Déjà Vu All Over Again: Transportation Security Regulations — The Emergence of Re-regulation and How to Deal With It

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I. INTRODUCTION

As we all know, the Interstate Commerce Commission ("ICC") was allowed to sunset almost a decade ago. Airlines were deregulated long before that. The ostensibly glorious age of deregulation was upon the transportation industry. Those in the transportation business, and their legal counsel, worked to adjust to the new era. However, then came September 11, 2001. Events of that day spawned the Transportation Security Administration ("TSA"), and a heightened awareness of security regulations was felt, but specifically in the transportation sector.[1] Following September 11, 2001, an array of regulations have been gestated, circulated and enacted. Some of the regulations have taken longer to come into effect than others. However, there are now multiple security regulations that have been implemented, and that are impacting the transportation industry on a daily basis. This article collects some of the more recently promulgated transportation statutes, rules, regulations, and ordinances; summarizes the status of the regulations and their implementation; and offers suggestions as to how shippers, carriers and

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1. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597, 597-602 (2001) (codified at 49 U.S.C. § 114).

intermediaries can cope with legal issues, or prevent practical problems that may emanate from the implementation of these regulations.[2]

II. TSA Hazmat Driver Registration, Fingerprints and Background Checks

A. Background of Implementation and Practicalities

A regulation that has been percolating since the enactment of the Patriot Act[3] is the TSA's plan to fingerprint[4] and conduct background checks on drivers of hazardous materials ("hazmat").[5] Although the TSA previously conducted name based security threat assessments on all 2.7 million hazmat drivers,[6] the current plan is more involved, requiring fingerprints to allow a search of FBI criminal records and an immigration status check.[7] The TSA's plan went into effect on January 31, 2005 for drivers seeking to obtain a hazmat license for the first time.[8] The program's second phase began on May 31, 2005.[9] As of that date, all commercial drivers who were renewing or transferring hazmat endorsements to other states were required to submit to a fingerprint background check.[10] The regulation emanates from the Patriot Act's concern for the security threat assessments of transportation workers generally, and hazmat endorsement applicants specifically.[11]

The American Trucking Association ("ATA") had sought to urge the TSA to have all fifty states use the TSA's contractor for the collection and transmission of fingerprints.[12] The TSA found that this requirement would place unreasonable restrictions upon the states, and would not significantly reduce costs.[13] The TSA also opted not to create a federal fin-

2. This article was written in the spring of 2005. As such, the regulations discussed herein were recent as of that time, but may not be considered recent at the date of publication.

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter "Patriot Act"].

4. 49 C.F.R. § 1572.5(b) (2005).

5. Press Release, Transp. Sec. Admin., TSA Begins Background Checks on Hazmat Drivers (Jan. 31, 2005), *available at* http://www.tsa.gov/public/display?content=09000519800f9bec (last visited Apr. 25, 2006).

6. *Id.*

7. *Id.*

8. 49 C.F.R. § 1572.13(b).

9. *Id.*

10. *Id.* § 1572.13(c)(2).

11. *See* Transp. Sec. Admin., Hazmat Threat Assessment Program, *available at* http://www.tsa.gov/public/display?content=0900051980114cb1 (last visited Apr. 25, 2006).

12. Letter from Justin P. Oberman, Assistant Administrator, Transp. Sec. Admin., to Richard D. Holcomb, Gen. Counsel, Am. Trucking Ass'ns, *available at* http://www.truckline.com/issues/governmentpolicy/hazmat/TSAdenial (select "TSA's response) (last visited Apr. 25, 2006).

13. *Id.*

gerprint collection system because several states indicated to the TSA that they had initiated procurement actions and legislative changes to reprogram computerized licensing systems, obtain legal authority to collect fees and fingerprints, and purchase fingerprint collection equipment.[14] The TSA did not want to penalize these states for their early efforts.[15] The TSA also recognized that driver licensing had always been an inherent "state function," and the TSA wanted the states to have flexibility in this regard.[16]

The TSA chose a process by which the states could conduct their own collection process or use the TSA's agent.[17] Thirty-three states and the District of Columbia elected to use the TSA's agent, Integrated Biometric Technology ("IBT"), while the other seventeen states elected to conduct their own background checks.[18] The average fee for the applicant using IBT is $94.00.[19] The application fees in other non-IBT states varies.[20] IBT is also contemplating asking the TSA if it may open offices in truck stops around the nation.

The fingerprinting program for new hazmat drivers began on January 31, 2005.[21] There were complaints about a lack of fingerprint sites in some of the most populous states. For example, the TSA lists six locations for fingerprinting in California, two in Georgia, and just one in Massachusetts, Michigan, Montana, Nebraska, Nevada, and Oregon.[22] IBT stated that it would add more sites before the May 31, 2005 deadline.

B. The Regulatory Framework

The rule in question is located at title 49, section 1572 of the Code of Federal Regulations. 49 C.F.R. § 1572.13, entitled "State responsibilities for issuance of hazardous materials endorsement," states, in pertinent part, that beginning on January 31, 2005, "[n]o state may issue or renew a hazardous materials endorsement for a CDL [commercial driver's li-

14. *Id.*

15. *Id.*

16. *Id.*

17. Am. Trucking Ass'ns, TSA Contractor Selects HazMat Fingerprint Collection Sites, http://www.truckline.com/issues/governmentpolicy/hazmat/Fingerprinting (last visited Apr. 25, 2006).

18. *Id.*

19. Am. Trucking Ass'ns, HazMat Background Checks Begin [hereinafter HazMat Background Checks Begin], http://www.truckline.com/issues/governmentpolicy/hazmat/HazMat BackgroundChecks (last visited Apr. 25, 2006).

20. Am. Trucking Ass'ns, State Implementation of HME Background Check Requirements, http://www.truckline.com/issues/governmentpolicy/hazmat/HazMatBackgroundChecks (select "link") (last visited Apr. 25, 2006).

21. HazMat Background Checks Begin, *supra* note 19.

22. Am. Trucking Ass'ns, Fingerprint Locations by State, http://www.truckline.com/issues/governmentpolicy/hazmat/HazMatBackgroundChecks (last visited Apr. 25, 2006).

cense] unless the State receives a Determination of No Security Threat from TSA."[23] The rule stipulates standards for security threat assessments. The TSA is to determine that an individual does not pose a security threat warranting the denial of a hazmat endorsement if:

1. The individual meets the citizenship status requirements;[24]
2. The individual does not have a disqualifying criminal offense;[25]
3. The individual has not been adjudicated as lacking mental capacity or committed to a mental institution;[26] and
4. The TSA conducts the specified analyses and determines that the individual does not pose a security threat.[27]

When conducting the security threat assessment, the TSA is to use one or more of the following:

1. An individual's fingerprints;
2. An individual's name;
3. Other identifying information.[28]

If the TSA determines during the course of conducting its security threat assessment that it is necessary to immediately revoke a hazmat endorsement, the TSA will direct the state to revoke the endorsement.[29] The individual may appeal the revocation following surrender of the endorsement.[30]

49 CFR § 1572.5 is an interim final rule that implements section 1012 of the Patriot Act.[31] The rule establishes security threat assessment standards for determining whether an individual poses a security threat warranting denial of a hazmat endorsement for a CDL.[32]

The following crimes constitute "disqualifying criminal offenses" under the rule:

1. Terrorism;
2. Murder;
3. Assault with intent to murder;
4. Espionage;
5. Sedition;
6. Kidnapping or hostage taking;

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23. 49 C.F.R. § 1572.13.
24. *Id.* § 1572.5(c)(2).
25. *Id.* § 1572.5(c)(1).
26. *Id.* § 1572.5(c)(4).
27. *Id.* § 1572.5(c)(3).
28. *Id.* § 1572.5(b)(1)-(3).
29. *Id.* § 1572.13(a).
30. *Id.* § 1572.141(b).
31. *See* Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).
32. 49 C.F.R. § 1572.5 ("Scope and standards for hazardous materials endorsement security threat assessment.").

7. Treason;
8. Rape or aggravated sexual abuse;
9. Unlawful possession, use, sale, distribution or manufacturer of an explosive, explosive device, firearm or other weapon;
10. Extortion;
11. Robbery;
12. Arson;
13. Distribution of, intent to distribute, possession or importation of a control substance;
14. Dishonesty, fraud, or misrepresentation, including identity fraud;
15. A crime involving a severe transportation security incident;
16. Improper transportation of a hazardous material;
17. Bribery;
18. Smuggling;
19. Immigration violations;
20. Violation of the Racketeer Influenced and Corrupt Organization Act;
21. 18 U.S.C. 1961 et seq. (RICO); and
22. Conspiracy or attempt to commit any of the crimes listed above.[33]

Any driver currently holding a hazmat endorsement ("HME"), and who has a disqualifying offense, must immediately surrender their HME to the state's Department of Motor Vehicles.[34]

Finally, when a criminal history records check discloses an arrest for any disqualifying crime without indicating a disposition, the TSA will notify the individual.[35] The individual must then provide the TSA with written proof that his or her arrest did not result in a disqualifying criminal offense within thirty days after his receipt of his or her notice from TSA.[36]

C. Legal and Practical Implications

The rule's new regulations and requirements will probably cause several hundred thousand previously licensed hazmat drivers not to register and, thus, be unavailable to transport hazmat. The regulations also force less-than-truckload ("LTL") carriers to have their drivers register since there could be hazmat in a consolidated LTL load. Thus, the rule will also increase supply chain costs. The regulations result in increased pay for hazmat drivers. For hazmat shippers, the rule may mean higher costs and a loss of flexibility in how they ship. These regulations could also impact negligent selection lawsuits, both for third-party intermediaries in terms of the carriers they select, and against carriers in terms of the driv-

33. *Id.* § 1527.103(a)-(b).
34. *See id.* § 1572.11(b).
35. *Id.* § 1572.103(d)(1).
36. *Id.* § 1572.103(d)(2).

ers they select. The screening, however, could reduce instances of driver theft and pilferage, which often spawn freight loss and damage lawsuits.

The rule also allows legal foreign drivers to hold an endorsement if they pass the security screening.[37] One potential problem with the rule is that it appears that Canadian and Mexican truckers will have the same background checks. The Canadian Border Services Agency ("CBSA") coordinates the Fast and Secure Trade ("FAST") program, which is designed, in part, to pre-approve drivers with respect to security considerations.[38] According to CBSA, 90,000 drivers of Canadian nationality cross the United States' border each year.[39] As of September 30, 2004, CBSA had received 47,000 applications for FAST cards and had issued 23,000.[40] As of that same date, 24,000 Canadian drivers were in the "pre-interview" or "interview" stage for the FAST card.[41] Another potential problem is that states can make their regulations more rigid than the federal rule, possibly leading towards a patchwork of regulation.

Carriers are also concerned that the TSA is not sharing enough information with them. For instance, there are no provisions in the rule that require the TSA to notify a carrier if a driver's HME application is declined.[42] "Declined" essentially means that the TSA considers the driver a national security threat.[43] This absence of notice could also be a problem for third party logistic companies ("3PLs") with far flung operations, or in situations in which freight is tendered to other carriers. Carriers and intermediaries may be forced to challenge the credentials of their respective employees or drivers. If not, they will not know whether one of their drivers is qualified under the rule. Because there is not a process in place for carriers to know if a driver is found to be a security risk, carriers could be liable in the event of an incident or an accident involving a "security risk" driver. Consequently, carriers should take steps to

37. *See id.* § 1572.9(b)(8) & (d)(6).

38. Can. Border Servs. Agency, The Free and Secure Trade Program, What is the FAST Program, http://www.cbsa-asfc.gc.ca/import/fast/menu-e.html (last visited Apr. 25, 2006).

39. NAT'L TANK TRUCK CARRIERS, INC., SECURITY THREAT ASSESSMENT FOR INDIVIDUALS APPLYING FOR A HAZARDOUS MATERIALS ENDORSEMENT FOR A COMMERCIAL DRIVERS LICENSE at 2, *available at* http://www.tanktruck.net/news/index.html (select "Here is NTTC's Petition to the Transportation Security Administration to Postpone Implementation of Fingerprint-based Criminal Background Checks") (last visited Apr. 25, 2006).

40. *Id.*

41. *Id.*

42. Letter from Richard D. Holcomb, Gen. Counsel, Am. Trucking Ass'ns, to Christine Beyer, Office of Chief Counsel, Transp. Sec. Admin. (Dec. 22, 2004), *available at* http://www.truckline.com/NR/rdonlyres/B119EF14-A634-4CEC-8A74-6BECFFD05837/0/newTSAcomments.pdf (last visited Apr. 29, 2006) (regarding "Appeal of the Interim Final Rule Entitled: 'Security Threat Assessment for Individuals Applying for Hazardous Materials Endorsement for a Commerical Drivers License; Interim Final Rule (Docket No. TSA-2004-19605)'").

43. *See* 49 C.F.R. § 1572.5(c).

verify that a driver is not a risk independently of the Agency's background checks, a problematic duplication of effort. Finally, there may be labor and employment issues for carriers when one of their drivers holding a CDL fails to get a hazmat endorsement and the carrier wishes to terminate the driver or limit his or her employment.

Shippers may also be forced to re-evaluate distribution strategies and carrier partners. This could rapidly consolidate the trucking industry, as freight shifts to carriers possessing the resources needed to handle high volume hazmat shipments. Particularly at risk are the shippers and carriers that distribute hazmat items, such as household paint, cleaning products, and cosmetics.

III. C-TPAT Evolution – Converting the Voluntary into the Mandatory?

A. Introduction

The Customs-Trade Partnership Against Terrorism ("C-TPAT") Program was implemented on a voluntary basis to assist shippers in assessing the security of their international supply chains.[44] The C-TPAT program was created in 2001,[45] and sponsored by the Department of Customs and Border Protection ("CBP").[46] The program was designed, at least in part, to identify importers with effective security procedures in place.[47] Companies that participated and had their business processes validated by CBP could expect, in turn, that their shipments would move efficiently across borders. [48] Thus, the concept was designed to enhance security, while limiting restrictions on commerce.

On March 25, 2005, the CBP released a set of new security standards to be applied by importers who voluntarily participate in the Program.[49] These standards will in all likelihood become mandatory minimum stan-

44. U.S. Customs and Border Protection, Customs-Trade Partnership Against Terrorism (C-TPAT): Partnership to Secure the Supply Chain [hereinafter Partnership to Secure the Supply Chain], http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/ (last visited Apr. 29, 2006).

45. U.S. Customs and Border Protection, Securing the Global Supply Chain: Customs-Trade Partnership Against Terrorism (C-TPAT) Strategic Plan, *available at* http://www.cbp.gov/linkhandler/cgov/import/commercial_enforcement/ctpat/ctpat_strategicplan.ctt/ctpat_strategicplan.pdf (last visited May 4, 2006).

46. Partnership to Secure the Supply Chain, *supra* note 44.

47. U.S. Customs and Border Protection, C-TPAT Frequently Asked Questions, http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/ctpat_faq.xml (last visited May 4, 2006).

48. *Id.*

49. U.S. Customs and Border Protection, Message from the Commissioner Announcing C-TPAT Importer Security Criteria, http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_criteria/criteria_importers/commi_importer_criteria.xml (last visited May 4, 2006).

dards for shippers participating in the Program. The security criteria thematically state that when an importer out-sources or contracts out elements of its supply chain, such as a foreign facility, conveyance, or domestic warehouse, the importer must work with these business partners to ensure that pertinent security measures are in place and adhered to for any trading party with which it has direct contact or contractual relations.[50] Importers are required to have written and verifiable processes for the selection of such business partners, including manufacturers, product suppliers, and vendors.[51] For those business partners eligible for C-TPAT certification, such as carriers, ports, terminal operators, brokers, or consolidators, the importer must have documentation indicating whether such business partners are C-TPAT certified.[52]

B. Security Procedures

Importers must require current and prospective business partners who are not already C-TPAT certified to demonstrate that they meet C-TPAT security criteria via written or electronic confirmation.[53] This can be accomplished by contractual mandates, a letter from a corporate officer attesting to compliance, a written statement demonstrating participation in C-TPAT or an equivalent accredited security program of a foreign customs authority, or by providing a completed importer security questionnaire.[54] These responses subject the business partners to verification and make it easier for importers to identify outsourcing for security purposes if outsourcing occurs at any point in their supply chain.

Importers are also able to ensure that business partners develop security processes and procedures consistent with C-TPAT security criteria, which enhances the integrity of the shipment at points of manufacture, including the periodic review of the business partners' facilities.[55] Other internal criteria for the selection of trading partners include financial soundness, capability of meeting contractual security requirements, and the ability to identify and correct security deficiencies.[56]

Additionally, physical access controls must be in place to "prevent unauthorized entry to facilities, maintain control of employees and visitors, and protect company assets," including "positive identification of all

50. U.S. Customs and Border Protection, C-TPAT Importer Security Criteria, http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_criteria/criteria_importers/ctpat_importer_criteria.xml (last visited May 4, 2006).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

employees, visitors, and vendors at all points of entry."[57] Proper vendor identification and photo identification must be presented for all deliveries.[58] There must be procedures in place to "identify, challenge, and address unauthorized [or] unidentified persons."[59]

"Processes must be in place to screen prospective employees and to periodically check current employees[,]" including pre-employment verifications, and background checks and investigations "consistent with foreign, federal, state, and local regulations . . . ."[60] In addition, termination procedures should be in place to promptly deny facility access to personnel whose employment has been terminated.[61]

Procedural security protecting the supply chain must also be adopted. "Procedures must be in place to ensure that all information used in the clearing of merchandise [or] cargo is legible [and] accurate, and protected against the exchange, loss or introduction of erroneous information[,]" including the safeguarding of computer access and information.[62] "Arriving cargo should be reconciled against information on the cargo manifest."[63] The cargo manifest should accurately describe the cargo, including weights, labels, marks and piece count.[64] "All shortages, overages, and other significant discrepancies or anomalies must be resolved . . . or investigated appropriately."[65]

Finally, procedures must be enforced to ensure the physical security for cargo handling areas and storage facilities. There should be perimeter fencing enclosing the areas around cargo handling and storage facilities.[66] Additionally, "interior fencing within a cargo handling structure should be used to segregate domestic, international, high value, and hazardous cargo."[67] The fencing should be regularly inspected.[68] Gates through which vehicles . . . or personnel enter or exit must be manned and . . . monitored [and] [t]he number of gates should be kept to the minimum . . . ."[69] "Adequate lighting must be provided inside and outside the facility including . . . entrances and exits, cargo handling and storage areas, fence lines and parking areas."[70] "Alarm systems and video surveillance

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

cameras should be utilized to monitor premises and prevent unauthorized access to cargo handling and storage areas."[71]

C. Legal and Practical Implications

These enhanced requirements could potentially discourage new companies from participating in the C-TPAT Program and drive some existing participants from the Program. Shipper groups contend that the proposed changes would require each importer to assess risks to its own supply chain, without clear guidelines on how to do so.[72] There could also be confusion over what measures are considered "voluntary" and what are "mandatory" under the Program.[73] Also, importers who agree to the new standards could be liable for claims arising from events causing property damage or personal injury.

Thus, in all likelihood, the C-TPAT voluntary parameters for participants in the C-TPAT Program will become mandatory in the near future. While many of the new security regulations place additional burdens upon those in the supply chain, the security enhancements may also prevent freight loss and damage claims.[74] Once again, however, violations or deviations from the standards set forth in the Program could potentially result in causes of action for the negligent selection, hiring, or retention of employees, and the negligent selection of intermediaries and trading partners.

The CBP may offer certain benefits to those shippers who stay in the Program and adhere to the minimum standards, including fewer inspections for C-TPAT members who import.[75] CBP analysis has found that C-TPAT members are six times less likely than non C-TPAT members to have their imports inspected for security.[76] They are also four times less

71. *Id.*

72. *See* U.S. Customs and Border Protection, Frequently Asked Questions Regarding Minimum Security Criteria For Importers, http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/security_criteria/criteria_importers/questions.xml (last visited May 4, 2006) ("Q: 3. Does CBP intend to revise the security guidelines for all sectors of C-TPAT membership? If so, has CBP determined the timeframe for completion of the refined security criteria for each sector?").

73. *See id.* ("Q: 15. The proposed C-TPAT program states that it allows for 'flexibility and customization of security plans,' however, the proposed criteria are drafted as 'mandatory' requirements. In the event that a requirement is not met due to circumstances outside of the participating C-TPAT importer, what would be the resulting consequences for the importer?").

74. *See id.* ("Q: 5. Is CBP moving towards making C-TPAT a regulatory program? A: No. C-TPAT will continue to evolve as a voluntary, incentives based government/private sector partnership. As C-TPAT evolves, the program will continue to work in partnership with the stakeholders of the international supply chain and cooperatively develop improved systems of security and efficiency.").

75. *Id.*

76. *Id.*

likely to be chosen for customs compliance exams.[77] It is problematic though, for shippers and importers to reach back into the supply chain to set security standards before they even take custody of the goods.

IV. HM-223 AND HAZMAT LOADING AND UNLOADING ISSUES

A. INTRODUCTION

HM-223, the "Applicability of the Hazardous Materials Regulations to Loading, Unloading and Storage," has been in development by the DOT's Research and Special Projects Administration ("RSPA")[78] for almost a decade.[79] Delays in the rule's enforcement have largely been the result of shippers' protests and a lawsuit pending in the federal appeals court.[80] Ironically, many shippers and carriers want the DOT to regulate the loading and unloading of tank cars and other functions related to hazmat transport. Indeed, the National Transportation Safety Board agrees with the shippers and carriers on this point.

The federal government *does* have jurisdiction over the movement of hazardous material.[81] However, HM-223 would redefine loading, unloading and storage of hazardous materials in a way that would partially rescind Washington's role. The rule is designed to identify segments of transportation that are the responsibility of the carrier and to delineate when the carrier takes control of the hazmat load, and when the carrier relinquishes control.[82] The implication of the rule is that the federal government would not be regulating loading and unloading operations of hazmats or would be regulating these processes only partially. In the "Through the Looking Glass" world of regulation, many shippers want the regulations to expand, to include full regulation of the loading and unloading of hazmats.

B. SPECIFIC FUNCTIONS AFFECTED

The rule clarifies the applicability of the hazmat regulation to specific functions and activities, including hazmat loading and unloading op-

77. *Id.*

78. RSPA has since been split into two agencies, the hazmat agency named the Pipeline and Hazardous Material Safety Administration, which oversees the safety of the more than 800,000 daily shipments of hazardous materials in the country along with the national hazardous material pipeline network of pipelines and the Research and Innovative Technology Administration.

79. *See* Applicability of Hazardous Materials Regulations to Loading, Unloading, and Storage, 68 Fed. Reg. 61906, 61906 (Oct. 30, 2003) [hereinafter Applicability of Hazardous Materials Regulations 2003].

80. *See* Applicability of Hazardous Materials Regulations to Loading, Unloading, and Storage, 69 Fed. Reg. 70902, 70903 (Dec. 8, 2004) [hereinafter Applicability of Hazardous Materials Regulations 2004].

81. Applicability of Hazardous Materials Regulations 2003, *supra* note 80, at 61906.

82. *Id.*

erations, and the storage of hazmats during transportation.[83]

1. A "pre-transportation function" is defined to be a function performed by any person that is required to assure the safe transportation of a hazardous material in commerce.[84] For instance, when performed by shipper personnel, loading a packaged or containerized hazmat onto a transport vehicle and filling a bulk packaging with hazmats in the absence of a carrier for the purposes of transporting it, is defined as a pre-transportation function.

2. The rule defines "transportation" as the movement of property and loading, unloading, or storage incidental to the movement.[85] However, for purposes of Hazardous Materials Regulations ("HMR"), the "transportation and commerce" begins only when a carrier takes physical possession of a hazmat for the purpose of transporting it.[86] The transportation continues only until the delivery of the package to its consignee or destination, as evidenced by the shipping documentation.[87]

3. "Transportation functions" under the rule are functions performed as part of the actual movement of hazardous materials in commerce, including loading, unloading and storage of hazardous materials that is "incidental to" that movement.[88]

4. "Loading incidental to movement" is defined to mean the loading by carrier personnel, or in presence of carrier personnel, of packaged or containerized hazmats onto a transport vehicle, for purposes of transporting it.[89] For bulk packaging, "loading incidental to movement" means the filling of the packaging with hazardous material by carrier personnel, or in the presence of carrier personnel, for the purpose of transporting it.[90] "Loading incidental to movement" is regulated under the HMR with potential coexistent jurisdiction with OSHA.[91]

5. "Unloading incidental to movement" is defined in the rule to mean the removal of a packaged or containerized hazmat from a transport vehicle, or the emptying of a hazmat from a bulk package after the hazmat has been delivered to a consignee, and prior to the delivering carriers' departure from the consignee's facility or premises.[92] "Unloading incidental to movement" is subject to regulation under the HMR with

83. *See* 49 CFR § 171.1.
84. *See id.* § 171.1(b).
85. *Id.* § 171.1(c)(1)-(4).
86. *Id.* § 171.1(c).
87. *Id.* § 171.1(c).
88. *Id.* § 171.1(c)(1)-(4).
89. *Id.* § 171.1(c)(2).
90. *Id.*
91. *Id.*
92. *Id.* § 171.1(c)(3).

potential coexistent jurisdiction with OSHA.[93] Note, however, that unloading by a consignee after the delivering carrier has departed from the facility is not unloading incidental to movement and not regulated under the HMR.[94] Similarly, preloading functions that are not "incidental to movement" are not regulated by the HMR.[95]

6. "Storage incidental to movement" is defined in the rule to mean storage by any person of a transport vehicle, freight container or package containing a hazmat between the time that a carrier takes physical possession of the hazmat for purpose of transporting it until the package containing the hazmat is physically delivered to the destination indicated on the shipping document.[96] However, in the case of railroad shipments if, after delivery, the track is under the control of a railroad, the storage on the track is "storage incidental to movement."[97]

The rule also amends section 171.1 of the HMR to summarize the regulated and non-regulated functions. As noted, regulated functions are:

1. Activities related to the design, manufacture and qualification of packaging represented as qualified for use in the transportation of hazmats;[98]
2. Pre-transportation functions;[99] and
3. Transportation functions defined as movement of a hazardous material and loading, and unloading and storage incidental to movement.[100]

Non-regulated functions are:

1. Rail and motor vehicle movements of a hazmat solely within a contiguous facility where public access is restricted;[101]
2. Transportation of a hazmat in a transport vehicle or conveyance operated by a federal, state, or local government employee solely for government purposes;[102]
3. Transportation of a hazmat by an individual for non-commercial purposes in a private motor vehicle;[103] and
4. Any matter subject to United States Postal law and regulations.[104]

The rule specifically notes that "[f]ederal hazmat law does not preempt other [f]ederal statutes nor does it preempt regulations issued by

93. *Id.*
94. *See id.* § 171.1(c)(3).
95. *See id.* § 171.1(b).
96. *Id.* § 171.1(c)(4).
97. *Id.* § 171.1(c)(4)(i)(B).
98. *Id.* § 171.1(a).
99. *Id.* § 171.1(b).
100. *Id.* § 171.1(c).
101. *Id.* § 171.1(d)(4).
102. *Id.* § 171.1(d)(5).
103. *Id.* § 171.1(d)(6).
104. *Id.* § 171.1(d)(7).

other [f]ederal agencies to implement statutorily authorized programs."[105] However, the rule further notes that a facility at which pre-transportation or transportation functions are performed must comply with OSHA and state or local regulations applicable to physical structures, such as noise, and air quality control standards, emergency preparedness, fire codes and local zoning requirements.[106] The rule also indicates that the facilities may have to comply with applicable state and local regulations for hazmat handling and storage operations.[107] This appears to be an implicit acknowledgment of authority for state and local governments to enact such regulations as long as they do not conflict with federal regulations.

C. Practical and Legal Implications

These hazmat regulations relating to loading and unloading essentially codify what has been the law as to delivery and injury or damage around the time of delivery. A carrier has always generally been found not to be responsible for loss, damage or injury to persons or property after it relinquishes control or possession of the cargo. However, carriers who interject themselves into the loading or unloading process can expand their liability.[108] Similarly, shippers who interject themselves into activities that may be determined under the rule to be incidental to transportation may subject themselves to additional hazmat regulatory strictures, and potential common law liabilities for loss, injury or damage.[109]

V. More Food for Thought – FDA Issues Transportation Records Rules

A. Regulatory Summary

The Food and Drug Administration ("FDA") issued its rules for establishing and maintaining transportation records for food transporters on December 9, 2004.[110] This enactment was the fourth and final rule issued for implementation of the Bio-Terrorism Act of 2002.[111] This rule allows carriers the option of using bills of lading and expense bills cur-

105. Applicability of the Hazardous Materials Regulations 2003, *supra* note 80, at 61907.
106. *Id.*
107. *Id.*
108. *See* 49 C.F.R. § 171.1(c)(2)-(3).
109. *Id.* § 171.1(g).
110. Establishment and Maintenance of Records Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 69 Fed. Reg. 71562, 71562 (Dec. 9, 2004) [hereinafter Establishment and Maintenance of Records].
111. Final Regulation Implementing the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 – Establishment and Maintenance of Records for Foods; Notice of Public Meeting, 69 Fed. Reg. 71655, 71655 (Dec. 9, 2004).

rently used for FMCSA compliance.[112] This option allows carriers to meet the FDA's requirements to "establish and maintain records" detailing where food is picked up and where it is delivered with less impact on their day-to-day operations.[113] At a minimum, the "transportation record" must include:

1. Name of consignor and consignee;[114]
2. Origin and destination points;[115]
3. Date of shipment;[116]
4. Number of packages;[117]
5. Description of freight;[118]
6. Route of movement;[119] and, if applicable,
7. Transfer points through which each shipment is moved.[120]

The FDA removed earlier requirements that the record keeping be based upon the final intended use of the food product.[121] This revision was based upon comments from the industry. For instance, a trucker does not necessarily know how a bulk load of a food product will be used when he delivers it to a storage tank.

Anyone who manufactures, processes, packs, transports, distributes, receives, holds or imports food in the United States is subject to the regulation.[122] However, there are several exclusions:

1. Farms;
2. Restaurants;
3. Those performing covered activities when the food is subject to the exclusive jurisdiction of the United States Department of Agriculture; and
4. Foreign persons, except foreign persons who transport food in the United States.[123]

In addition, the following persons or facilities are excluded from the record keeping requirements:

1. Fishing vessels not engaged in processing;
2. Retail food establishments that employ ten or fewer full time equivalent employees;

112. *See* Establishment and Maintenance of Records, *supra* note 110, at 71566; *see also* 49 C.F.R. § 373.103(a) (2005).
113. Establishment and Maintenance of Records, *supra* note 110, at 71566.
114. 49 C.F.R. § 373.103(a)(1).
115. *Id.* § 373.103(a)(3).
116. *Id.* § 373.103(a)(2).
117. *Id.* § 373.103(a)(4).
118. *Id.* § 373.103(a)(6).
119. *Id.* § 373.103(a)(9).
120. *Id.* § 373.103(a)(10).
121. *See* Establishment and Maintenance of Records, *supra* note 110, at 71565.
122. *Id.* at 71569.
123. *Id.* at 71563.

3. Non-profit food establishments; and
4. Persons who manufacture, process, pack, transport, distribute, receive, hold, or import food contact substances other than the finished container that directly contacts the food.[124]

Importantly, the regulations in subpart J of the final rule do not require duplication of existing records, if those records contain all of the information required by the subpart.[125] In addition, "persons can supplement existing records with any new information required by this final rule instead of creating an entirely new record containing both existing and new information."[126]

A summary of the required information is as follows:

1. Name, address, telephone number, and, if available, fax number and e-mail address of the immediate previous source and subsequent recipient;
2. Adequate description;
3. Date received or released;
4. For persons who manufacture, process, or pack food, the lot or code number or other identifiers;
5. Quantity and how the food is packaged;
6. Name, address, telephone number, and, if available, fax number, and e-mail address of the transporter who transported the food to and from the reporter.[127]

Carriers and others in the supply chain can meet the requirements of this rule if they comply with certain other transportation regulations:

1. By compliance with, and establishing and maintaining, specified information that is in the records required of roadway interstate transporters by the DOT's FMCSA, as contained in 49 CFR § 373.101 and 373.103; or
2. By establishing and maintaining specified information that it is in the records required of rail and water interstate transporters by DOT's Surface Transportation Board in 49 CFR § 1035.1 and 1035.2; or
3. By establishing and maintaining specified information that is in the records required of international air transporters on airway bills by the Warsaw Convention as Amended at the Hague, 1995 and by Protocol No. 4 of Montreal, 1975 (Warsaw Convention); or
4. By entering into an agreement with a non-transporter immediate previous source, if located in the United States, or immediate subsequent recipient, if located in the United States, to establish, maintain, or establish and maintain the required records.[128]

A summary of the record retention requirements is as follows:

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 71563-64.
128. *Id.* at 71564.

1. Non-transporters must retain for six months after the dates they receive and released the food all required records for any food for which a significant risk of spoilage, loss of value or loss of palatability occurs within sixty days after the date they receive or release the food;
2. Non-transporters must retain for one year after the dates they received and released the food all required records for any food for which a significant risk of spoilage, loss of value, or loss of palatability occurs only after a minimum of sixty days, but within six months, after the date they receive or release the food;
3. Non-transporters must retain for two years after the dates they receive and release the food all records for any food for which a significant risk of spoilage, loss of value, or loss of palatability does not occur sooner than six months after the date they receive or release the food, including foods preserved by freezing, dehydrating, or being placed in a hermetically sealed container;
4. Non-transporters of food must retain records for one year for any food having a significant risk of spoilage, loss of value, or loss of palatability only after a minimum of sixty days after the date the transporter receives and releases the food;
5. Food transporters must retain records for a maximum of one year for non-perishable food shipment and six months for perishable food shipments;
6. Records can be kept in paper or electronic format;
7. Records must be made available as soon as possible upon governmental request, not to exceed twenty-four hours from the time and receipt of the official request;
8. Failure to establish or maintain records or refusal to permit access to a verification or copying of any records is a prohibited act under section 301 of the Food, Drug and Cosmetic Act;
9. Compliance dates for records establishment and maintenance requirements is December 9, 2005, except that the compliance date for small businesses that employ fewer than five hundred, but more than ten full-time equivalent employees is June 9, 2005, and the compliance date for very small businesses that employ ten or fewer full-time employees is December 11, 2006.[129]

B. Practical and Legal Implications

The rules will not be a significant additional burden for those in the food transport supply chain since they permit duplicate record keeping functions already required under other transportation statutes and regulations to suffice for compliance with the new FDA rules. Compliance, or lack of compliance, with the rules could impact proof of loss and damage in perishable goods freight loss situations. Similarly, the record keeping requirements could ease proof problems in these cases. The requirements could also result in potential causes of action for the negligent selection of a carrier. The regulation will affect a large percentage of

129. *Id.*

interstate motor carriers because the Agency is using a very broad definition of food and most carriers haul something that fits the category at some point.

VI. New Air Cargo Security Requirements

On November 10, 2004, the TSA proposed new security rules for air cargo.[130] The proposed rules would enhance aviation cargo security by creating a mandatory security program for all cargo aircraft and amending existing security regulations for other aircraft operators and regulated parties.[131] The regulations would

1. Require security threat assessments for individuals with unescorted access to cargo;

2. Codify cargo screening requirements first implemented under SD's EA's and part 1550 programs issued in November 2003;

3. Require airports with SIDA's to extend them to cargo operating areas;

4. Require aircraft operators to prevent unauthorized access to the operation area of the aircraft while loading and unloading cargo;

5. Require aircraft operators under a full or all cargo program to accept cargo only from an entity with a comparable security program or directly from the shipper;

6. Codify and further strengthen the Known Shipper program;

7. Establish a security program specific to aircraft operators and all cargo operations;

8. Enhance security requirements for indirect air carriers.[132]

The intent of the TSA's proposed security requirements is to infuse them throughout the supply chain to minimize and incrementalize their impact upon the flow of goods instead of concentrating all of the efforts on one measure, such as physical inspection at a single stage.[133] Such a single stage inspection could potentially result in significant disruption of the supply chain.[134]

"TSA currently requires a variety of individuals working in aviation to submit to a criminal history records check. Generally, these individuals work on airport grounds, and have access to secure areas."[135] However, "[i]n the cargo environment, many other persons have access to cargo before someone who works for the airport and has had such a check han-

130. Air Cargo Security Requirements, 69 Fed. Reg. 65258, 65258 (Nov. 10, 2004).
131. *Id.* at 65261.
132. *Id.* at 65262.
133. *Id.* at 65263.
134. *Id.*
135. *Id.* at 65265.

dles it."[136] Consequently, "TSA proposes to require additional persons who have unescorted access to air cargo, but do not have unescorted Security Identification Displayed Area (SIDA) access, to undergo a security check to verify that they do not pose a security threat. TSA recognizes that the number of individuals with access to cargo is large . . . and that the companies [who employ these workers] run the gamut from complex organizations to 'mom and pop's.'"[137] The program will subject these individuals to fingerprint-based criminal history background checks, which will be costly and time consuming.[138] However, "TSA believes that potential security concerns . . . would be best addressed . . . by requiring the individuals to submit to a Security Threat Assessment program . . . ."[139]

Additionally, the new security rules include security measures for persons boarding all cargo aircraft.[140] The TSA is proposing to codify requirements for screening persons other than passengers boarding all cargo aircraft.[141] These include non-flight crew members or passengers, such as those escorting animals being shipped via air cargo. Moreover, the TSA would like to screen cargo. "To guard against unauthorized weapons, explosives, persons and other destructive substances or items in cargo, TSA proposes to codify a requirement for aircraft operators to inspect a portion of air cargo, including that offered by known shippers."[142]

Securing the cargo operating environment is also important. "Measures to prevent unauthorized individuals from gaining access to the cargo operations area are necessary to prevent tampering with the aircraft or the cargo and to remove a potential access point for stowaways."[143] The regulation would expand those airport workers required to have a SIDA and airport approved photo identification.[144]

"TSA is proposing to authorize aircraft operators under full or all-cargo programs to accept cargo only from the shipper, or from an entity with a security program comparable to the aircraft operator's."[145] This requisite would "prohibit aircraft operators from carrying cargo transferred from persons or businesses without the appropriate security measures to guard against the introduction of unauthorized weapons,

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *See id.*
141. *Id.*
142. *Id.* at 65266.
143. *Id.*
144. *Id.*
145. *Id.*

explosives [or] persons . . . ."[146]

The TSA also "proposes to codify and strengthen the Known Shipper program in regulation at 49 CFR 1554.239, 1554.215, and 1548.17."[147] "[T]he Known Shipper program is a protocol to distinguish shippers about whom security-relevant information is known from those shippers about whom the aircraft operator has inadequate information."[148] "This program applies to aircraft operators with full programs, corresponding foreign air carriers, and [Indirect Air Carriers ("IACs")] that offer cargo to such aircraft operators and foreign air carriers."[149]

Further, the rules would enhance existing requirements for IACs.

> The IAC, sometimes called a freight forwarder, is a crucial part of the air cargo system, acting as an intermediary between the shipper and the aircraft operator for approximately 80% of all air cargo shipped on passenger aircraft in the United States. TSA estimates that there are 3,200 entities in the United States operating as IACs ranging from large corporations to sole proprietors working out of their homes. All IACs are required to maintain a security program known as the IACSSP and they are regulated under 49 CFR 1548. [The new rule] proposes to expand the definition of IAC to include businesses engaged in the indirect transport of cargo on larger commercial aircraft, regardless of whether the operation is conducted with a passenger aircraft or an all-cargo aircraft.[150]

VII. The D.C. Hazmat Ban: The Epicenter of a Hazmat Tsunami?

A. Background on the Ban

Although Boston Congressman Tip O'Neill once prophetically proclaimed that "all politics is local," local ordinances can have a traumatic, macroeconomic ripple effect. These ripples may be materializing in the guise of the recent Washington, D.C. ban on hazardous materials.

On February 1, 2005, the District of Columbia City Council passed a ninety-day emergency ban on the transportation of explosives, flammable and poisonous gasses or materials via truck or rail, in a 2.2 mile zone near the United States capitol.[151] Anyone seeking to transport such materials through the zone would have to apply for a permit.[152] The ordinance was signed into law on February 15, 2005 to take effect following a comment

146. *Id.*
147. *Id.*
148. *Id.* at 65266-67.
149. *Id.* at 65267.
150. *Id.*
151. Terrorism Prevention in Hazardous Materials Transportation Temporary Act of 2005, Bill I.D. DC LB 78, 2005 WLNR 3869365 (Mar. 4, 2005).
152. *Id.* § 4(1).

period.[153] CSX Transportation, Inc. filed a petition with the Surface Transportation Board contesting this local ordinance.[154] Several shippers and chemical companies[155] filed petitions in support of CSX, as did the federal government.[156] The very legitimate fear was that a patchwork of local ordinances could render it practically impossible to transport hazmats, particularly since numerous, rather mundane, items are encompassed by the hazmat categorization, such as hairspray, varnish, and other household items. Also, many LTLs transport hazmats in consolidated loads. Such a political patchwork would ramp up costs for both carriers and consumers of transportation services, shippers and consignees.[157]

CXS's petition was filed on February 7, 2005.[158] On March 14, 2005, the Surface Transportation Board decided that the D.C. Ordinance is preempted by section 10501(b) of the ICC Termination Act of 1995.[159] The Surface Transportation Board thus granted CSX's Petition for a Declaratory Order.[160] Although the Board did not have the power to invalidate the D.C. Act, the Board's decision was submitted to the District Court for the District of Columbia at the court's request.[161]

CSX also filed a federal lawsuit in the United States District Court for the District of Columbia to declare the ban invalid and to block its implementation.[162] The lawsuit was filed on February 16, 2005.[163] In the lawsuit, CSX contends that as a common carrier it is required by federal law to transport the ostensibly banned materials.[164] To comply with the common carrier law and to simultaneously attempt to comply with the Washington D.C. ordinance would not only impose an unreasonable burden on interstate commerce, it would increase risk to other communities by dramatically adding to the miles and the hours these materials spend

153. *See id.* § 9.

154. CSX Transp., Inc. – Petition for Declaratory Order, Finance Docket No. 34662, at 2 (Surface Transp. Bd. March 14, 2005), *available at* http://www.stb.dot.gov/decisions/ReadingRoom.nsf/UNID/71E5094C5C84055385256FC4006EE48C/$file/35599.pdf (last visited June 4, 2006).

155. *See, e.g.*, Letter from Peter H. Masterman, Vice President, Logistics and Customer Serv., NOVA Chemicals Inc., to Honorable Vernon Williams, Sec'y, Surface Transp. Bd. (February 11, 2005), *available at* http://www.stb.dot.gov/filings/all.nsf/0/5fa62ee18681cc7a85256fa5007d2dc9/$FILE/213242.pdf (last visited June 4, 2005).

156. CSX Transp., Inc. – Petition for Declaratory Order, *supra* note 154, at 1.

157. *See id.* at 4.

158. *Id.* at 1.

159. *Id.* at 11.

160. *Id.*

161. CSX Transp., Inc. v. Williams (*CSX Transp. I*), No. 05-338 (EGS), 2005 U.S. Dist. LEXIS 6799, at *2 (D.D.C. Apr. 18, 2005), *rev'd & remanded by* 406 F.3d 667 (D.C. Cir. 2005).

162. *Id.*

163. Complaint at 1, CSX Transp., Inc. v. Williams (*CSX Transp. I*), No. 05-338 (EGS), 2005 U.S. Dist. LEXIS 6799 (D.D.C. Apr. 18, 2005).

164. *Id.* ¶ 93.

in other communities.[165] Although there is not a large quantity of hazmats transported by rail through Washington, D.C., to the extent that other municipal jurisdictions create a patchwork of local ordinances spanning the nation, problems as to uniformity, and operational headaches will most certainly result.

CSX has also filed a Motion for Summary Judgment in the Lawsuit and, that motion and CSX's Motion for Preliminary Injunction, are now fully briefed.[166]

B. Legal and Practical Implications: An Assault on the Preemption Doctrine

The preemption doctrine, as most practitioners know, impacts many of the legal aspects relating to interstate carriage, and helps to provide uniformity of court decisions, and free and fair access to the courts. The D.C. Hazmat Ordinance could represent an assault on this preemption doctrine, as it applies to interstate commerce. The pending lawsuits will be a test case of that doctrine. If the court or Surface Transportation Board do not strike down the ordinance, carriers should be prepared for a proliferation of, and consequent renewed vigilance to, local ordinances regarding hazmats. This vigilance will be complicated by the reality that

165. *Id.* ¶¶ 58-75.

166. This article was written in February of 2005. In April 2005, the D.C. District Court concluded that, because the federal government had not formulated a comprehensive federal policy addressing the risks of terrorism on the nation's rail system, states were permitted to act in a limited role to protect public safety and security. Consequently, the D.C. Terrorism Prevention Act was not preempted by the Federal Railroad Safety Act, the Hazardous Materials Transportation Act, or the Interstate Commerce Commission Termination Act. *CSX Transp. I*, 2005 U.S. Dist. LEXIS 6569, *21-48. Furthermore, the district court found that, because the Terrorism Prevention Act only applied within the boundaries of the District, it did not violate the Home Rule Act. *Id.* at *72-78. CSX subsequently appealed to the United States Court of Appeals for the District of Columbia Circuit. CSX Transp., Inc. v. Williams (*CSX Transp. II*), 406 F.3d 667 (D.C. Cir. 2005).

In May 2005, the D.C. Circuit Court of Appeals reversed the district court's decision and remanded to the district court with direction to enter a preliminary injunction preventing the District from enforcing the ban. *Id.* at 669. The Court of Appeals found a sufficient likelihood that the Terrorism Prevention Act was preempted by rules that the United States Department of Transportation promulgated under the Federal Railroad Safety Act to grant a preliminary injunction. *Id.* The court based its decision on three factors: (1) protecting the nation's capital was a national, not local, safety concern, (2) the Terrorism Prevention Act did not allow carriers to operate with the freedom afforded them under the Department of Transportation's security rules, and (3) the Terrorism Prevention Act unnecessarily burdened interstate commerce. *Id.* at 672-73.

In September 2005, the district court ordered the production of additional, sensitive Department of Transportation documents under a protective order to more fully evaluate whether the Terrorism Prevention Act was preempted by Federal Railroad Safety Act. CSX Transp., Inc. v. Williams (*CSX Transp. III*), 231 F.R.D. 42, 43 (D.D.C. 2005). The court scheduled a status conference for November, 2005. *Id.*

many LTL carriers often carry mundane hazmats such as hairspray, glue and other household items, which might be banned by this ordinance and other copycat local ordinances.[167]

A polyglot patchwork of local ordinances could result in re-routings, fines, and increased surcharges for permitting in municipal areas. These costs would be passed along to those in the supply chain and add inefficiencies to the system. Also, violations of local ordinances could be used as springboards to negligence per se assertions in lawsuits for freight loss and damage or bodily injury.

VIII. SUMMARY

As we have seen with the Hours of Service regulations, governmental promulgations that are intended to focus upon safety and security issues, can have a profound effect on supply chain efficiencies, inefficiencies and overall productivity. In certain situations, such as with the Hours of Service régime, safety regulations can actually spawn greater efficiencies, and enhance productivity. Other regulations simply add to the hassles and headaches of daily operations, and increase costs. However, many of these new security regulations, while they do increase costs and headaches – may also have double-edged benefits for shippers, carriers and intermediaries. They may facilitate assistance in burdens of proof in litigation because of enhanced record keeping requirements. They may also limit the quantum of freight loss and damage claims because of their greater scrutiny on security and access to freight. Careful compliance with the regulations can also decrease the likelihood of the amorphous, but steadily increasing "negligent selection/retention" cause of action.

167. CSX Transp., Inc. – Petition for Declaratory Order, *supra* note 154, at 11 (indicating that Pittsburgh is standing by, prepared to enact a similar ordinance).