

§ 107.333

Counsel assesses a civil penalty taking the following into account:

- (a) The nature and circumstances of the violation;
- (b) The extent and gravity of the violation;
- (c) The degree of the respondent's culpability;
- (d) The respondent's prior violations;
- (e) The respondent's ability to pay;
- (f) The effect on the respondent's ability to continue in business; and
- (g) Such other matters as justice may require.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-30, 58 FR 50500, Sept. 27, 1993; Amdt. 107-38, 61 FR 21100, May 9, 1996]

CRIMINAL PENALTIES

§ 107.333 Criminal penalties generally.

A person who knowingly violates §171.2(l) of this title or willfully or recklessly violates a requirement of the Federal hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both, except the maximum amount of imprisonment shall be 10 years in any case in which the violation involves the release of a hazardous material which results in death or bodily injury to any person.

[71 FR 8487, Feb. 17, 2006]

§ 107.335 Referral for prosecution.

If the Associate Administrator becomes aware of a possible willful violation of the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any special permit, or order issued thereunder, for which the Associate Administrator exercises enforcement responsibility, it shall report it to the Office of the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590-0001. If appropriate, the Chief Counsel refers the report to the Department of Jus-

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tice for criminal prosecution of the offender.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-22, 55 FR 39978, Oct. 1, 1990; Amdt. 107-24, 56 FR 8621, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-35, 60 FR 49108, Sept. 21, 1995; 66 FR 45377, Aug. 28, 2001]

§ 107.336 Limitation on fines and penalties.

If a State or political subdivision or Indian tribe assesses any fine or penalty determined by the Secretary to be appropriate for a violation concerning a subject listed in §107.202(a), no additional fine or penalty may be assessed for such violation by any other authority.

[Amdt. 107-24, 56 FR 8624, Feb. 28, 1991]

INJUNCTIVE ACTION

§ 107.337 Injunctions generally.

Whenever it appears to the Office of Chief Counsel that a person has engaged, or is engaged, or is about to engage in any act or practice constituting a violation of any provision of the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any special permit, or order issued thereunder, for which the Office of Chief Counsel exercises enforcement responsibility, the Administrator, PHMSA, or his delegate, may request the Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages as provided by 49 U.S.C. 5122(a).

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-32, 59 FR 49131, Sept. 26, 1994]

§ 107.339 Imminent hazards.

Whenever it appears to the Office of the Chief Counsel that there is a substantial likelihood that death, serious illness, or severe personal injury will result from the transportation of a particular hazardous material or hazardous materials container, before a compliance order proceeding or other administrative hearing or formal proceeding to abate the risk of that harm

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can be completed, the Administrator, PHMSA, or his delegate, may bring an action under 49 U.S.C. 5122(b) in the appropriate United States District Court for an order suspending or restricting the transportation of that hazardous material or those containers or for such other equitable relief as is necessary or appropriate to ameliorate the hazard.

[Amdt. 107-11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107-15, 51 FR 34987, Oct. 1, 1986; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994]

APPENDIX A TO SUBPART D OF PART 107—GUIDELINES FOR CIVIL PENALTIES

I. This appendix sets forth the guidelines used by the Office of Hazardous Materials Safety (as of October 1, 2005) in making initial baseline determinations for recommending civil penalties. The first part of these guidelines is a list of baseline amounts or ranges for probable violations frequently cited in enforcement reports referred for action. Following the list of violations are general guidelines used by OHMS in making initial penalty determinations in enforcement cases.

II. LIST OF FREQUENTLY CITED VIOLATIONS

II—LIST OF FREQUENTLY CITED VIOLATIONS

Violation description	Section or cite	Baseline assessment
General Requirements		
A. Registration Requirements: Failure to register as an offeror or carrier of hazardous material and pay registration fee.	107.608, 107.612	\$1,000 + \$500 each additional year.
B. Training Requirements:		
1. Failure to provide initial training to hazmat employees (general awareness, function-specific, safety, and security awareness training):	172.702	
a. More than 10 hazmat employees .....	.....	\$700 and up each area.
b. 10 hazmat employees or fewer .....	.....	\$450 and up each area.
2. Failure to provide recurrent training to hazmat employees (general awareness, function-specific, safety, and security awareness training).	172.702	\$450 and up each area.
3. Failure to provide security training when a security plan is required but has not been developed.	172.702	Included in penalty for no security plan.
4. Failure to provide security training when a security plan has been developed but hazmat employees have not been trained concerning the security plan and its implementation.	172.702	\$2,500.
5. Failure to create and maintain training records:	172.704	
a. more than 10 hazmat employees .....	.....	\$800 and up.
b. 10 hazmat employees or fewer .....	.....	\$500 and up.
C. Security Plans:		
1. Failure to develop a security plan; failure to adhere to security plan:	172.800	
a. § 172.504 table 1 materials .....	.....	\$7,500.
b. Packing Group I .....	.....	\$6,000.
c. Packing Group II .....	.....	\$4,500.
d. Packing Group III .....	.....	\$3,000.
2. Incomplete security plan or incomplete adherence (one or more of four required elements missing).	.....	One-quarter (25%) of above for each element.
3. Failure to update a security plan to reflect changing circumstances	172.802(b)	One-third (33%) of baseline for no plan.
4. Failure to put security plan in writing; failure to make all copies identical.	172.800(b)	One-third (33%) of baseline for no plan.
D. Notification to a Foreign Shipper: Failure to provide information of HMR requirements applicable to a shipment of hazardous materials within the United States, to a foreign offeror or forwarding agent at the place of entry into the U.S.	171.12(a)	\$1,500 to \$7,500 (corresponding to violations by foreign offeror or forwarding agent).
E. Expired Exemption or Special Permit: Offering or transporting a hazardous material, or otherwise performing a function covered by an exemption or special permit, after expiration of the exemption or special permit	171.2(a), (b), (c), Various.	\$1,000 + \$500 each additional year.
Offeror Requirements—All hazardous materials		
A. Undeclared Shipment:		

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
Offering for transportation a hazardous material without shipping papers, package markings, labels, or placards.	172.200, 172.300, 172.400, 172.500.	\$15,000 and up.
B. Shipping Papers:		
1. Failure to provide a shipping paper for a shipment of hazardous materials.	172.201	\$3,000 to \$6,000.
2. Failure to follow one or more of the three approved formats for listing hazardous materials on a shipping paper.	172.201(a)(1)	\$1,200.
3. Failure to retain shipping papers:		
a. by an offeror, for two years after the date the shipment is provided to the carrier (or 3 years if the material is a hazardous waste).	172.201(e), 174.24(b), 175.30(a), 176.24(b), 177.817(f).	\$1,000.
b. by a carrier, for one year after the date the shipment is provided to the carrier (or 3 years if the material is a hazardous waste).		
4. Failure to include a proper shipping name in the shipping description or using an incorrect proper shipping name.	172.202	\$800 to \$1,600.
5. Failure to include a hazard class/division number in the shipping description.	172.202	\$1,000 to \$2,000.
6. Failure to include an identification number in the shipping description.	172.202	\$1,000 to \$2,000.
7. Using an incorrect hazard class/identification number:	172.202.	
a. that does not affect compatibility requirements .....	.....	\$800.
b. that affects compatibility requirements .....	.....	\$3,000 to \$6,000.
8. Using an incorrect identification number:	172.202..	
a. that does not change the response information .....	.....	\$800.
b. that changes the response information .....	.....	\$3,000 to \$6,000.
9. Failure to include the Packing Group, or using an incorrect Packing Group.	172.202	\$1,200.
10. Using a shipping description that includes additional unauthorized information (extra or incorrect words).	172.202	\$800.
11. Using a shipping description not in required sequence	172.202	\$500.
12. Using a shipping description with two or more required elements missing or incorrect:	172.202.	
a. such that the material is misdescribed .....	.....	\$3,000.
b. such that the material is misclassified .....	.....	\$6,000.
13. Failure to include the total quantity of hazardous material covered by a shipping description.	172.202(c)	\$500.
14. Failure to list an exemption or special permit number in association with the shipping description.	172.203(a)	\$800.
15. Failure to indicate "Limited Quantity" or "Ltd Qty" following the basic shipping description of a material offered for transportation as a limited quantity.	172.203(b)	\$500.
16. Failure to include "RQ" in the shipping description to identify a material that is a hazardous substance.	172.203(c)(2)	\$500.
17. Failure to include a required technical name in parenthesis for a listed generic or "n.o.s." material.	172.203(k)	\$1,000.
18. Failure to include the required shipper's certification on a shipping paper.	172.204	\$1,000.
19. Failure to sign the required shipper's certification on a shipping paper.	172.204	\$800.
C. Emergency Response Information Requirements:		
1. Providing or listing incorrect emergency response information with or on a shipping paper.	172.602.	
a. No significant difference in response .....	.....	\$800.
b. Significant difference in response .....	.....	\$3,000 to \$6,000.
2. Failure to include an emergency response telephone number on a shipping paper.	172.604	\$2,600.
3. Failure to have the emergency response telephone number monitored while a hazardous material is in transportation or listing multiple telephone numbers (without specifying the times for each) that are not monitored 24 hours a day.	172.604	\$1,300.
4. Listing an unauthorized emergency response telephone number on a shipping paper.	172.604	\$2,600 to \$4,200.
5. Listing an incorrect or non-working emergency response telephone number on a shipping paper.	172.604	\$1,300.
6. Failure to provide required technical information when the listed emergency response telephone number is contacted.	172.604	\$1,300.
D. Package Marking Requirements:		
1. Failure to mark the proper shipping name on a package or marking an incorrect shipping name on a package.	172.301(a)	\$800 to \$1,600.
2. Failure to mark the identification number on a package	172.301(a)	\$1,000 to \$2,000.

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II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
3. Marking a package with an incorrect identification number	172.301(a).	
a. that does not change the response information .....	.....	\$800.
b. that changes the response information .....	.....	\$3,000 to \$6,000.
4. Failure to mark the proper shipping name and identification number on a package.	172.301(a)	\$3,000 to \$6,000.
5. Marking a package with an incorrect shipping name and identification number.	172.301(a).	
a. that does not change the response information .....	.....	\$1,500 to \$3,000.
b. that changes the response information .....	.....	\$3,000 to \$6,000.
6. Failure to include the required technical name(s) in parenthesis for a listed generic or "n.o.s." entry.	172.301(c)	\$1,000.
7. Marking a package as containing hazardous material when it contains no hazardous material.	172.303(a)	\$800.
8. Failure to locate required markings away from other markings that could reduce their effectiveness.	172.304(a)(4)	\$800.
9. Failure to mark a package containing liquid hazardous materials with required orientation marking.	172.312	\$2,500 to \$3,500.
10. Failure to mark "RQ" on a non-bulk package containing a hazardous substance.	172.324(b)	\$500.
E. Package Labeling Requirements:		
1. Failure to label a package	172.400	\$5,000.
2. Placing a label that represents a hazard other than the hazard presented by the hazardous material in the package.	172.400	\$5,000.
3. Placing a label on a package that does not contain a hazardous material.	172.401(a)	\$800.
4. Failure to place a required subsidiary label on a package	172.402	\$500 to \$2,500.
5. Placing a label on a different surface of the package than, or away from, the proper shipping name.	172.406(a)	\$800.
6. Placing an improper size label on a package	172.407(c)	\$800.
7. Placing a label on a package that does not meet color specification requirements (depending on the variance).	172.407(d)	\$600 to \$2,500.
8. Failure to provide an appropriate class or division number on a label.	172.411	\$2,500.
F. Placarding Requirements:		
Failure to properly placard a freight container or vehicle containing hazardous materials:.	172.504.	
a. when Table 1 is applicable .....	.....	\$1,000 to \$9,000.
b. when Table 2 is applicable .....	.....	\$800 to \$7,200.
G. Packaging Requirements:		
1. Offering a hazardous material for transportation in an unauthorized non-UN standard or nonspecification packaging (includes failure to comply with the terms of an exemption or special permit authorizing use of a nonstandard or nonspecification packaging).	Various.	
a. Packing Group I (and § 172.504 Table I materials) .....	.....	\$9,000.
b. Packing Group II .....	.....	\$7,000.
c. Packing Group III .....	.....	\$5,000.
2. Offering a hazardous material for transportation in a self-certified packaging that has not been subjected to design qualification testing:.	178.601 & Various.	
a. Packing Group I (and § 172.504 Table I materials) .....	.....	\$10,800.
b. Packing Group II .....	.....	\$8,400.
c. Packing Group III .....	.....	\$6,000.
3. Offering a hazardous material for transportation in a packaging that has been successfully tested to an applicable UN standard but is not marked with the required UN marking.	178.503(a)	\$3,600.
4. Failure to close a UN standard packaging in accordance with the closure instructions.	173.22(a)(4)	\$2,500.
5. Offering a hazardous material for transportation in a packaging that leaks during conditions normally incident to transportation:	173.24(b).	
a. Packing Group I (and § 172.504 Table I materials) .....	.....	\$12,000.
b. Packing Group II .....	.....	\$9,000.
c. Packing Group III .....	.....	\$6,000.
6. Overfilling or underfilling a package so that the effectiveness is substantially reduced:	173.24(b).	
a. Packing Group I (and § 172.504 Table I materials) .....	.....	\$9,000.
b. Packing Group II .....	.....	\$6,000.
c. Packing Group III .....	.....	\$3,000.
7. Offering a hazardous material for transportation after October 1, 1996, in an unauthorized non-UN standard packaging marked as manufactured to a DOT specification:	171.14.	
a. packaging meets DOT specification .....	.....	\$3,000.
b. packaging does not meet DOT specification .....	.....	\$5,000 to \$9,000.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
8. Failure to mark an overpack with a statement that the inside packages comply with prescribed specifications or standards when specification or standard packaging is required.	173.25(a)(4)	\$3,000.
9. Filling an IBC or a portable tank (DOT, UN, or IM) that is out of test and offering hazardous materials for transportation in that IBC or portable tank.	173.32(a), 180.352, 180.605.	
a. All testing overdue .....	.....	\$3,500 to \$7,000.
b. Only periodic (5 year) test overdue .....	.....	\$3,500.
c. Only intermediate periodic (2.5 year) tests overdue .....	.....	\$3,500.
10. Failure to provide the required outage in a portable tank that results in a release of hazardous materials.	173.32(f)(6)	\$6,000 to \$12,000.

Offeror Requirements—Specific hazardous materials

A. Cigarette Lighters: Offering for transportation an unapproved cigarette lighter, lighter refill, or similar device, equipped with an ignition element and containing fuel.	173.21(i)	\$7,500.
B. Class 1—Explosives:		
1. Failure to mark the package with the EX number for each substance contained in the package or, alternatively, indicate the EX number for each substance in association with the description on the shipping description.	172.320	\$1,200.
2. Offering an unapproved explosive for transportation:	.....	173.54,
a. Div. 1.3 and 1.4 fireworks meeting the chemistry requirements (quantity and type) of APA Standard 87–1.	173.56(b)	\$5,000 to \$10,000.
b. All other explosives (including forbidden) .....	.....	\$10,000 and up.
3. Offering a leaking or damaged package of explosives for transportation.	173.54(c)	\$10,000 and up.
4. Packaging explosives in the same outer packaging with other materials.	173.61	\$2,500 to \$5,000.
C. Class 7—Radioactive Materials:		
1. Failure to include required additional entries, or providing incorrect information for these additional entries.	172.203(d)	\$1,000 to \$3,000.
2. Failure to mark the gross mass on the outside of a package of Class 7 material that exceeds 110 pounds.	172.310(a)	\$800.
3. Failure to mark each package in letters at least 13 mm (½ inch) high with the words "Type A" or "Type B" as appropriate.	172.310(b)	\$800.
4. Placing a label on Class 7 material that understates the proper label category.	172.403	\$5,000.
5. Placing a label on Class 7 material that fails to contain (or has erroneous) entries for the name of the radionuclide(s), activity, and transport index.	172.403(g)	\$2,000 to \$4,000.
6. Failure to meet one or more of the general design requirements for a package used to ship a Class 7 material.	173.410	\$5,000.
7. Failure to comply with the industrial packaging (IP) requirements when offering a Class 7 material for transportation.	173.411	\$5,000.
8. Failure to provide a tamper-indicating device on a Type A package used to ship a Class 7 material.	173.412(a)	\$2,000.
9. Failure to meet the additional design requirements of a Type A package used to ship a Class 7 material.	173.412(b)–(i)	\$5,000.
10. Failure to meet the performance requirements for a Type A package used to ship a Class 7 material.	173.412(j)–(l)	\$8,400.
11. Offering a DOT specification 7A packaging without maintaining complete documentation of tests and an engineering evaluation or comparative data:	173.415(a), 173.461	
a. Tests and evaluation not performed .....	.....	\$8,400.
b. Complete records not maintained .....	.....	\$2,000 to \$5,000.
12. Offering any Type B, Type B(U), Type B(M) packaging that failed to meet the approved DOT, NRC or DOE design, as applicable.	173.416	\$9,000.
13. Offering a Type B packaging without holding a valid NRC approval certificate:	173.471(a).	
a. Never having obtained one .....	.....	\$3,000.
b. Holding an expired certificate .....	.....	\$1,000.
14. Failure to meet one or more of the special requirements for a package used to ship uranium hexafluoride.	173.420	\$10,800.
15. Offering Class 7 material for transportation as a limited quantity without meeting the requirements for limited quantity.	173.421(a)	\$4,000.
16. Offering a multiple-hazard limited quantity Class 7 material without addressing the additional hazard.	173.423(a)	\$500 to \$2,500.

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II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
17. Offering Class 7 low specific activity (LSA) materials or surface contaminated objects (SCO) with an external dose rate that exceeds an external radiation level of 1 rem/hr at 3 meters from the unshielded material.	173.427(a)(1)	\$6,000.
18. Offering Class 7 LSA materials or SCO as exclusive use without providing specific instructions to the carrier for maintenance of exclusive use shipment controls.	173.427(a)(6)	\$1,000.
19. Offering in excess of Type A quantity of a Class 7 material in a Type A packaging.	173.431	\$12,000.
20. Offering a package that exceeds the permitted limits for surface radiation or transport index.	173.441	\$10,000 and up.
21. Offering a package without determining the level of removable external contamination, or that exceeds the limit for removable external contamination.	173.443	\$5,000 and up.
22. Storing packages of radioactive material in a group with a total transport index more than 50.	173.447(a)	\$5,000 and up.
23. Offering for transportation or transporting aboard a passenger aircraft any single package or overpack of Class 7 material with a transport index greater than 3.0.	173.448(e)	\$5,000 and up.
24. Exporting a Type B, Type B(U), Type B(M), or fissile package without obtaining a U.S. Competent Authority Certificate or, after obtaining a U.S. Competent Authority Certificate, failing to submit a copy to the national competent authority of each country into or through which the package is transported.	173.471(d)	\$3,000.
25. Offering special form radioactive materials without maintaining a complete safety analysis or Certificate of Competent Authority.	173.476(a), (b)	\$2,500.
D. Class 2—Compressed Gases in Cylinders:		
1. Filling and offering a cylinder with compressed gas when the cylinder is out of test.	173.301(a)(6)	\$4,200 to \$10,400.
2. Failure to check each day the pressure of a cylinder charged with acetylene that is representative of that day's compression, after the cylinder has cooled to a settled temperature, or failure to keep a record of this test for 30 days.	173.303(d)	\$5,000.
3. Offering a limited quantity of a compressed gas in a metal container for the purpose of propelling a nonpoisonous material and failure to heat the cylinder until the pressure is equivalent to the equilibrium pressure at 130 °F, without evidence of leakage, distortion, or other defect.	173.306(a)(3), (h)	\$1,500 to \$6,000.

Manufacturing, Reconditioning, Retesting Requirements

A. Third-Party Packaging Certifiers (General):		
Issuing a certification that directs the packaging manufacturer to improperly mark a packaging (e.g., steel drum to be marked UN 4G).	171.2(e), 178.2(b), 178.3(a), 178.503(a).	\$500 per item.
B. Packaging Manufacturers (General):		
1. Failure of a manufacturer or distributor to notify each person to whom the packaging is transferred of all the requirements not met at the time of transfer, including closure instructions.	178.2(c)	\$2,500.
2. Failure to insure a packaging certified as meeting the UN standard is capable of passing the required performance testing.	178.601(b).	
a. Packing Group I (and § 172.504 Table 1 materials) .....	.....	\$10,800.
b. Packing Group II .....	.....	\$8,400.
c. Packing Group III .....	.....	\$6,000.
3. Certifying a packaging as meeting a UN standard when design qualification testing was not performed.	178.601(d).	
a. Packing Group I (and § 172.504 table 1 materials) .....	.....	\$10,800.
b. Packing Group II .....	.....	\$8,400.
c. Packing Group III .....	.....	\$6,000.
4. Failure to conduct periodic retesting on UN standard packaging (depending on length of time and Packing Group).	178.601(e)	\$2,000 to \$10,800.
5. Failure to properly conduct testing for UN standard packaging (e.g., testing with less weight than marked on packaging; drop testing from lesser height than required; failing to condition fiberboard boxes before design test):		
a. Design qualification testing	178.601(d)	\$2,000 to \$10,800.
b. Periodic retesting	178.601(e)	\$500 to \$10,800.
6. Marking, or causing the marking of, a packaging with the symbol of a manufacturer or packaging certifier other than the company that actually manufactured or certified the packaging.	178.2(b), 178.3(a), 178.503(a)(8).	\$7,200.
7. Failure to maintain testing records	178.601(l).	

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
a. Design qualification testing .....	.....	\$1,000 to \$5,000.
b. Periodic retesting .....	.....	\$500 to \$2,000.
8. Improper marking of UN certification	178.503	\$500 per item.
9. Manufacturing DOT specification packaging after October 1, 1994	171.14.	
that is not marked as meeting a UN performance standard.		
a. If packaging does meet DOT specification .....	.....	\$3,000.
b. If packaging does not meet DOT specification .....	.....	\$6,000 to \$10,800.
C. Drum Manufacturers & Reconditioners:		
1. Failure to properly conduct production leakproofness test on a new	178.604(b), (d),	
or reconditioned drum.	173.28(b)(2)(i).	
a. Improper testing .....	.....	\$2,000.
b. No testing performed .....	.....	\$3,000 to \$5,000.
2. Marking an incorrect registration number on a reconditioned drum ..	173.28(b)(2)(ii).	
a. Incorrect number .....	.....	\$800.
b. Unauthorized use of another reconditioner's number .....	.....	\$7,200.
3. Representing, marking, or certifying a drum as a reconditioned UN	173.28(c), (d)	\$6,000 to \$10,800.
standard packaging when the drum does not meet a UN standard.		
4. Representing, marking, or certifying a drum as altered from one UN	173.28(d)	\$500.
standard to another, when the drum has not actually been altered.		
D. IBC and Portable Tank Requalification:		
1. Failure to properly mark an IBC or portable tank with the most cur-	180.352(e),	\$500 per item.
rent retest and/or inspection information.	178.703(b),	
2. Failure to keep complete and accurate records of IBC or portable	180.605(k).	
tank retest and reinspection.	180.352(f), 180.605(l).	
a. No records kept .....	.....	\$4,000.
b. Incomplete or inaccurate records .....	.....	\$1,000 to \$3,000.
3. Failure to make reinspection and retest records available to a DOT	180.352(f), 49 U.S.C.	\$1,000.
representative upon request.	5121(b)(2).	
E. Cylinder Manufacturers & Rebuilders:		
1. Manufacturing, representing, marking, certifying, or selling a DOT	Various	\$7,500 to \$15,000.
high-pressure cylinder that was not inspected and verified by an ap-	.....
proved independent inspection agency.	.....	\$800.
2. Failure to have a registration number or failure to mark the registra-	.....
tion number on the cylinder.	.....
3. Marking another company's number on a cylinder	Various	\$7,200.
4. Failure to mark the date of manufacture or lot number on a DOT-39	178.65(j)	\$3,000.
cylinder.	.....
5. Failure to have a chemical analysis performed in the U.S. for a ma-	Various	\$5,000.
terial manufactured outside the U.S./failure to obtain a chemical	.....
analysis from the foreign manufacturer.	.....
6. Failure to meet wall thickness requirements	Various	\$7,500 to \$15,000.
7. Failure to heat treat cylinders prior to testing	Various	\$5,000 to \$15,000.
8. Failure to conduct a complete visual internal examination	Various	\$2,500 to \$6,200.
9. Failure to conduct a hydrostatic test, or conducting a hydrostatic	Various	\$2,500 to \$6,200.
test with inaccurate test equipment.	.....
10. Failure to conduct a flattening test	Various	\$7,500 to \$15,000.
11. Failure to conduct a burst test on a DOT-39 cylinder	178.65(f)(2)	\$5,000 to \$15,000.
12. Failure to have inspections and verifications performed by an in-	Various	\$7,500 to \$15,000.
spector.	.....
13. Failure to maintain required inspector's reports	Various.	
a. No reports at all .....	.....	\$5,000.
b. Incomplete or inaccurate reports .....	.....	\$1,000 to \$4,000.
14. Representing a DOT-4 series cylinder as repaired or rebuilt to the	180.211(a)	\$6,000 to \$10,800.
requirements of the HMR without being authorized by the Associate		
Administrator.		
F. Cylinder Requalification:		
1. Failure to remark as DOT 3AL an aluminum cylinder manufactured	173.23(c)	\$800.
under a former exemption or special permit.	.....
2. Certifying or marking as retested a nonspecification cylinder	180.205(a)	\$800.
3. Failure to have retester's identification number (RIN)	180.205(b)	\$4,000.
4. Failure to have current authority due to failure to renew a retester's	180.205(b)	\$2,000.
identification number (RIN).	.....
5. Failure to have a retester's identification number and marking an-	180.205(b)	\$7,200.
other RIN on a cylinder.	.....
6. Marking a RIN before successfully completing a hydrostatic retest ..	180.205(b)	\$800.
7. Representing, marking, or certifying a cylinder as meeting the re-	171.2(c), (e),	\$2,000 to \$6,000.
quirements of an exemption or special permit when the cylinder was	178.205(c), Applica-	
not maintained or retested in accordance with the exemption or spe-	ble Exemption or	
cial permit.	Special Permit.	
8. Failure to conduct a complete visual external and internal examina-	180.205(f)	\$2,100 to \$5,200.
tion.	

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II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
9. Failure to conduct visual inspection or hydrostatic retest	180.205(f) & (g)	\$4,200 to \$10,400.
10. Performing hydrostatic retesting without confirming the accuracy of the test equipment.	180.205(g)(3)	\$2,100 to \$5,200.
11. Failure to hold hydrostatic test pressure for 30 seconds or sufficiently longer to allow for complete expansion.	180.205(g)(5)	\$3,100.
12. Failure to perform a second retest, after equipment failure, at a pressure increased by the lesser of 10% or 100 psi (includes exceeding 90% of test pressure prior to conducting a retest).	180.205(g)	\$3,100.
13. Failure to condemn a cylinder when required (e.g., permanent expansion of 10% [5% for certain exemption or special permit cylinders], internal or external corrosion, denting, bulging, evidence of rough usage).	180.205(i)	\$6,000 to \$10,800.
14. Failure to properly mark a condemned cylinder or render it incapable of holding pressure.	180.205(i)(2)	\$800.
15. Failure to notify the cylinder owner in writing when a cylinder has been condemned.	180.205(i)(2)	\$1,000.
16. Failure to perform hydrostatic retesting at the minimum specified test pressure.	180.209(a)(1)	\$2,100 to \$5,200.
17. Marking a star on a cylinder that does not qualify for that mark	180.209(b)	\$2,000 to \$4,000.
18. Marking a "+" sign on a cylinder without determining the average or minimum wall stress by calculation or reference to CGA Pamphlet C-5.	173.302a(b)	\$2,000 to \$4,000.
19. Marking a cylinder in or on the sidewall when not permitted by the applicable specification.	180.213(b)	\$6,000 to \$10,800.
20. Failure to maintain legible markings on a cylinder	180.213(b)(1)	\$800.
21. Marking a DOT 3HT cylinder with a steel stamp other than a low-stress steel stamp.	180.213(c)(2)	\$6,000 to \$10,800.
22. Improper marking of the RIN or retest date on a cylinder	180.213(d)	\$800.
23. Marking an FRP cylinder with steel stamps in the FRP area of the cylinder such that the integrity of the cylinder is compromised.	Applicable Exemption or Special Permit.	\$6,000 to \$10,800.
24. Failure to maintain current copies of 49 CFR, DOT exemption or special permits, and CGA Pamphlets applicable to inspection, retesting, and marking activities.	180.215(a)	\$600 to \$1,200.
25. Failure to keep complete and accurate records of cylinder reinspection and retest.	180.215(b).	
a. No records kept .....	.....	\$4,000.
b. Incomplete or inaccurate records .....	.....	\$1,000 to \$3,000.
26. Failure to report in writing a change in name, address, ownership, test equipment, management, or retester personnel.	171.2(c) & (e), Approval Letter.	\$600 to \$1,200.

Carrier Requirements

A. Incident Notification:		
1. Failure to give immediate notification of a reportable hazardous materials incident.	171.15	\$3,000.
2. Failure to file a written hazardous material incident report within 30 days following an unintentional release of hazardous materials in transportation (or other reportable incident).	171.16	\$500 to \$2,500.
B. Shipping Papers:		
Failure to retain shipping papers for 375 days after a hazardous material (or 3 years for a hazardous waste) is accepted by the initial carrier.	174.24(b), 175.30(a)(2), 176.24(b), 177.817(f).	\$1,000.
C. Stowage/transportation Requirements:		
1. Transporting packages of hazardous material that have not been secured against movement.	Various	\$3,000.
2. Failure to properly segregate hazardous materials	Various	\$7,500 and up.
3. Transporting explosives in a motor vehicle containing metal or other articles or materials likely to damage the explosives or any package in which they are contained, without segregating in different parts of the load or securing them in place in or on the motor vehicle and separated by bulkheads or other suitable means to prevent damage.	177.835(i)	\$5,200.
4. Transporting railway track torpedoes outside of flagging kits, in violation of DOT-E 7991.	171.2(b) & (e)	\$7,000.
5. Transporting Class 7 (radioactive) material having a total transport index greater than 50.	177.842(a)	\$5,000 and up.
6. Transporting Class 7 (radioactive) material without maintaining the required separation distance.	177.842(b)	\$5,000 and up.
7. Failure to comply with requirements of an exemption or special permit authorizing the transportation of Class 7 (radioactive) material having a total transportation index of 50.	171.2(b) & (e).	

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
a. Failure to have the required radiation survey record	\$5,000.
b. Failure to have other required documents	\$500 each.
c. Other violations	\$5,000 and up.

III. CONSIDERATION OF STATUTORY CRITERIA

A. These guidelines are used by the Office of Hazardous Materials Safety (OHMS) in setting initial proposed penalties for hazmat violations. They indicate baseline amounts or ranges for probable violations frequently cited in enforcement reports and set forth general OHMS policy for considering statutory criteria.

B. The initial baseline determination partially considers the nature, extent, circumstances, and gravity of the alleged violation. That determination then is adjusted to consider all other evidence concerning the nature, extent, circumstances, and gravity of the alleged violation; degree of culpability; history of prior violations; ability to pay; effect of the penalty on ability to continue to do business; and such other matters as justice may require (a major component of which is corrective action taken by a respondent to prevent a recurrence of similar violations). In making a penalty recommendation, the baseline or range may be increased or decreased on the basis of evidence pertaining to these factors.

C. The following miscellaneous factors are used to implement one or more of the statutory assessment criteria.

IV. MISCELLANEOUS FACTORS AFFECTING PENALTY AMOUNTS

A. *Corrective Action*

1. A proposed penalty is mitigated for documented corrective action of alleged violations taken by a respondent. Corrective action may occur: (1) After an inspection and before a Notice of Probable Violation (NOPV) is issued; (2) on receipt of an NOPV; or (3) after receipt of an NOPV (possibly after it is solicited by an PHMSA attorney). In general, corrective action may reduce a penalty up to 25%. Mitigation may be taken into account in the referral memo or may be recommended prior to issuance of an Order by PHMSA's Chief Counsel.

2. The two primary factors in determining the penalty reduction are extent and timing of the corrective action. In other words, mitigation will be determined on the basis of how much corrective action was taken and when it was taken. Systemic action to prevent future violations is given greater consideration than action simply to remedy violations identified during the inspection.

3. Mitigation is applied to individual violations. Thus, in a case with two violations, if corrective action for the first violation is more extensive than for the second, the penalty for the first will be mitigated more than that for the second.

B. *Respondents That Re-Ship*

A shipper that reships materials received from another company, in the same packaging and without opening or altering the package, independently is responsible for ensuring that the shipment complies with Federal hazmat law, and independently may be subject to enforcement action if the package does not comply. Nevertheless, the reshipper is considered to have a lesser level of responsibility for compliance in those respects in which it reasonably relies on the compliance of the package as received. In most cases of this type, OHMS will discount the applicable baseline standard by about 25%. The specific knowledge and expertise of all parties must be considered in discounting for reliance on a prior shipper. This discount is applied before any consideration of mitigation based on corrective action.

C. *Penalty Increases for Multiple Counts*

Under the Federal hazmat law, 49 U.S.C. 5123(a), each violation of the HMR and each day of a continuing violation (except for violations pertaining to packaging manufacture or qualification) is subject to a civil penalty of up to \$50,000 or \$100,000 for a violation occurring on or after August 10, 2005. Absent aggravating factors, OHMS, in its exercise of discretion, ordinarily will apply a single penalty for multiple counts or days of violation. In a number of cases, particularly those involving shippers, an inspector may cite two or more similar packaging violations for different hazardous materials. For example, the inspector may cite the same marking violation for two or more packages. OHMS usually will consider those additional violations as counts of the same violation and will not recommend multiples of the same baseline penalty. Rather, OHMS usually will recommend the baseline penalty for a single violation, increased by 25% for each additional violation.

D. *Financial Considerations*

1. Mitigation is appropriate when the baseline penalty would (1) exceed an amount that the respondent is able to pay, or (2) have an

adverse effect on the respondent's ability to continue in business. These criteria relate to a respondent's entire business, and not just the product line or part of its operations involved in the violation(s). Beyond the overall financial size of the respondent's business, the relevant items of information on a respondent's balance sheet include the current ratio (current assets to current liabilities), the nature of current assets, and net worth (total assets minus total liabilities).

2. These figures are considered on a case-by-case basis. In general, however, a current ratio close to or below 1.0 means that the company may have difficulty in paying a large penalty, and may justify reduction of the penalty or an installment payment plan. A small amount of cash on hand representing limited liquidity, even with substantial other current assets (such as accounts receivable or inventory), may warrant a short-term payment plan. Respondent's income statement also will be reviewed to determine whether a payment plan is appropriate.

3. Many companies are able to continue in business for extended periods of time with a small or negative net worth, and many respondents have paid substantial civil penalties in installments even though net worth was negative. For this reason, negative net worth alone does not always warrant reduction of a proposed penalty or even, in the absence of factors discussed above, a payment plan.

4. In general, an installment payment plan may be justified where reduction of a proposed penalty is not, but the appropriateness of either (or both) will depend on the circumstances of the case. The length of a payment plan should be as short as possible, but the plan may consider seasonal fluctuations in a company's income if the company's business is seasonal (e.g., swimming pool chemical sales, fireworks sales) or if the company has documented specific reasons for current non-liquidity.

5. Evidence of financial condition is used only to decrease a penalty, and not to increase it.

E. Penalty Increases for Prior Violations

The baseline penalty presumes an absence of prior violations. If prior violations exist, generally they will serve to increase a proposed penalty. The general standards for increasing a baseline proposed penalty on the basis of prior violations are as follows:

1. For each prior civil or criminal enforcement case—25% increase over the pre-mitigation recommended penalty.

2. For each prior ticket—10% increase over the pre-mitigation recommended penalty.

3. A baseline proposed penalty will not be increased more than 100% on the basis of prior violations.

4. A case or ticket of prior violations initiated in a calendar year more than six years

before the calendar year in which the current case is initiated normally will not be considered in determining a proposed penalty for the current violation(s).

F. Penalty Increases for Use of Expired Special Permits

Adjustments to the base line figures for use of expired special permits can be made depending on how much material has been shipped during the period between the expiration date and the renewal date. If the company previously has been found to have operated under an expired special permit, the penalty is normally doubled. If the company has been previously cited for other violations, the penalty generally will be increased by about 25%.

[Amdt. 107-33, 60 FR 12141, Mar. 6, 1995, as amended by Amdt. 107-40, 62 FR 2972, 2977, Jan. 21, 1997; 62 FR 51556, Oct. 1, 1997; 65 FR 58618, Sept. 29, 2000; 66 FR 45180, Aug. 28, 2001; 68 FR 52848, 52855, Sept. 8, 2003; 69 FR 54044, Sept. 7, 2004; 70 FR 56090, Sept. 23, 2005; 70 FR 73162, Dec. 9, 2005; 71 FR 8487, Feb. 17, 2006]

Subpart E—Designation of Approval and Certification Agencies

§ 107.401 Purpose and scope.

(a) This subpart establishes procedures for the designation of agencies to issue approval certificates and certifications for types of packagings designed, manufactured, tested, or maintained in conformance with the requirements of this subchapter, subchapter C of this chapter, and standards set forth in the United Nations (U.N.) Recommendations (Transport of Dangerous Goods). Except for certifications of compliance with U.N. packaging standards, this subpart does not apply unless made applicable by a rule in subchapter C of this chapter.

(b) The Associate Administrator may issue approval certificates and certifications addressed in paragraph (a) of this section.

[Amdt. 107-31, 50 FR 10062, Mar. 13, 1985, as amended by Amdt. 107-23, 56 FR 66157, Dec. 20, 1991; 66 FR 45377, Aug. 28, 2001]

§ 107.402 Application for designation as an approval or certification agency.

(a) Any organization or person seeking designation as an approval or certification agency shall apply in writing to the Associate Administrator for