**Section 108.APPENDIX A Guidelines For the Assessment of Civil Money Penalties Under the Illinois Hazardous Materials Transportation Act and Regulations**

Regulations were adopted by the Illinois Department of Transportation on February 1, 1979, implementing the Illinois Hazardous Materials Transportation Act, (Public Act 80-351) (Ill. Rev. Stat. 1981, ch. 95½, pars. 700-1 et seq.) ("IHMTA"), to protect the People of the State of Illinois against the risk to life and property inherent in the transportation of hazardous materials over highways in Illinois by keeping such risk to a minimum consistent with technical feasibility and economic reasonableness.

Section 11 of the IHMTA provides that any person who knowingly commits an act that violates the IHMTA or any regulation issued pursuant to the Act is liable to the State for a civil penalty of not more than $10,000 for such violation, and if the violation is a continuing one, each day of violation constitutes a separate offense.

Section 11 of the IHMTA authorizes the Department to assess the amount of any such penalty up to the stated maximum by written notice after reasonable notice and opportunity for a fair and impartial hearing. In determining the amount of the penalty the IHMTA directs the Department to:

*. . . take into account the nature, circumstances, extent and gravity of the violation and, with respect to a person found to have committed such violation, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business and such other matters as justice may require.*

Subpart D of Part 107 of the Illinois Hazardous Materials Transportation Regulations (92 Ill. Adm. Code 107), now in force and effect, describes the various enforcement authorities exercised by the Department and their associated sanctions and prescribes the procedures governing the exercise of those authorities and the imposing of those sanctions. Sections 107.313 through 107.323 set forth the Department's enforcement procedures for the assessment of civil money penalties.

The regulations do not address the policy and procedures to be utilized by the Department to determine the civil money penalty which it will seek to impose for violations of the Act and the regulations. This Statement sets forth the civil money penalty policy which the Department will apply in determining, for purposes of issuing a Notice of Probable Violation, the amount of the civil money penalty which the Department will seek to have assessed against a violator of the Act and the regulations.

It should be noted that this civil money penalty policy applies only to the initial determination by the Department of the money relief which it intends to pray for in the Notice of Probable Violation which the Department issued to commence a civil money penalty proceeding against a violation. If a hearing is necessary, the amount of any civil money penalty assessed by order of the hearing officer may be independent of the guidelines set forth herein. Such civil money penalty assessed by order of the hearing officer may be greater than, less than or equal to the amount of the civil money penalty requested by the Department in its Notice of Probable Violation.

INTRODUCTION

There has been much discussion by the courts and legal commentators about the administrative prescription and imposition of civil money penalties. It appears well established, however, that the legislature may, by law, impose appropriate obligations and may encourage their enforcement by reasonable money penalties. The legislature may also, by law, grant to an administrative agency the power to prescribe such penalties and impose them in individual cases without the necessity of invoking the judicial process.

One of the major objections to giving an administrative agency the discretion to impose money penalties is that the money penalties will be imposed in an arbitrary or capricious manner.

In response to this concern, judicial decisions on the exercise of discretionary powers by administrative agencies have required that the legislature provide some guidelines to the considerations that should be weighed by the administrative agency; that, as a matter of fairness (due process), notice and an opportunity for a hearing should precede the imposition of the penalty; and that there be an opportunity for judicial review. If these requirements are fulfilled, there appear to be no significant constitutional impediments to the administrative imposition of money penalties.

The Illinois Hazardous Materials Transportation Act ("IHMTA") delegates to the Department of Transportation the authority to prescribed and impose civil monetary penalties. Section 11 of IHMTA prescribes:

1. What act is to be penalized – a knowing commission of an act that is in violation of the IHMTA or any rule or regulation issued thereunder (this would, of course, include omissions where the IHMTA or any rule or regulation require an affirmative act to be done);

2. Who is subject to the penalty – any person who transports or ships or causes to be transported or shipped hazardous materials;

3. What is the penalty – not more than $10,000 for a violation and if any violation is a continuing one, each day of violation constitutes a separate offense;

4. How is the penalty to be imposed – after reasonable notice and opportunity for a fair and impartial hearing; in writing; and taking into account the nature, circumstances, extent and gravity of the violation; the degree of culpability of the violator; the violator's history of prior offenses; the violator's ability to pay; the effect of the penalty on the violator's ability to continue to do business and such other matters as justice may require;

5. Judicial review is provided under the Administrative Review Law (Ill. Rev. Stat. 1981, ch. 110, pars. 3-101 et seq.).

These are adequate standards and safeguards imposed on the powers given the Department. Also, the power to impose civil money penalties is reasonably necessary to accomplish the legislative purpose.

Similar statutory frameworks can be found in the federal statutes, such as the federal Hazardous Materials Transportation Act (49 U.S.C. 1801), Water Pollution Control Act (33 U.S.C. 1151), Occupational Safety and Health Act (29 U.S.C. 651), and the Motor Vehicle Safety Act (15 U.S.C. generally).

PURPOSE OF THE CIVIL MONEY PENALTY

The objective of the civil money penalty is to assist in accomplishing the goals of the Illinois Hazardous Materials Transportation Act by deterring violations and encouraging voluntary compliance. Punitive considerations are secondary.

When a carrier or shipper complies with the IHMTA, he faces an investment of resources as well as, in many instances, a long term commitment to the payment of operation and maintenance expenses. For example, personnel handling hazardous materials must be trained; labels and placards must be purchased; the proper packaging must be acquired; tank containers must be periodically tested; required paperwork must be done. While complying with the regulations will lead to protecting against the risk to life and property inherent in the transportation of hazardous materials, compliance may not necessarily yield any direct short term economic benefit to the shipper or carrier. If financial resources were not used to comply with the Hazardous Material laws, they presumably would be invested in a manner which would be economically beneficial to the shipper or carrier. Therefore, from a strictly economic point of view, a shipper or carrier may perceive it to be in his best interest to delay the commitment of funds for compliance.

This short-term economic advantage to the non-complying shipper or carrier often creates an incentive to delay compliance. The civil money penalty serves to reduce this incentive.

In addition, the civil money penalty is an effective tool for reducing the harm or risk of harm to the public health and safety caused by non-compliance with the Hazardous Materials laws. By holding shippers or carriers liable for the costs of these risks, a money penalty encourages shippers and carriers to comply with the law.

The civil money penalty policy established by this memorandum is designed to assure fair and uniform money penalties. It is based on the statutory considerations set forth in Section 11 of the IHMTA.

It must be emphasized that this civil money penalty policy is for determining what money penalties the Department will seek when civil actions are taken. It is not a policy to determine which enforcement actions should be taken.

OTHER CIVIL MONEY PENALTY POLICIES

As the basis for recommending a civil money penalty policy, the Department reviewed civil money penalty enforcement mechanisms used by other agencies under related regulatory schemes. Several examples reviewed are illustrative.

The policies of the Materials Transportation Bureau of the federal Department of Transportation do not provide much guidance. At this time they have no systematic mechanism for determining penalty amounts or for assuring consistency among cases over time.

The federal Environmental Protection Agency has a complex and quite technical policy for assessments of civil money penalties against major source violators of the Clean Air Act (42 U.S.C. 7401 et seq.) and Clean Water Act (33 U.S.C. 1251 et seq.). Since the EPA policy is directed at enforcement of pollution control equipment requirements, the EPA policy is structured solely to calculate and eliminate the economic benefits to a non-complying source. Adopting this policy to the Department's hazardous materials program was considered unworkable since a strictly economic disincentive policy based on calculating the economic benefits of non-compliance is not easily adaptable to, and may not be realistically appropriate for, the hazardous materials program.

The federal EPA employs a different type of civil penalty mechanism for enforcing its regulations respecting availability of unleaded gasoline. This penalty mechanism establishes a matrix-type procedure for determining a proper penalty in accordance with statutorily mandated criteria – again very similar to those in Section 11 of the IHMTA – which are required to form the basis for the USEPA penalty. USEPA has established a table which classifies, in a fixed number of categories, the possible violations by their potential for causing the harm for which the EPA's law is intended to protect. Each class of violation is then fed through a matrix which adjusts the type of violation by the history of the violator's similar violations and again by the size of the violator's business. The result is a separate penalty assessment schedule – one for each class of violations – which sets out a dollar value or range of values depending on the violator's history of performance and the size of the violator's business. This penalty mechanism provides an unadjusted penalty arrived at in an objective manner (i.e., application of the matrix), which unadjusted penalty may be adjusted in a subjective manner based on consideration of the mitigating criteria mandated by EPA's statute. This type of penalty mechanism was considered as possibly appropriate and workable for the hazardous materials program.

THE CIVIL MONEY PENALTY POLICY

After reviewing several different possible penalty assessment structures, the Department established a civil money penalty mechanism which it believes will be effective and appropriate. This mechanism provides for consideration of the statutory criteria, provides a basis for consistency and leaves room for flexibility in applying what are really subjective factors.

The penalty mechanism is consistent with a proper exercise by the Department of its discretionary authority. The Department is free to exercise the discretion vested in it to determine the weight to be assigned to each of the criteria dictated by the legislature.

The penalty to be assessed will be determined first by a purely objective procedure of using the assessment formula. Although the Department used its discretion in creating the assessment formula, the use of the formula eliminates the arbitrary exercise of discretion by the Department. The factors composing the penalty formula have been established and the appropriate penalty amount has been assigned to each. The assessment formula yields an unadjusted initial penalty. If there are no factors to mitigate this initial penalty, then in each case, similar violations for similar sizes of businesses with the same degrees of culpability will yield similar penalties.

Where there are mitigating factors, the unadjusted penalty can be modified to reflect the circumstances of the individual violator in individual cases. This adjusted penalty is arrived at through a subjective process wherein the Department exercises its administrative discretion to mitigate the penalty in part or in its entirety. However, the Department's discretion is limited by the considerations mandated by the legislature in Section 11 of the IHMTA.

The violator has the burden of raising the mitigating facts as a defense to reduce the penalty sought. The Department will, however, consider such factors, to the degree known or to the degree possible, in setting the initial penalty as required by the IHMTA. In considering mitigating factors when determining the preliminary amount to be assessed, the Department will attempt to determine the ability of the respondent to pay the penalty.

In cases where non-compliance is attributable to the Department or its enforcement agents, to impossibility, or to emergency (as these concepts are discussed in another part of this policy), the unadjusted penalty will be reduced for that part of the non-compliance attributable to the mitigating circumstances. In most such instances, a civil money penalty will not be assessed.

In cases where the Department determines that the violator will be unable to pay or to continue in business after paying the unadjusted penalty, an unlimited adjustment may be made. However, it will be considered that payments could be deferred or made in installments.

USE OF THE CIVIL MONEY PENALTY POLICY IN ENFORCEMENT ACTIONS

The goal of an administrative enforcement action is both expeditious compliance (including interim controls) and appropriate and adequate money penalties. Compliance and money penalties will not in any way be traded off against each other. The civil money penalty is not a substitute for compliance and is not intended to preclude injunctive relief or other non-duplicative remedies, particularly the administrative compliance order. Money penalties are not fees. Payment of money penalties does not give any right or privilege to continue operation in violation of law.

STATUTORY CONSIDERATION FOR ASSESSMENT OF THE CIVIL MONEY PENALTY

The Department has been expressly instructed by the legislature to consider certain factors in determining the amount of the assessed money penalty. These factors were not defined by the legislature. How they are to be defined and applied have been left to the Department. The determination of the specific amounts to be assessed must at a minimum be based on these factors. The legislature has not, however, precluded consideration of other factors. The following is a brief discussion of the concepts which underlie the statutory considerations.

A. Harm to the Public Health, Safety and Property.

It is the declared legislative intent of the IHMTA to protect the public against the risk to life and property inherent in the transportation of hazardous materials over highways by keeping such risks to a minimum consistent with technical feasibility and economic reasonableness. The civil money penalty will be used to redress this harm or risk of harm to the public health and safety.

The Department's authority under IHMTA is to regulate for the safe transportation of hazardous materials so as to prevent harm to life and property. Other state agencies are concerned with environmental considerations. Although one of the goals of the Hazardous Materials laws is to protect against harm to property, it does not appear that the legislature intended to use the civil money penalty to supplant the loss and damage claims structure of the transportation industry. Nor does it appear to be the intent of the legislature to place the Department in a position of "parens patriae" to use its civil money penalty to collect a fund out of which to pay death, injury or property claims of individual private citizens. What is intended to be redressed is the harm or risk of harm to the collective public.

This factor is reflected in the statutory requirement that the Department consider the nature, circumstances, extent and gravity of the violation.

The "nature" of the violation encompasses the seriousness of the violation. It requires the Department to distinguish between technical violations as opposed to basic and fundamental violations. For example, omitting the hazardous materials description from the shipping paper is more fundamental than entering the description in the wrong sequence. Another example would be failure to indicate the "up" side of a packaging, versus indicating it in an unacceptable manner such as by a hand-drawn marking across on the side of the package. The "nature" of the violation calls for examination of it on the continuum running from form to substance.

The "circumstances" of the violation is a broad consideration which would encompass both aggravating as well as mitigating factors. To the extent mitigating circumstances are known at the time the Department determines the civil penalty it will seek, they will serve to reduce the culpability factor and perhaps the weight given to other factors.

The "extent" of the violation requires the Department to consider whether the violation was widespread or confined. A violation limited to one package or one shipment, for example, must be contrasted with violations on all packages in the shipment or on all shipments by the company over a period of time.

The "gravity" of the violation is a consideration of the seriousness of the violation. This requires the Department to consider whether the violation resulted in harm to the public health and safety (looking at resulting death, injury or property damage) and whether the violation could have resulted in such harm. The Department will therefore be required to consider two distinct factors: what DID happen as a result of the violation and what COULD have happened as a result of the violation. The gravity of the violation will be directly affected by the degree of hazard of the material, the volume of the material per package, the number of improper packages shipped and the relative exposure of transportation employees and the public to the hazard.

The penalty amount applicable to the harm or risk of harm will have to be determined on the facts of each specific case.

B. The Violator's Recalcitrance, Defiance or Indifference to the Requirements of the Law.

Philosophically speaking, good faith efforts to obey the law are expected of all persons subject to its jurisdiction. Mere assertions of "good faith" should not be considered as a basis for reducing the otherwise appropriate penalty. Courts traditionally consider the degree of the violator's recalcitrance, defiance, purposeful delay, or indifference to legal obligations in setting penalties. The Department will do so also, and will not hesitate to include a sum in the civil penalty to reflect such factors where they exist.

Care will be exercised, however, not to seek to add such an element of penalty on a person, firm, or entity for exercising, without purpose of delay, its lawful rights to challenge agency determinations in administrative or court proceedings. A violator which has complied with all requirements that were not disputed while challenging the rest has not been, on those grounds alone, recalcitrant, defiant or indifferent. Such a violator is on a different footing from one which used a challenge of one aspect of its compliance requirement to delay all compliance, or which makes frivolous challenges for purposes of delay.

Consideration of a violator's recalcitrance, defiance, or indifference will require the Department to look at the violator's culpability and history of performance or, as stated by IHMTA, the history of prior offenses.

"Culpability" of the person is the quality of the person's awareness of his actions, and the degree to which he was responsible for averting such violations. Ignorance is no excuse and, to a great extent, ignorance in handling hazardous materials will weigh in favor of a more severe sanction, rather than less. In typical transportation, however, there often are other parties involved such as forwarding agents, contract packers, other carriers, warehousemen, and the like. To the extent a particular function under the regulations is not assigned to a specific person (and many are not), and to the extent that the performance of that function fell between multiple parties to a transaction, "culpability" of a particular person may be lessened. The degree of "culpability" will be influenced for example by the hazard of the material in question, the quantity, the frequency with which this person deals with that material or the regulations, and other like considerations. Negligence in conducting one's operations, or in monitoring agents and contractors performing operations on one's behalf, will be considered in assessing "culpability." In this element, the Department will weigh how avoidable the violation may have been. To the extent the violation may appear to have been intentional, for example, for the purpose of using cheaper packaging or getting lower freight rates, criminal prosecution, rather than a civil money penalty, may be in order.

The history of a violation performance in shipping and transporting hazardous materials will be considered by the Department. The Department will consider the violator's performance record in terms of prior Notices of Apparent Violation, prior Warning Letters, and prior compliance efforts of the violator. Consideration will primarily be given to the violator's history of performance in terms of previous occurrences of the same type of violation as the one for which the respondent is being charged. History of committing other acts prohibited by the Hazardous Materials laws will be considered but is not as significant as repetitions of the same type of prohibited act. For example, if the violation being charged is an equipment violation, the Department will focus primarily on the violator's performance record of equipment violations. The Department will further consider the type of equipment violations involved. Prior administrative and judicial enforcement proceedings for the same type of violation which culminated in sanctions against the violator, whether through default judgments, consent decrees or order, will also be considered. The Department will also give consideration to any federal administrative or judicial actions which have been brought against the violator for federal hazardous materials offenses. The consideration of history of performance also reflects, in part, the statutory consideration of the degree of culpability.

C. Mitigation for Non-Compliance Caused by the Department Itself.

When failure to comply or compliance delay was caused by, requested by, or attributable to the Department or its enforcement agents, such as the Illinois State Police, civil money penalties are not appropriate. When the failure or delay was partially caused by the Department, the penalties may be reduced in proportion to the period of delay caused by the Department. It is expected that mitigation on this basis would only be permitted when the Department was clearly responsible for the delay. Consideration of this factor would fall under the statutory consideration of "such other matters as justice may require."

D. Mitigation for Impossibility.

Where delayed compliance was, in fact, attributable to causes absolutely beyond the control of the violator (such as acts of nature) and was not due to the fault or negligence of the violator, a civil money penalty may not be required – even in instances where as a result of the impossibility the violator has enjoyed an economic benefit. The violator will bear the burden, however, of demonstrating that all reasonable steps were taken by him to comply. Examples of excusable circumstances would include natural disasters, fire, embargoes, strikes, and inability of a supplier to furnish materials. Non-compliance will not be excused where the violator encouraged or contributed to the impossibility or unduly delayed negotiations for needed equipment or materials through unreasonable demands, unusual restrictions, or other delays. If only a portion of the period of delayed compliance is attributable to such factors beyond the violator's control a civil money penalty will be sought only for that period of non-compliance that was not attributable to such factors. Considerations of impossibility would fall under the statutory considerations of "degree of culpability" and "such other matters as justice may require."

Shippers and carriers affected by this policy should understand that where they believe that they cannot comply with a requirement of the Hazardous Materials laws by reason of causes absolutely beyond their control, it is their responsibility to contact the Department's Hazardous Materials Section about their situation. If a shipper or carrier desires to continue to ship or transport hazardous materials until such time as it can bring itself back into compliance with the Hazardous Materials laws, then the shipper or carrier MUST make an application for an exemption by which application they MUST demonstrate that their actions, although not in compliance with the Hazardous Materials laws, will insure equivalent levels of safety. If a shipper or carrier cannot demonstrate this, then no exemption will be issued. Such a shipper or carrier must not ship or transport hazardous materials until compliance can once again be achieved. The Department will consider it to be a very serious violation where a shipper or carrier undertakes to excuse its own non-compliance even where non-compliance may be due to causes absolutely beyond the control of the shipper or carrier.

E. Other Bases for Mitigation.

There may also be other unforeseeable mitigating circumstances which might excuse all or a part of the otherwise appropriate civil money penalty. Acceptability of such a situation as a mitigating circumstance will have to be considered on a case-by-case basis. Another instance in which all or part of an otherwise appropriate civil money penalty might not be sought would be where emergency needs (such as employment or energy) require non-compliance. Obviously, situations involving unusual mitigating circumstances must be looked at individually since the full range of such situations cannot be predicted. As discussed above under "impossibility," a shipper or carrier who is unable to comply must make an application for an exemption. No shipper or carrier may at any time excuse itself from compliance.

Since the Act imposes absolute duties of compliance, the burden is clearly upon the violator to establish a compelling reason why a civil money penalty should be mitigated. This burden is satisfied only when serious efforts have been made to comply but actual impossibility or Department conduct alone have precluded compliance. Only in these instances have violators really made a "good faith" effort that excuses non-compliance.

All firms and individuals must be held to a standard that requires careful and diligent planning and serious effort to come into compliance in a timely manner.

F. Other Statutory Factors.

The IHMTA also requires consideration of a violator's ability to pay and the effect on the violator's ability to continue to do business. This requires the penalty to be a function of the "size" of the violator's business. The objective of the Department's penalty structure is to provide meaningful deterrence to all members of the industry and thereby encourage compliance. The size of business criteria will reflect the respondent's ability to pay and continue in business and thereby provides an equivalent degree of deterrence despite differences in business size.

A penalty designed to provide adequate deterrence against a large business may be wholly inappropriate if assessed against a much smaller business. Such a penalty might cause the smaller business to terminate its operations. More nearly uniform deterrence can usually be achieved by assessing the smaller respondent a smaller penalty.

"Size" will be considered to be expressable in terms of some determinable financial criteria which reflects the respondent's economic vitality or strength.

Consideration will also be given to whether to defer or reduce the penalty where a violator lacks the ability to immediately pay the full amount of the penalty.

An unlimited adjustment may be required upon consideration of the effect that the proposed money penalty will have upon a respondent's ability to continue in business. This consideration is the logical extreme of the criteria that relates to the size of the business. A penalty may be unreasonable if the respondent would suffer a severe economic hardship or if its business must be terminated. Deterrence and compliance in such a case might be achieved by coordinating a reduced money penalty with a compliance order or an injunction, rather than putting the respondent out of business through the imposition of a large money penalty.

If one cannot afford to conduct a hazardous materials shipping or carrying operation safely, however, then there is merit in having that operation go out of business.

CIVIL MONEY PENALTY MECHANISM

The civil money penalty shall be determined in accordance with the following mechanism:

Except as otherwise stated, a numerical value of from 1 to 5 shall be assigned to each of the following factors: (a) nature of the violation, (b) extent of the violation, (c) gravity of what did happen as a result of the violation, (d) gravity of what could have happened as a result of the violation, (e) culpability, (f) and history of performance for this or other hazardous materials offenses. A value of 4 or 5 in the gravity of what did happen will be weighted by doubling the value. Repetition of the same offense will always be valued at 5 and weighted by doubling it to 10. The doubling of these values reflects the Department's determination that repetition of the same violation or a violation which results in serious loss or injury should carry a greater penalty. The values assigned will be summed. The sum will be divided by the maximum possible weighted value per violation (40) and then multiplied by the maximum possible penalty per violation ($10,000). The result will be the unadjusted civil money penalty which the Department will seek to assess in actions against violators.

Values will be assigned based upon the following limits:

NATURE would range from 1 for a purely technical violation but general overall compliance, to 5 for complete absence of effort to comply with a fundamental requirement.

EXTENT would range from 1 for a situation involving a single unit, partial violation on a single occasion, to 5 for multi-unit violations over an extended time period.

GRAVITY:

A. Of what did happen, would range from 1 for light property damage or minor personal injury to 5 for a fatality or permanently disabling injury or substantial property damage. Any value of 4 or 5 automatically would be weighted by doubling to 8 or 10, respectively. If there is no personal injury or property damage a value of 0 would be assigned.

B. Of what could have happened, would range from 1 for the general possibility of light property damage or minor personal injury, to 5 for the likelihood of fatal or permanently disabling consequences or substantial property damage. If there is no likelihood that there could have been personal injury or property damage a value of 0 would be assigned.

CULPABILITY would range from 1 for violation of requirements that should have been known, but as a practical matter were not seen, to 5 for violations of fundamental requirements for which that person was clearly responsible.

HISTORY OF PERFORMANCE:

A. The value assigned for the prior prohibited acts of the same type as the one for which the violator is being charged would range from 1 where the violator had previously received a single Notice of Apparent Violation citing him for the same type of act, to 5 where sanctions pursuant to a Notice of Probable Violation or court action charging the same type of act were imposed against the violator, either by default, consent or order. Where a value of 5 is assigned, this value would be automatically weighted by doubling to 10.

B. The value assigned for prior prohibited acts which are not the same type as the one for which the violator is being charged, would range from 0 for no such prior acts to 5 for multiple prior prohibited acts of requirements of a fundamental nature.

A series of examples may suffice to illustrate how this system would work. These examples present simple, hypothetical situations which do not reflect all circumstances which may arise.

Ex. 1: A shipper chronically fails to use required DOT specification packaging for a material corrosive to skin. This violation is observed on a routine inspection. There is no leakage or damage. He has had other moderate hazardous materials violations in the past, but has not received sanctions for this one. A value of 5 would be assigned for the nature of the violation, which is total non-compliance with a fundamental requirement; a value of 5 is assigned for the extent of the violation, which involves all containers and has occurred over an extended time period; a value of 0 is assigned to the gravity of the event; a value of 2 is assigned for the gravity of the chemical burns that COULD have resulted; a value of 5 is assigned for culpability, since proper packaging is a primary shipper responsibility and he should have been aware of it; and a value of 2 is assigned for moderate past hazardous materials violations. This totals 19, divided by the maximum possible value of 40, times $10,000, results in a preliminary civil penalty of $4,750.

Ex. 2: In the same situation as Ex. 1, but where minor leakage has occurred, the value assigned to the gravity of what did happen would be raised to 2, raising the total value to 21, and raising the preliminary penalty to $5,250.

Ex. 3: In the same situation as Ex. 1, but where there was substantial leakage of a material that permanently disabled a transportation worker, the gravity of what happened would be raised to 5 and automatically would double to 10, and the value of what could have happened would be raised to 5. This gives a total assigned value of 32, and a preliminary civil penalty of $8,000.

Ex. 4: In the same situation as Ex. 3, but where there had been prior sanctions for the SAME offense, the value of 5 would be assigned to prior offenses and would automatically double to 10, giving a total of 40, and a preliminary civil penalty of the maximum $10,000.

Ex. 5: A motor carrier is stopped on a routine check and has one of three placards missing from the vehicle, but he otherwise is in compliance, and has had previous moderate hazardous materials sanctions but none for placarding. A value of 1 would be assigned for the partial violation of a fundamental requirement, but where compliance otherwise was achieved; a value of 1 would be assigned for the extent, being a single missing placard on a single vehicle on a single occasion; a value of 0 would be assigned to the gravity of what did happen; a value of 1 would be assigned for the value of what could have happened, if there had been an emergency and there was a need to view the placard from the one side where it was missing; a value of 1 would be assigned for culpability, since although the maintenance of placards is the carrier's responsibility, in all likelihood this violation was inadvertent; and a value of 2 would be used for past hazardous materials violations. This totals 6, divided by 40, times $10,000, results in a preliminary civil penalty of $1,500.

Ex. 6: The same motor carrier in Ex. 5 is missing ALL placards from the vehicle, although the papers received from the shipper showed placards to be necessary. Values would change. A value of 5 would be assigned for the total failure to meet a fundamental requirement; a value of 2 would be assigned for the extent, since four placards were missing, but from a single vehicle on a single occasion; a value of 0 would be given the gravity of what did happen; a value of 5 would be given the gravity of what could have happened; a value of 5 would be assigned for culpability for total non-compliance with a responsibility that clearly is the carrier's; and a value of 2 would be assigned for past violations. This totals 19, for a preliminary civil penalty of $4,750. (NOTE: If the placards were intentionally removed by the driver to avoid tunnel restrictions, etc., a civil penalty would apply to the company, and the Department might recommend criminal prosecution of the driver for a willful violation; if he was instructed to remove the placards by his supervisor, criminal prosecution might be recommended against the company and, perhaps, against the supervisor individually, as well.)

Ex. 7: The shipper in Ex. 1, in his reply to the notice of probable violation, proves that although the containers were not marked with the DOT specification marking, they were built to standards equivalent to or better than the specification requirements. In considering this "circumstance," the preliminary penalty values would be reassigned for the nature of the violation from 5 to 1, to reduce the gravity of what could have happened from 2 to 0, and to reduce the culpability from 5 to 1, since he carried the responsibility to meet packaging standards but did not meet the marketing requirements. This would provide a revised total of 9, and a willingness to settle in a settlement conference called by the presiding officer, for the reduced penalty of $2,250 rather than the original figure of $4,750.

If the reply indicates other circumstances to warrant reduction of the penalty, these will be taken into account to reduce the original values assigned. To the extent the recipient of the letter proves that he lacks the ability to pay or to continue to do business, consideration will be given to a staggered schedule of payments before agreeing to overall reduction of the penalty. Of course, there may be circumstances where the penalty should be reduced for reasons of financial distress, but those circumstances will be very limited.

The caveat bears repeating that this mechanism is a GUIDELINE, not a rigid formula that will be implemented blindly. To the extent that a particular case calls for unusual treatment, it may receive that treatment, irrespective of the penalty figures that the proposed system would impose. As a matter of routine, however, this system will provide the basis for determining preliminary civil penalties and it will provide a necessary measure of consistency from case-to-case, violation-to-violation, and year-to-year in administering the Department's hazardous materials program.