



July 1, 2004

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Docket Management System
U.S. Department of Transportation
Room Plaza 401
400 Seventh Street SW
Washington, DC 20590-0001

Re: Transportation Security Administration (TSA) Docket No. TSA-2003-15569; Amendment No. 1520-1; Comments on Interim Final Rule

Dear Sirs:

The Council on Safe Transportation of Hazardous Articles, Inc. ("COSTHA") hereby offers its comments on the interim final rule (IFR) published jointly by the Department of Transportation's (DOT) Office of the Secretary of Transportation (OST) and the Department of Homeland Security's (DHS) Transportation Security Administration (TSA) in the *Federal Register* on May 18, 2004 [69 FR 28066] under TSA Docket No. TSA-2003-15569; Amendment No. 1520-1, and entitled "**Protection of Sensitive Security Information**".

COSTHA is a non-profit organization representing manufacturers, shippers, distributors, carriers, freight forwarders, trainers, packaging manufacturers and others associated with the hazardous materials transportation industry. In addition to promoting regulatory compliance and safety in hazardous materials transportation, COSTHA assists its members and the public in evaluating the practicality and efficacy of laws, rules and regulations for the safe transportation and distribution of hazardous materials. Since many COSTHA members are directly involved with the offering for transport and transport of a wide variety of hazardous materials that require development of a hazardous materials security plan pursuant to the requirements of subpart I of part 172 the DOT Hazardous Materials

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Regulations ("the HMR", 49 CFR parts 171-180), COSTHA has a substantial and direct interest in the above captioned IFR.

The IFR adopts requirements for the protection of Sensitive Security Information (SSI). Identical requirements for the protection of SSI are included by OST in 49 CFR part 15 and by TSA in 49 CFR part 1520. The stated purpose for the new requirements for the protection of SSI is, generally, "to protect the confidentiality of maritime security measures adopted under the U.S. Coast Guard's regulations implementing the Maritime Security Act (MTSA) and other activities related to port and maritime security" and to make "clarifying changes to existing provisions of the SSI regulation [in 49 CFR part 1520] governing aviation security" [69 FR 28066]. The later existing regulation "applies primarily to information related to aviation security" under which "[a]irlines, airports, and others operating in civil aviation are required to limit access to [the required SSI] to those persons who need it to carry out their security functions" (*Id.*).

The IFR requests comments on the requirements for the protection of SSI adopted therein, and these comments are submitted in response to that request. In these comments, references to regulatory provisions adopted under the IFR will include first the relevant provision in the OST regulation followed by the relevant provision in the TSA regulation (e.g., "section 15.1/1520.1").

Applicability of parts 15/1520 to hazardous materials security plans required under subpart I of part 172 of the HMR.

As noted above, and as frequently reiterated throughout the IFR, the main thrust of the new requirements appears to be the protection of SSI relating to maritime and aviation security. Nowhere in the IFR itself is specific reference made to hazardous materials security plans required by subpart I of part 172 of the HMR. These hazardous materials security plan requirements apply not only to air and maritime carriers, but also to motor carriers and railroads, and to offerers ("shippers") by all modes of transport of a wide variety of hazardous materials, including any hazardous material offered for transport or transported in a quantity that requires placarding under subpart F of part 172 of the HMR (see § 172.800(b)(7)). Paragraph 172.802(a) requires that the security plan include, *inter alia*, "an assessment of possible transportation security risks for shipments of the hazardous materials". The HMR require that "hazmat employees" involved in preparation and implementation of the security plan not only have access to the security plan, but also receive "in-depth" training in the provisions of the required plan (see §§ 172.802(b) and 172.704(a)(5)).

While nowhere in the IFR is it clearly stated that - apart from "aviation and maritime security" information - the requirements of the IFR are also intended to apply to hazardous materials security plans required under the HMR, certain oblique references in the IFR appear

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to “capture” these plans and make them subject to the requirements of the IFR. For example, SSI is defined in § 15.5(b)(1)/1520.5(b)(1) to include “[a]ny security program or security contingency plan issued, established, required, received, or approved by DOT or DHS” (emphasis added) - yet nowhere in the examples of such information listed in that paragraph is there any example of a security plan or program relating to other than aviation or maritime security. Another example of information constituting SSI, as identified in 15.5(b)(5)/1520.5(b)(5), is any “vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS” (emphasis added). In § 15.2/1520.3, “vulnerability assessment” is defined to include any “review, audit, or other examination of the security of a transportation infrastructure asset;..., vessel, aircraft, train, commercial motor vehicle, or pipeline” - but no specific reference is made to, for example, an assessment of the security of the facility of an “offerer” (“shipper”) of hazardous materials for transportation. Moreover, it remains unclear whether “vulnerability assessment” as used here is intended to have the same meaning as the phrase “an assessment of possible transportation security risks” for shipments of hazardous materials, as the latter is used in § 172.802(a) of the HMR.

Consequently, COSTHA finds the IFR to be ambiguous both regarding its general applicability to security plans required under subpart I of part 172 of the HMR, as well as regarding applicability to those plans to the extent that they relate to *other than* “aviation or maritime security” measures. Therefore, if it is intended that the requirements of the IFR apply to hazardous materials security plans developed and implemented pursuant to the requirements of subpart I of part 172 of the HMR, it is hereby requested that this intent made clear by appropriate amendments to parts 15/1520 to clarify this intent. On the other hand, if it is intended that the provisions of the IFR not apply to hazardous materials security plans as required under the HMR, it is requested that the provisions in parts 15/1520 - in particular, those cited in the foregoing paragraph - be revised to clearly exclude those plans.

Comments on specific provisions of the IFR.

In the event that OST/TSA determines that it is intended that the requirements in the IFR apply to hazardous materials security plans developed and implemented under subpart I of part 172 of the HMR - and without prejudice to such determination - COSTHA offers the comments below on specific provisions in parts 15/1520 adopted under the IFR.

§ 15.9/1520.9 *Restrictions on the disclosure of SSI.* Paragraph 15.9(a)(1)/1520.9(a)(1) requires SSI not in the physical possession of a “covered person” to be stored by the person in “a secure container, such as a locked desk or file cabinet or in a locked room”. In some cases hazardous materials transportation plans are stored electronically, and access to the plan restricted to persons requiring access (as specified in the HMR) by use of restricted passwords or access codes. The provisions of 15.9(a)(1)/1520.9(a)(1) do not appear to contemplate storage of, and restriction of access to SSI by electronic means, although such storage and

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access restriction can clearly provide the same level of protection as “a secure container, such as a locked desk”. Therefore, it is requested that § 15.9(a)(1)/1520.9(a)(1) be revised to authorize storage of, and restriction of access to SSI by appropriate electronic means.

§ 15.11/1520.11 *Persons with a need to know.* Paragraph 15.9(a)(2)/1520.9(a)(2) permits disclosure of and/or provision of access to SSI *only* to covered persons with “a need to know”. Paragraph 15.11(a)/1520.11(a) defines “persons with a need to know” in the context of the private sector. However, § 15.11(a)(2)/1520(a)(2) limits persons with a “need to know” for purposes of dissemination of SSI to persons performing, being trained to perform, or supervising *only* “aviation or maritime transportation security activities”. Thus, the definition of “persons with a need to know” excludes the typical hazmat employee involved in preparation and implementation of the hazardous materials security plans required by the HMR, and who is required by the HMR not only have access to the security plan, but also to receive “in-depth” training in the provisions of the required plan. This leads to the contradiction that information concerning hazardous materials transportation security plans - which are deemed SSI under the IFR and, therefore, may only be made available to persons with “a need to know” as defined in § 15.11(a)/1520(a) - cannot be provided to the typical hazmat employee unless that employee is engaged in “aviation or maritime security activities”. Accordingly, COSTHA requests that § 15.11(a)(2)/1520(a)(2) be revised so as to remove this inconsistency, and to clearly include the relevant hazmat employees within the scope of “persons with a need to know” for purposes of dissemination of information relative to the hazmat transportation security plan.

§ 15.13/1520.13 *Marking of SSI.* Section 15.13/1520.13 requires any front and back cover, any title page, and each page of any paper record containing SSI to be marked with certain information. Included in this information is a rather lengthy “distribution limitation statement”, the required text of which is prescribed in § 15.13(c)/1520.13(c). COSTHA questions the benefit of including such a lengthy distribution limitation statement on *each page* of *every* document containing SSI - particularly in light of the fact that each page of each document would already be required to be marked “SENSITIVE SECURITY INFORMATION”. Accordingly, COSTHA requests that § 15.13(a)/1520.13(a) be revised to remove the requirement to include this lengthy distribution limitation statement on each page of each document containing SSI. For example, the statement could be required to appear only on any front and back cover and on any title page, or, for documents not having a front and back cover, on the first page and the last page of the document. Alternatively, a short reference could be added on each page in connection with the “SENSITIVE SECURITY INFORMATION MARKING” referring to the limited distribution statement required to appear elsewhere (e.g., on the front and back cover) in the document.

In conclusion, COSTHA welcomes the opportunity to comment on the OST and TSA requirements for the protection of SSI. COSTHA requests that consideration be given to the

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foregoing general and specific comments on the IFR in the development of the final rule that will be issued under this docket.

Please do not hesitate to contact me if you have questions or require additional information concerning the foregoing comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "John V. Currie", with a large, stylized initial "J" and "C".

John V. Currie
COSTHA Administrator

cc: RSPA Chief Counsel
RSPA Associate Administrator for HMS