

for which the Associate Administrator exercises enforcement responsibility, it shall report it to the Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. If appropriate, the Chief Counsel refers the report to the Department of Justice 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 exemption, or order issued thereunder, for which the Office of Chief Counsel exercises enforcement responsibility, the Administrator, RSPA, 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 can be completed, the Administrator, RSPA, 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 January 18, 1995) 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

Violation description	Section or cite	Baseline assessment
PART 107—REQUIREMENTS		
Failure to register as a carrier or shipper of hazardous material	107.608	\$1,000 +, \$500 each add'l year.
PART 171—REQUIREMENTS		
Failure to give immediate telephone notice of a reportable hazardous materials incident.	171.15	\$3,000.

Violation description	Section or cite	Baseline assessment
Failure to file a DOT 5800.1 Hazardous Materials Incident Report within 30 days following an unintentional release of hazardous materials in transportation.	171.16	\$500 to \$2,500.
PART 172—REQUIREMENTS		
Shipping Papers (§ 172.200—172.205):		
Failure to execute a shipping paper for a shipment of hazardous materials	172.201	\$3,000 to \$6,000.
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.
Failure to include a proper shipping name in the shipping description or using an incorrect proper shipping name.	172.202	\$800 to \$1,600.
Failure to include a hazard class/division number in the shipping description.	172.202	\$1,000 to \$2,000.
Using an incorrect hazard class/identification number	172.202	
—that does not affect compatibility requirements		\$800.
—that affects compatibility requirements		\$3,000 to \$6,000.
Failure to include an identification number in the shipping description	172.202	\$1,000 to \$2,000.
Using an incorrect identification number	172.202	
—that does not change the response information		\$800.
—that changes the response information		\$3,000 to \$6,000.
Using a shipping description that includes additional unauthorized information (extra or incorrect words).	172.202	\$800.
Using a shipping description not in required sequence	172.202	\$500.
Using a shipping description with two or more required elements missing or incorrect.	172.202	
—such that the material is misdescribed		\$3,000.
—such that the material is misclassified		\$6,000.
Failure to include the total quantity of hazardous material covered by a shipping description.	172.202(c)	\$400.
The letters "RQ" are not used in the shipping description to identify materials that are hazardous substances.	172.203(c)(2)	\$500.
Using a shipping description for Class 7 (radioactive) material that fails to contain the required additional entries, or contains incorrect information for these additional entries.	172.203(d)	\$2,000 to \$4,000.
Failure to include a required technical name in parentheses for a listed generic or "nos" material.	172.203(k)	\$1,000.
Failure to list an exemption number in association with the shipping description.	172.203(a)	\$800.
Failure to include the required shipper's certification on a shipping paper ...	172.204(a)	\$1,000.
Failure to execute the required shipper's certification on a shipping paper	172.204	\$800.
Emergency Response Information Requirements (§ 172.600—172.604):		
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.
Package Marking Requirements (§ 172.300—172.338):		
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.
Failure to mark the identification number on a package	172.301(a)	\$1,000 to \$2,000.
Marking a package with an incorrect identification number	172.301(a)	
—that does not change the response information		\$800.
—that changes the response information		\$3,000 to \$6,000.
Failure to mark the proper shipping name and identification number on a package.	172.301(a)	\$3,000 to \$6,000.
Marking a package with an incorrect shipping name and identification number.	172.301(a)	
—that does not change the response information		\$1,500 to \$3,000.
—that changes the response information		\$3,000 to \$6,000.
Failure to include the required technical name(s) in parentheses for a listed generic or "no" entry.	172.301(c)	\$1,000.
Failure to mark a package containing liquid hazardous materials with required orientation marks.	172.312	\$2,500 to \$3,500.

Violation description	Section or cite	Baseline assessment
Package Labeling Requirements (§ 172.400–172.450):		
Failure to label a package	172.400	\$5,000.
Placing a label that represents a hazard other than the hazard presented by the hazardous material in the package.	172.400	\$5,000.
Placing a label on a package that does not contain a hazardous material ..	172.401(a)	\$800.
Placing a label on Class 7 (radioactive) material that understates the proper label category.	172.403	\$5,000.
Placing a label on Class 7 (radioactive) 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.
Placing a label not conforming to size requirements on a package	172.407(c)	\$800.
Placing a label on a different surface of the package than, or far away from, the proper shipping name.	172.406(a)	\$800.
Placing a label that does not meet color specification requirements on a package (depending on the variance).	172.407(d)	\$600 to \$2,500.
Failure to place a required subsidiary label on a package	172.402	\$500 to \$2,500.
Failure to provide an appropriate class or division number on a label	172.411	\$2,500.
Placarding Requirements (§ 172.500–172.560):		
Failure to properly placard a freight container or vehicle containing hazardous materials when table 1 is applicable.	172.504	\$1,000 to \$9,000.
Failure to properly placard a freight container or vehicle containing hazardous materials when table 2 is applicable.	172.504	\$800 to \$7,500.
Training Requirements (§ 172.700–172.704):		
Failure to train hazmat employees in the three required areas of training ...	172.702	
—more than 10 hazmat employees		\$2,400 and up.
—10 hazmat employees or less		\$1,500 and up.
Failure to train hazmat employees in any one of the three required areas of training.	172.702	
—more than 10 hazmat employees		\$800 and up.
—10 hazmat employees or less		\$500 and up.
Failure to maintain training records	172.704.	
—more than 10 hazmat employees		800 and up.
—10 hazmat employees or less		\$500 and up.
PART 173—REQUIREMENTS		
Overpack Requirements (§ 173.25)		
Failure to mark an overpack with a statement indicating that the inside packages comply with prescribed specifications when specification packaging is required.	173.25(a)(4)	\$3,000.
Reconditioner Requirements (§ 173.28):		
1. Representing, marking, or certifying a drum as a reconditioned UN standard packaging, when the drum did not meet a UN standard.	173.28(c), (d)	\$6,000 to \$10,800.
2. Marking an incorrect registration number on a reconditioned packaging	173.28(b)(2)(ii)	
a. Incorrect number		\$800.
b. Use of another reconditioner's number		\$7,200.
3. Failure to properly conduct alternate leakage test	173.28(b)(2)(i)	
a. Improper test		\$2,000.
b. No test at all		\$4,000.
4. Representing, marking, or certifying a drum as altered from one standard to another, when the drum had not actually been altered.	173.28(d)	\$500.
Representing, marking, or certifying a drum as altered from one standard to another, when the drum had not actually been altered.	173.28(d)	\$500.
Portable and IM Tank Requirements (§§173.32(e), 173.32c, 173.315)		
Offering hazardous materials for transportation in a DOT specification or exemption portable tank which is out of test.	173.32(a)(1), 173.315(a), Applicable Exemption.	\$3,500 to \$7,000.
Offering an IM portable tank for transportation that has not been hydrostatically tested within the last 2½ years per 173.32b(a).	173.32c(c)	\$3,500.
Offering an IM portable tank for transportation that has not been visually inspected in last five years per 173.32b(b).	173.32c(c)	\$3,500.
Offering an IM portable tank for transportation that has not been visually or hydrostatically tested as required, or failing to remove the safety relief valves during testing.	173.32c(c)	\$7,000.
Offering a hazardous material for transportation in an IM portable tank equipped with bottom outlets, when the material contained is prohibited from being offered in this type of packaging.	173.32c(g)	
—Packing Group II		\$7,000.
—Packing Group III		\$5,000.
Failure to provide the required outage for a shipment of hazardous materials, that results in the release of hazardous materials.	173.32c(k)	\$6,000 to \$12,000.
Offering a hazardous material for transportation in an DOT, exemption, or IM portable tank which fails to bear markings that it has been properly retested.	173.32(e)(3), 173.32b(d).	\$3,000.

Violation description	Section or cite	Baseline assessment
Cylinder Retesters (§§173.23, 173.34, and 173.302):		
Failure to remark as DOT 3AL an aluminum cylinder manufactured under a former exemption.	173.23(c)	\$600.
Certifying or marking as retested a nonspecification cylinder	173.34	\$800.
Marking a cylinder in or on the sidewall area when not permitted by the applicable specification.	173.34(c)(1)	\$6,000 to \$10,800.
Failure to maintain legible markings on a cylinder	173.34(c)	\$800.
Failure to perform hydrostatic retesting at the minimum of 5/3 times the service pressure, or at the minimum specified test pressure.	173.34(e)	\$2,100 to \$5,200.
Failure to conduct a complete visual external and internal examination	173.34(e)(3)	\$2,100 to \$5,200.
Failure to have a retester's identification number (RIN)	173.34(e)(2)(i)	\$4,000.
Failure to have current authority due to failure to renew a retester's identification number.	173.34(e)(2)(i)	\$2,000.
Failure to have a retester's identification number and marking another RIN on a cylinder.	173.34(e)(2)(i)	\$7,200.
Marking a RIN before successfully completing a hydrostatic retest	173.34(e)(1)(ii)	\$800.
Requalifying a DOT cylinder without performing the visual inspection or hydrostatic retest.	173.34(e)(1)(ii)	\$4,200 to \$10,400.
Performing hydrostatic retesting without demonstrating the accuracy of the testing equipment.	173.34(e)(4)	\$2,100 to \$5,200.
Failure to hold hydrostatic test pressure for 30 seconds or sufficiently longer to allow for complete expansion.	173.34(e)(4)	\$3,100.
Failure to perform a second retest, after equipment failure, at a pressure of 10% more or 100 psi more, whichever is less (includes exceeding 90% of test pressure prior to conducting a retest).	173.34(e)(4)	\$3,100.
Failure to condemn a cylinder with permanent expansion of 10% or greater (5% for certain exemption cylinders); failure to condemn cylinders with evidence of internal or external corrosion, denting, bulging, or rough usage.	173.34(e)(6)	\$10,000.
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	\$6,000 to \$10,800.
Failure to keep complete and accurate records of cylinder reinspection and retest.		
—No records kept		\$4,000.
—Incomplete or inaccurate records	173.34(e)(8)	\$1,000 to \$3,000.
Improper marking of the RIN or retest date on a cylinder	173.34(e)(7)	\$800
Marking a DOT 3HT cylinder with a steel stamp other than a low-stress steel stamp.	173.34(e)(15)	\$6,000 to \$10,800.
Marking a "+" sign on a cylinder without determining the average or maximum wall stress, by calculation or reference to CGA Pamphlet C–5.	173.302(c)(3)	\$3,000 to \$4,000.
Representing, marking, or certifying a cylinder as meeting the requirements of an exemption, when the cylinder was not maintained or retested in accordance with the exemption.	171.2(c), Applicable Exemption.	\$2,000 to \$6,000.
Rebuilder Requirements (§173.34):		
Representing a DOT–4 series cylinder as meeting the requirements of the Hazardous Materials Regulations without being authorized to do so by the Associate Administrator for Hazardous Materials Safety.	173.34(l)	\$6,000 to \$10,800.
Offeror Requirements (General):		
Offering a hazardous material for transportation in an unauthorized non-UN standard or nonspecification packaging (includes the failure to comply with the terms of an exemption authorizing the use of a nonstandard or nonspecification packaging).	Various	
—Packing Group I (includes §172.504 table 1 materials)		\$9,000.
—Packing Group II		\$7,000.
—Packing Group III		\$5,000.
Offering a hazardous material for transportation in a packaging that has successfully been tested to an applicable UN standard, but is not marked with the required UN marking.	178.3(a), 178.503(a) ..	\$3,600.
Offering a hazardous material for transportation in a packaging that leaks during conditions normally incident to transportation.	173.24(b)	
—Packing Group I (includes §172.504 table 2 materials)		\$12,000.
—Packing Group II		\$9,000.
—Packing Group III		\$6,000.
Overfilling a package so that the effectiveness is substantially reduced	173.24(b)	
—Packing Group I (includes §172.504 table 1 materials)		\$9,000.
—Packing Group II		\$6,000.
—Packing Group III		\$3,000.
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	
—packaging meets DOT specification		\$3,000.
—packaging does not meet DOT specification		\$5,000 to \$9,000.

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Violation description	Section or cite	Baseline assessment
Offeror Requirements (Class 1—Explosives):		
Failing to mark the "EX" approval number on a package containing an explosive.	172.320	\$1,200.
Offering an unapproved explosive for transportation	173.54 and 173.56(b)	
—Div 1.3 & 1.4 fireworks meeting the chemistry requirements (both quantity and type) of APA Standard 87-1.	.....	\$5,000 to \$10,000.
—all other explosives (including forbidden explosives) .....	.....	\$10,000 to \$27,500.
Offering a leaking or damaged package of explosives for transportation	173.54(c)	\$10,000 to \$27,500.
Offeror Requirements (Class 7—Radioactive Materials):		
1. 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.
2. Offering a Type B packaging without holding a valid NRC approval certificate.	173.471(a)	
a. Never having obtained one .....	.....	\$2,500.
b. Holding an expired certificate .....	.....	\$1,000.
3. Offering a limited quantity of radioactive materials without marking the inner (or single) packaging "Radioactive".	173.421(a)(4)	\$5,000 and up.
4. Offering low specific activity (LSA) radioactive materials consigned as exclusive use without providing instructions for maintenance of exclusive use shipment controls.	173.427(a)(6)	\$800.
5. Offering a package that exceeds the permitted limits for surface radiation or transport index.	173.441	\$10,000 and up.
6. 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.
7. Storing packages of radioactive material in a group with a total transport index more than 50.	173.447(a)	\$5,000 and up.
8. Offering special form radioactive materials without maintaining a complete safety analysis or Certificate of Competent Authority.	173.476(a), (b)	\$2,500.
Offeror Requirements (Cylinders):		
Offering a compressed gas for transportation in a cylinder that is out of test.	173.301(c)	\$4,200 to \$10,400.
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 at least 30 days.	173.303(d)	\$5,000.
Offering a limited quantity of a compressed gas in a metal container for the purpose of propelling a nonpoisonous material and failing 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.

PART 178—REQUIREMENTS

Third-Party Packaging Certifiers (General):		
1. 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.
Manufacturers (General):		
1. 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 (includes Section 172.504 table 1 materials) .....	.....	\$10,800.
b. Packing Group II .....	.....	\$8,400.
c. Packing Group III .....	.....	\$6,000.
2. Certifying a packaging as meeting a UN standard when design qualification testing was not performed.	178.601(d)	
a. Packing Group I (includes Section 172 504 table 1 materials) .....	.....	\$10,800.
b. Packing Group II .....	.....	\$8,400.
c. Packing Group III .....	.....	\$6,000.
3. 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.
4. 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.
5. 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.
6. Failure to maintain testing records	178.601(1)	
a. Design qualification testing .....	.....	\$1,000 to \$5,000.

Violation description	Section or cite	Baseline assessment
b. Periodic retesting .....	.....	\$500 to \$2,000.
7. Improper marking of UN certification	178.503	\$500 per item.
8. Manufacturing DOT specification packaging after October 1, 1994 that is not marked as meeting a UN performance standard.	171.14	
a. If packaging does meet DOT specification .....	.....	\$3,000.
b. If packaging does not meet DOT specification .....	.....	\$6,000 to \$10,800.
Manufacturing Requirements—Drums:		
1. Failure to properly conduct production leakproofness test.		
a. Improper testing	178.604(b)(1)	\$2,000.
b. No testing performed	173.28	\$2,000 to \$10,800.
Manufacturing Requirements—Cylinders:		
1. Manufacturing, representing, marking, certifying, or selling a DOT high-pressure cylinder that was not inspected and verified by an approved independent inspection agency.	Various	\$7,500 to \$15,000.
2. Failure to have a registration number or failure to mark the registration number on the cylinder.	Various	\$800.
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 cylinder.	178.65	\$3,000.
5. Failure to have a chemical analysis performed in the US for a material manufactured outside the US/failure to obtain a chemical analysis from the foreign manufacturer.	Various	\$5,000.
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 test with inaccurate test equipment.	Various	\$2,500 to \$6,200.
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 inspector	Various	\$7,500 to \$15,000.
13. Failure to maintain a required inspector's reports	Various	
a. No reports at all .....	.....	\$5,000.
b. Incomplete or inaccurate reports .....	.....	\$1,000 to \$4,000.
Other Requirements		
Carrier Requirements:		
Transporting packages of hazardous materials that have not been secured against movement within the vehicle.	177.834(a) & (g)	\$3,000.
Transporting explosives in a motor vehicle containing metal or other articles or materials likely to damage such 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 such damage.	177.835(i)	\$5,200.
Transporting railway track torpedoes outside of flagging kits, in violation of E–7991.	171.2(b)	\$7,000.
Transporting Class 7 (radioactive) material having a total transport index more than 50.	177.842(a)	\$5,000 and up.
Transporting Class 7 (radioactive) material without maintaining the required separation distance.	177.842(b)	\$5,000 and up.
Failing to comply with requirements of an exemption authorizing the transportation of Class 7 (radioactive) material having a total transport index more than 50.	171.2(b)	
—failure to have the radiation survey record required by ¶¶ 7(f), 8(b)(3).	.....	\$5,000.
—failure to have other accompanying documents required by ¶ 8(b) ...	.....	\$500 each.
—other violations of ¶¶ 7 and 8 .....	.....	\$5,000 and up.
Exemptions:		
Offering or transporting hazardous materials, or otherwise performing a function, covered by an exemption after expiration of the exemption.	171.2(a), (b), (c), Various.	\$1,000 + \$500 each add'l year.

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 RSPA 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 RSPA'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. 5213(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 \$25,000 (\$27,500 for a violation occurring after January 21, 1997). 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

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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

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

- a. One prior case—25% increase over the pre-mitigation recommended penalty
- b. Two prior cases—50% increase over the pre-mitigation recommended penalty
- c. Three prior cases—75% increase over the pre-mitigation recommended penalty
- d. Four or more prior cases—100% increase over the pre-mitigation recommended penalty

2. A case of prior violations closed more than five years previously normally will not be considered in determining a proposed penalty.

F. Penalty Increases for Use of Expired Exemptions

Adjustments to the base line figures for use of expired exemptions 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 exemption, 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]

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 re-

quirements 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 Hazardous Materials Safety (DHM-32), Department of Transportation, 400 Seventh Street, SW., Washington DC 20590-0001. Each application must be signed and certified to be correct by the applicant or, if the applicant is an organization, by an authorized officer or official representative of the organization. Any false statement or representation, or the knowing and willful concealment of a material fact, may subject the applicant to prosecution under the provisions of 18 U.S.C. 1001, result in the denial or termination of a designation.

(b) Each application for designation must be in English and include the following information:

(1) Name and address of the applicant, including place of incorporation if a corporation. In addition, if the applicant is not a resident of the United States, the name and address of a permanent resident of the United States designated in accordance with § 107.7 to serve as agent for service of process.

(2) If the applicant's principal place of business is in a country other than the United States, a copy of the designation from the Competent Authority of that country delegating to the applicant an approval or designated agency authority for the type of packaging for which a DOT designation is