounding the receiver's facility.

(3) Proximity to entities that may be attractive targets, including other businesses, housing, schools, and hospitals.

(4) Any information regarding threats to the facility.

(5) Other circumstances that indicate the potential threat of the receiver's facility does not warrant compliance with this section.

§ 1580.109 Preemptive effect.

Under 49 U.S.C 20106, issuance of § 1580.107 of this subpart preempts any State law, rule, regulation, order or common law requirement covering the same subject matter.

Subpart C—Passenger Rail Including Passenger Railroad Carriers, Rail Transit Systems, Tourist, Scenic, Historic and Excursion Operators, and Private Cars**§ 1580.200 Applicability.**

This subpart includes requirements for:

(a) Each passenger railroad carrier, including a carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(b) Each passenger railroad carrier hosting an operation described in paragraph (a) of this section.

(c) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation.

(d) Operation of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(e) Each rail transit system.

§ 1580.201 Rail security coordinator.

(a) *Applicability.* This section applies to:

(1) Each passenger railroad carrier, including a carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(2) Each passenger railroad carrier hosting an operation described in paragraph (a)(1) of this section.

(3) Each rail transit system.

(4) Each private rail car operation, including business/office cars and circus trains, on or connected to the general railroad system of transportation, when notified by TSA, in writing, that a security threat exists concerning that operation.

(5) Each tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation, when notified by TSA, in writing, that a security threat exists concerning that operation.

(b) Each person described in paragraph (a) of this section must designate and use a primary and at least one alternate Rail Security Coordinator (RSC).

(c) The RSC and alternate(s) must be appointed at the corporate level.

(d) Each passenger railroad carrier and rail transit system required to have an RSC must provide to TSA the names, titles, phone number(s), and e-mail address(es) of the RSCs, and alternate RSCs, and must notify TSA within 7 calendar days when any of this information changes.

(e) Each passenger railroad carrier and rail transit system required to have an RSC must ensure that at least one RSC:

(1) Serves as the primary contact for intelligence information and security-related activities and communications with TSA. Any individual designated as an RSC may perform other duties in addition to those described in this section.

(2) Is available to TSA on a 24 hours a day 7 days a week basis.

(3) Coordinate security practices and procedures with appropriate law enforcement and emergency response agencies.

§ 1580.203 Reporting significant security concerns.

(a) *Applicability.* This section applies to:

(1) Each passenger railroad carrier, including a carrier operating light rail or heavy rail transit service on track that is part of the general railroad system of transportation, each carrier operating or providing intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban area (as described by 49 U.S.C. 20102), and each public authority operating passenger train service.

(2) Each passenger railroad carrier hosting an operation described in paragraph (a)(1) of this section.

(3) Each tourist, scenic, historic, and excursion rail operator, whether operating on or off the general railroad system of transportation.

(4) Operation of private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation.

(5) Each rail transit system.

(b) Each person described in paragraph (a) of this section must immediately report potential threats or significant security concerns to DHS in a manner prescribed by TSA.

(c) Potential threats or significant security concerns encompass incidents, suspicious activities, and threat information including, but not limited to, the following:

(1) Interference with the train or transit vehicle crew.

(2) Bomb threats, specific and non-specific.

(3) Reports or discovery of suspicious items that result in the disruption of rail operations.

(4) Suspicious activity occurring onboard a train or transit vehicle or

inside the facility of a passenger railroad carrier or rail transit system that results in a disruption of rail operations.

(5) Suspicious activity observed at or around rail cars or transit vehicles, facilities, or infrastructure used in the operation of the passenger railroad carrier or rail transit system.

(6) Discharge, discovery, or seizure of a firearm or other deadly weapon on a train or transit vehicle or in a station, terminal, facility, or storage yard, or other location used in the operation of the passenger railroad carrier or rail transit system.

(7) Indications of tampering with passenger rail cars or rail transit vehicles.

(8) Information relating to the possible surveillance of a passenger train or rail transit vehicle or facility, storage yard, or other location used in the operation of the passenger railroad carrier or rail transit system.

(9) Correspondence received by the passenger railroad carrier or rail transit system indicating a potential threat to rail transportation.

(10) Other incidents involving breaches of the security of the passenger railroad carrier or the rail transit system operations or facilities.

(d) Information reported should include, as available and applicable:

(1) The name of the passenger railroad carrier or rail transit system and contact information, including a telephone number or e-mail address.

(2) The affected station, terminal, or other facility.

(3) Identifying information on the affected passenger train or rail transit vehicle including number, train or transit line, and route, as applicable.

(4) Origination and termination locations for the affected passenger train or rail transit vehicle, including departure and destination city and the rail or transit line and route.

(5) Current location of the affected passenger train or rail transit vehicle.

(6) Description of the threat, incident, or activity.

(7) The names and other available biographical data of individuals involved in the threat, incident, or activity.

(8) The source of any threat information.

APPENDIX A TO PART 1580—HIGH THREAT URBAN AREAS (HTUAS)

State	Candidate urban area	Geographic area captured in the data count	Previously designated urban areas included
AZ	Phoenix Area*	Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale, Tempe, and a 10-mile buffer extending from the border of the combined area.	Phoenix, AZ.
CA	Anaheim/Santa Ana Area	Anaheim, Costa Mesa, Garden Grove, Fullerton, Huntington Beach, Irvine, Orange, Santa Ana, and a 10-mile buffer extending from the border of the combined area.	Anaheim, CA; Santa Ana, CA.
	Bay Area	Berkeley, Daly City, Fremont, Hayward, Oakland, Palo Alto, Richmond, San Francisco, San Jose, Santa Clara, Sunnyvale, Vallejo, and a 10-mile buffer extending from the border of the combined area.	San Francisco, CA; San Jose, CA; Oakland, CA.
	Los Angeles/Long Beach Area	Burbank, Glendale, Inglewood, Long Beach, Los Angeles, Pasadena, Santa Monica, Santa Clarita, Torrance, Simi Valley, Thousand Oaks, and a 10-mile buffer extending from the border of the combined area.	Los Angeles, CA; Long Beach, CA.
	Sacramento Area*	Elk Grove, Sacramento, and a 10-mile buffer extending from the border of the combined area.	Sacramento, CA.
	San Diego Area*	Chula Vista, Escondido, and San Diego, and a 10-mile buffer extending from the border of the combined area.	San Diego, CA.
CO	Denver Area	Arvada, Aurora, Denver, Lakewood, Westminster, Thornton, and a 10-mile buffer extending from the border of the combined area.	Denver, CO.
DC	National Capital Region	National Capital Region and a 10-mile buffer extending from the border of the combined area.	National Capital Region, DC.
FL	Fort Lauderdale Area	Fort Lauderdale, Hollywood, Miami Gardens, Miramar, Pembroke Pines, and a 10-mile buffer extending from the border of the combined area.	N/A.
	Jacksonville Area	Jacksonville and a 10-mile buffer extending from the city border.	Jacksonville, FL.
	Miami Area	Hialeah, Miami, and a 10-mile buffer extending from the border of the combined area.	Miami, FL.
	Orlando Area	Orlando and a 10-mile buffer extending from the city border.	Orlando, FL.
	Tampa Area*	Clearwater, St. Petersburg, Tampa, and a 10-mile buffer extending from the border of the combined area.	Tampa, FL.
GA	Atlanta Area	Atlanta and a 10-mile buffer extending from the city border.	Atlanta, GA.
HI	Honolulu Area	Honolulu and a 10-mile buffer extending from the city border.	Honolulu, HI.
IL	Chicago Area	Chicago and a 10-mile buffer extending from the city border.	Chicago, IL.
IN	Indianapolis Area	Indianapolis and a 10-mile buffer extending from the city border.	Indianapolis, IN.
KY	Louisville Area*	Louisville and a 10-mile buffer extending from the city border.	Louisville, KY.
LA	Baton Rouge Area*	Baton Rouge and a 10-mile buffer extending from the city border.	Baton Rouge, LA.
	New Orleans Area	New Orleans and a 10-mile buffer extending from the city border.	New Orleans, LA.
MA	Boston Area	Boston, Cambridge, and a 10-mile buffer extending from the border of the combined area.	Boston, MA.
MD	Baltimore Area	Baltimore and a 10-mile buffer extending from the city border.	Baltimore, MD.
MI	Detroit Area	Detroit, Sterling Heights, Warren, and a 10-mile buffer extending from the border of the combined area.	Detroit, MI.
MN	Twin Cities Area	Minneapolis, St. Paul, and a 10-mile buffer extending from the border of the combined entity.	Minneapolis, MN; St. Paul, MN.
MO	Kansas City Area	Independence, Kansas City (MO), Kansas City (KS), Olathe, Overland Park, and a 10-mile buffer extending from the border of the combined area.	Kansas City, MO.
	St. Louis Area	St. Louis and a 10-mile buffer extending from the city border.	St. Louis, MO.
NC	Charlotte Area	Charlotte and a 10-mile buffer extending from the city border.	Charlotte, NC.
NE	Omaha Area*	Omaha and a 10-mile buffer extending from the city border.	Omaha, NE.
NJ	Jersey City/Newark Area	Elizabeth, Jersey City, Newark, and a 10-mile buffer extending from the border of the combined area.	Jersey City, NJ; Newark, NJ.
NV	Las Vegas Area*	Las Vegas, North Las Vegas, and a 10-mile buffer extending from the border of the combined entity.	Las Vegas, NV.

APPENDIX A TO PART 1580—HIGH THREAT URBAN AREAS (HTUAs)—Continued

State	Candidate urban area	Geographic area captured in the data count	Previously designated urban areas included
NY	Buffalo Area*	Buffalo and a 10-mile buffer extending from the city border.	Buffalo, NY.
	New York City Area	New York City, Yonkers, and a 10-mile buffer extending from the border of the combined area.	New York, NY.
OH	Cincinnati Area	Cincinnati and a 10-mile buffer extending from the city border.	Cincinnati, OH.
	Cleveland Area	Cleveland and a 10-mile buffer extending from the city border.	Cleveland, OH.
	Columbus Area	Columbus and a 10-mile buffer extending from the city border.	Columbus, OH.
	Toledo Area*	Oregon, Toledo, and a 10-mile buffer extending from the border of the combined area.	Toledo, OH.
OK	Oklahoma City Area*	Norman, Oklahoma and a 10-mile buffer extending from the border of the combined area.	Oklahoma City, OK.
OR	Portland Area	Portland, Vancouver, and a 10-mile buffer extending from the border of the combined area.	Portland, OR.
PA	Philadelphia Area	Philadelphia and a 10-mile buffer extending from the city border.	Philadelphia, PA.
	Pittsburgh Area	Pittsburgh and a 10-mile buffer extending from the city border.	Pittsburgh, PA.
TN	Memphis Area	Memphis and a 10-mile buffer extending from the city border.	Memphis, TN.
TX	Dallas/Fort Worth/Arlington Area	Arlington, Carrollton, Dallas, Fort Worth, Garland, Grand Prairie, Irving, Mesquite, Plano, and a 10-mile buffer extending from the border of the combined area.	Dallas, TX; Fort Worth, TX; Arlington, TX.
	Houston Area	Houston, Pasadena, and a 10-mile buffer extending from the border of the combined entity.	Houston, TX.
	San Antonio Area	San Antonio and a 10-mile buffer extending from the city border.	San Antonio, TX.
WA	Seattle Area	Seattle, Bellevue, and a 10-mile buffer extending from the border of the combined area.	Seattle, WA.
WI	Milwaukee Area	Milwaukee and a 10-mile buffer extending from the city border.	Milwaukee, WI.

*FY05 Urban Areas eligible for sustainment funding through the FY06 UASI program; any Urban Area not identified as eligible through the risk analysis process for two consecutive years will not be eligible for continued funding under the UASI program.

APPENDIX B TO PART 1580—SUMMARY OF THE APPLICABILITY OF PART 1580

[This is a summary—see body of text for complete requirements]

Proposed security measure and rule section	Freight railroad carriers NOT transporting specified hazardous materials	Freight railroad carriers transporting specified hazardous materials (1580.100(b))	Rail operations at certain facilities that ship (i.e., offer, prepare, or load for transportation) hazardous materials	Rail operations at certain facilities that receive or unload hazardous materials within HTUA	Passenger railroad carriers and rail transit systems	Certain other rail operations (private, business/office, circus, tourist, historic, excursion)
Allow TSA to inspect (1580.5).	X	X	X	X	X	X
Appoint rail security coordinator (1580.101 freight; 1580.201 passenger).	X	X	X	X	X	Only if notified in writing that security threat exists.
Report significant security concerns (1580.105 freight; 1580.203 passenger).	X	X	X	X	X	X
Provide location and shipping information for rail cars containing specified hazardous materials if requested (1580.103)		X	X	X		
Chain of custody and control requirements for transport of specified hazardous materials that are or may be in HTUA (1580.107)		X	X	X		

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Kip Hawley,

Assistant Secretary.

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