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August 16, 1993

Office of the Chief Counsel
Federal Highway Administration
Room 4232, HCC-10
400 Seventh Street, S.W.
Washington, D.C. 20590

Re: FHWA Docket No. MC-92-4

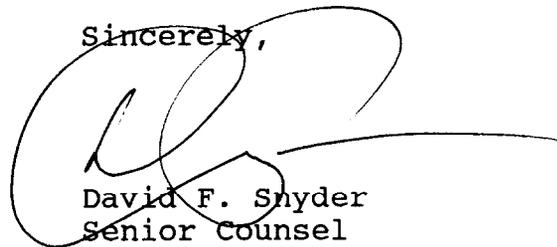
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LEOS, REGS. DIV.

Dear Docket Clerk:

FHWA-97-2180-41

Please find for filing the comments of the American Insurance Association on the above referenced matter.

Sincerely,



David F. Snyder
Senior Counsel

FHWA DOCKET MC-92-4-43
PAGE 1 OF 5

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Comments of the American Insurance Association on the Notice of Proposed Rulemaking of the Department of Transportation, Federal Highway Administration, 49 CFR part 397 [FHWA Docket No. MC-92-4] RIN 2125-AC78; Federal Motor Carrier Safety Regulations; Transportation of Hazardous Materials

The American Insurance Association represents 250 insurers which, in combination, provide nearly one-third of the commercial automobile insurance coverage in the United States. These insurers are committed to reducing death, injuries and damage on our highways and have long supported highway safety efforts, including many measures concerning commercial motor vehicles. While we support a permit program for hazardous materials haulers, we do not believe that any increases in financial responsibility limits are needed or authorized.

Increases In Financial Responsibility Mandates Could Have A Devastating Impact On Business, Insurers Or Both

The rule apparently mandates higher financial responsibility limits for many businesses and individuals -- up to \$5 million. See 58 Fed. Reg. 33420. This will result in severe financial strain for the affected businesses and individuals, despite the fact that no such increases in financial responsibility limits are authorized or required by law. Any such increases would be arbitrary and capricious because there is nothing in the record establishing the need for them.

Here is an example from one AIA member company of the insurance rate increases that would result from increasing financial responsibility limits from \$1 million to \$5 million:

RATE EFFECTS OF INCREASING INSURANCE LIMITS FROM \$1 MILLION TO \$5 MILLION

<u>State and Type of Vehicle</u>	<u>% Increase</u>
Oregon, New Jersey, Ohio, South Dakota	
- light & medium trucks	25.2%
- heavy trucks	40.5%
- extra heavy trucks	57.0%
New York	
- light & medium trucks	62.7%
- heavy trucks	70.9%
- extra heavy trucks	70.9%
Pennsylvania	
- light & medium trucks	55.1%
- heavy trucks	50.9%
- extra heavy trucks	51.1%

In fact, the potential size of the economic impact on some haulers is recognized by the so-called "**phase-in**" of the requirements for increased financial responsibility for haulers of explosives Class A and/or Class B. Yet, this offers little real relief on the short term, as it is virtually impossible for an insurer to know how much hazardous material is being carried on each and every trip, and no relief thereafter.

In addition to the extreme negative financial impact on businesses and individuals who must pay for the increased financial responsibility limits, is the adverse impact on insurers, whose assets now will be exposed up to \$5 million every time many more vehicles are on the highway, when the financial exposure may be much less today. An expansion of policyholders requiring these higher limits will create a serious financial strain on insurers, especially smaller regional insurers of farmers or businesses, which may not have the surplus to support the increased loss exposure. This effect is aggravated by the fact that insurers are required to write policies involuntarily through state mandated assigned risk pools which provide coverage to virtually all applicants, at the limits required by law, regardless of how unsafe the operator.

Even assuming that the limits are increased, the proposed rule is ambiguous as to which coverages are required and whether an MCS-90 would be necessary. The proposed rule is also ambiguous on how compliance with the new financial responsibility limits will be monitored -- by the U.S. Department of Transportation, the states, or self-certification?

Any Increase In Financial Responsibility Limits Will Not Carry Out The Public Policies Underlains The Act And The Proposed Rule

The purposes set forth in 49 U.S.C. app. §1801 note pertain to safety. The Notice of Proposed Rulemaking also states that the rule "**would** increase regulatory compliance, enhance motor carrier safety, and promote the safe transportation of the designated hazardous materials," 58 Fed. Reg. 33418. These purposes are not furthered by requiring higher limits of financial responsibility.

Increasing financial responsibility limits will do nothing to improve safety. Safety is a matter of prevention, not paying for the cost of an accident after it has occurred.

Insurers are also not able to "**police**" motor carrier safety because under state laws creating involuntary markets, insurers are required to insure virtually all applicants, regardless of how unsafe. Thus, in no real way does increasing financial responsibility limits contribute to safety.

Any Increase In Financial Responsibility Limits Mandated
By The Proposed Rule Is Unauthorized

The proposed rule is issued under the authority of Sections 8 and 15 of the Hazardous Materials Transportation Act as amended by the Hazardous Materials Transportation Uniform Safety Act of 1990, (49 U.S.C. app. 1801 et sea.). While the law does authorize the requirement of **"safety permits"** for the haulers of certain hazardous materials, the law does not expressly authorize any increase in financial responsibility limits. Authority to increase financial responsibility limits should be express, not implied, because of the severe economic ramifications for motor carriers and insurers.

Nonetheless, the proposed rule requires, as admitted in the Notice of Proposed Rulemaking at 58 Fed. Reg. 33420, that **"Many . . . motor carriers will be required to obtain financial responsibility coverage in the amount of \$5 million."** This means that many haulers of class A and/or class B explosives (and possibly some haulers of the other 3 specific types of hazardous materials) will be required under the rule to obtain new and much more expensive financial responsibility, e.g. insurance. If this is indeed the case, it is utterly without legal authority and/or support in the record.

The statute only allows consideration of **"applicable"** federal minimum financial responsibility laws and regulations. See 49 U.S.C. app. **§1805(d)(2)** and (4). This language does not give the Secretary the authority to apply higher financial responsibility limits other than as **"applicable"** under the statutes. Such a higher limit is not **"applicable"** under the statutes and the Secretary cannot by regulation make applicable what the law does not make applicable.

To the extent that this rule would have the impact of increasing mandatory financial responsibility for some motor carriers, this rule is not authorized by statute, and is thus unlawful. In the absence of express statutory authority, there is no legal basis for increasing the financial responsibility limits of any motor carrier as these rules apparently would. Further, such increases in financial responsibility limits would also be arbitrary and capricious, in that there is no record supporting the need for any increases in financial responsibility limits.

There is no inherent need to increase financial responsibility mandates as part of the permit program. A prevention-oriented safety permit system could function quite well without any increase in financial responsibility limits.

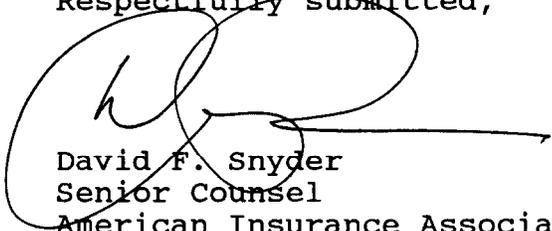
Conclusion

We respectfully object to the proposed rule, to the extent that it increases the financial responsibility limits on haulers. Such increases are not a necessary part of the **permit** system. Any increases in financial responsibility are also unsupported by the law and unsupported by anything in the record. They are thus arbitrary and capricious, and an abuse of discretion.

Increasing financial responsibility limits has no impact on safety while it constitutes a severe financial drain on motor carriers and insurers. Any increases in financial responsibility limits will not carry out any of the public policies for creating the permitting system under the statute or rules (e.g., to prevent accidents, injury and damage in the first place).

Increases in financial responsibility requirements could have a devastating impact on some businesses and some insurers. Such a result would benefit no one but would unnecessarily harm many parties.

Respectfully submitted,



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