



HAZARDOUS
MATERIAL
ENFORCEMENT IS
SPILLING
INTO UNEXPECTED AREAS



BY LEE BRAEM, ERIC BOYD AND ILANA MORADY



As in-house counsel for a mid-size manufacturing company, you routinely handle a variety of legal questions from your clients. One afternoon, as you are about to leave for the day, you receive a message from a warehouse manager that he has received a Letter of Investigation (LOI) from the Federal Aviation Administration (FAA) about potential violations of the Hazardous Material Regulations (HMRs). Before the call, you didn't think your company even handled hazardous materials. You had seen tank trailers and trucks on the highway marked with HazMat placards, and knew that your company didn't ship any such materials. The LOI alleges that someone in the warehouse mailed a package to a customer that contained small amounts of materials that are allegedly "hazardous," but you find that hard to believe.

Such scenarios are happening throughout the country right now due to increased enforcement by the numerous agencies with authority over hazardous material shipments. Companies have received LOIs and similar enforcement notices relating to such everyday materials as batteries, hand sanitizers and office cleaners. Unknown to many, detailed requirements exist for anyone handling, packaging, marking, labeling, documenting, storing, moving, loading, unloading or shipping hazardous materials. The types of materials that can be "hazardous" under the HMRs are often surprising; yet failing to comply with these requirements when shipping hazardous materials by air, highway, rail or water could be hazardous to your company's bottom line.



What is a hazardous material?

Hazardous material, commonly referred to as “HazMat,” is a special category of regulated material that is flammable, explosive or toxic, or that has other properties with the potential to cause damage to property, human health and safety, or the environment if there were a spill or other release. Over 15 percent of the freight tonnage shipped in the United States is regulated as hazardous by the US Department of Transportation (DOT). Each day, US companies move approximately one million shipments of hazardous materials, which amounts to over 400 billion tons of hazardous materials shipped each year. The purpose of the DOT’s hazardous materials transportation program, and the HMRs promulgated as part of that program, is to identify and manage the risks associated with transport of HazMat.¹

Over 3,000 materials have been identified by the DOT as subject to regulation under the HMRs. Thousands of other unnamed materials are regulated because they have hazardous properties, such as being explosive, flammable, corrosive or infectious. Of the multitude of regulated materials, many are common commercial items, such as household paint, batteries, cleaning solutions, swimming pool chemicals and even hand sanitizer. Companies that deal with hazardous materials on a regular basis are familiar with the nuances of the regulatory requirements. For an occasional shipper of HazMat, it can be much harder to know when and how to comply. For example, even a company that returns hazardous material to a customer or supplier is considered a HazMat shipper. Nonetheless, the HMRs apply equally to everyone, so it is important to understand the rules.

The HMRs

The main part of the HMRs is codified at 49 CFR Parts 100-185. The statutory authority is the Hazardous Materials Transportation Act, 49 USC 5101 et seq., as amended (HMTA). The HMRs at Section 173.2 and 172.101 contain the basic definitions, procedures and criteria for making the preliminary determinations of whether a material is hazardous. Once a material is determined to be hazardous, the HMRs apply to any person offering hazardous materials for transportation (a shipper).² The regulations also apply to any person transporting HazMat (a carrier), or any person who manufactures, fabricates, repairs or tests packaging and containers for the transport of HazMat in commerce. Freight or cargo brokers, forwarding agents,



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freight forwarders, warehouses, contract carriers and package reconditioners are all examples of entities typically subject to the rules. Even mailing chemicals or carrying small amounts of chemicals onto a passenger aircraft is subject to the HMRs. Company employees carrying chemical products or samples in their private or company vehicles for business purposes are also subject to the rules.

Enforcement

Who enforces the HMRs?

The DOT encompasses many agencies that regulate some part of HazMat transport. The Pipeline and Hazardous Materials Safety Administration (PHSMA) is the principal arm of the DOT

that promulgates and enforces the HazMat regulations. Other arms of the DOT or federal government are involved in HazMat matters, depending on the mode of transportation: ground, air, water or rail. For example, air shipments are also covered by regulations promulgated by the Federal Aviation Administration (FAA). The FAA brings its own enforcement actions for violations of the HMRs based on field inspections by FAA agents. Truck shipments are overseen by the Federal Motor Carrier Safety Administration (FMCSA), which primarily sets safety standards for large commercial vehicles in interstate commerce. The Federal Railroad Administration (FRA) oversees rail shipments, and the Coast Guard oversees shipments by water. Each modal agency performs its own inspections and establishes its own programs to prioritize inspection activities. These various agencies also partner with local governments and other federal agencies, such as the Customs Service and the Department of Homeland Security.

The enforcement process

To take the FAA enforcement procedures as an example, the FAA may investigate shippers for violations of the HMRs in several circumstances. First, if the FAA inspects an air carrier for compliance, it will often use evidence obtained through the process to investigate the shipper as well. Second, a hazardous materials spill or incident can also trigger government inspections of both the shipper and carrier. While a carrier is required to report certain incidents to the government, it is not required to inform the shipper (although some carriers may provide a courtesy notice).

If compliance issues are discovered as a result of an FAA inspection, the agency sends a Letter of Investigation (LOI), which requires a response within 10 days. FAA Guidance explains that an LOI serves two purposes: noti-



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ifying the alleged violator of the investigation, and providing the alleged violator an opportunity to tell his side of the story. The LOI usually describes an issue being investigated, but does not identify the specific HMR provision allegedly violated. The LOI may also request specific information or records. Recipients of an LOI may feel compelled to respond by “coming clean” and admitting to the allegations. Companies should remember, however, that this type of response can come back to haunt them by turning the case into a slam-dunk for the government. If the LOI does not specify the HMR provisions your company allegedly violated, don’t make the government’s case. Let the government figure out what specific HMR violations they want to allege, and you may find that they ignore an area that you thought was going to be a problem for your company.

Depending on the facts and the company’s response, the FAA may issue a Notice of Proposed Penalty or refer the matter to the DOT Office of Inspector General for criminal enforcement. Civil penalties can range up to \$110,000; criminal penalties can be as high as \$500,000 and can include prison time. The penalty amounts sought are based on agency penalty policies that usually leave room for negotiation downward. Like enforcement actions involving OSHA or EPA, it is always helpful to take advantage of the opportunity to discuss the allegations with the authorities, and try to mitigate or dismiss the alleged violations. Administrative enforcement actions, presided over by agency administrative law judges, are usually resolved through settlement. The FAA has a policy to issue press releases for any proposed penalty over \$50,000. Unlike the EPA, the FAA will not reduce penalties based on voluntary disclosures of HazMat violations.

Enforcement statistics

Fines for violation of the HMRs can range from \$250 to \$110,000 per violation. A minimum \$495 penalty applies to any violation related to training.⁵ Criminal penalties can range from \$250,000 to \$500,000 and imprisonment up to 10 years per violation.⁴ For continuing violations, each day of violation is a separate offense. The authorities can also hold up further shipment of the HazMat until compliance is achieved. Some of the most commonly cited violations include: failure to properly identify and classify the HazMat; incomplete shipping papers; failure to properly mark or label a package; failure to offer HazMat in an authorized or tested package; improper closure of packaging; and failure to train or have training documentation.

Baseline penalties presume an absence of prior violations, so generally, the existence of any prior violations will increase a penalty. In other words, the government is not sympathetic when a company has any type of track record for HazMat violations. The government can increase a

Practice Tips

1. **What you don’t know can hurt you.** You need to provide all employees, not just HazMat employees, with general awareness training, so they can identify materials that potentially could be considered hazardous.¹²
2. **One strike and you’re out!** Don’t assume that you will be able to avoid enforcement because it is your first offense. Although enforcement agencies have the authority to conclude actions with warning letters, penalties for first-time HazMat violations are on the rise.
3. **“We are from the government, and we are here to help.”** Responses to letters of investigation, like responses to subpoenas and information requests, can and will be used to support a case against you. Be careful what you say.
4. **Too much of a good thing isn’t always wonderful.** The response to a letter of investigation is not the place to confess all of your sins with respect to compliance with the HMRs. You can use the receipt of the letter, however, as the impetus to get your HazMat house in order.
5. **You can fight city hall.** A proposed penalty can be negotiated down, as long as the final penalty remains consistent with the agency’s enforcement guidance. Knowledge of the regulations, guidance and enforcement practices of the particular HazMat agency is invaluable.

proposed penalty by up to 100 percent on the basis of prior violations,⁵ and can quickly escalate a matter to criminal enforcement if they believe evidence of indifference or willful ignorance meets the standard for proving intent. Therefore, while a first penalty may only be a few thousand dollars, companies should be aware that actions for repeat violations are likely to be far more severe.

In the past few years, the number of hazardous materials civil penalty actions has been increasing and will likely continue increasing.⁶ In 2007, PHMSA closed only 169 civil penalty cases and collected less than \$1 million in penalties.⁷ In 2010, however, PHMSA closed 510 civil penalty cases and collected over \$1.5 million in penalties.⁸ The incidents that result in civil penalty actions run the gamut, including situations than an unaware company could easily find itself in. For example, in 2011, the FAA reported almost 600 undeclared HazMat incidents.⁹ While





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ACC Extras on... Hazardous Material Enforcement

ACC Docket

- Business Ethics: The Alphabet Soup of Risk Management (Oct. 2007). www.acc.com/docket/bizethics/riskmgmt_oct07

Forms and Policies

- Hazardous Materials Incidents Checklist (June 2010). www.acc.com/forms/haz-mat_jun10
- Environmental Standard — Asbestos Management (Jan. 2007). www.acc.com/forms/asbestos_jan07

Leading Practices Profile

- Crisis Management and the Role of In-house Lawyers: Company Leading Practices (June 2011). www.acc.com/lpp/crisis-mgmt_jun11

Green-house Counsel

- You May Have More Environmental Issues than You Think (March 2010). www.acc.com/greenhouse/environmental_mar10

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some shippers may knowingly fail to declare hazardous materials, it is not uncommon for shippers to send HazMat without even realizing it.¹⁰

Most of the HazMat incidents that occur each year involve flammable liquids. In 2011, there were just under 6,500 flammable liquids incidents in the United States, which caused nearly \$55,000,000 in damages. Common flammable liquids regulated under the HMRs include paints, cigarette lighters, waxes and polishes. After flammable liquids, the next most common HazMat incident type involves corrosive materials. In 2011, there were approximately 3,300 incidents and approximately \$16,000,000 in damages. Common corrosive materials include batteries, certain cleaning agents and solvents. Combined, flammable liquids and corrosives account for approximately 75 percent of all HazMat incidents each year.

Compliance

Most DOT rules on HazMat transport are geared toward shippers. Shippers are responsible for ensuring that hazards associated with shipments are properly com-

municated, i.e., classified, named, marked and labeled. Additionally, shippers must properly package and ensure that HazMat is shipped with the proper papers. Shippers are also responsible for making sure their employees have received the proper HazMat training.

Communication

The HMRs contain communication requirements with which shippers of hazardous materials must comply. Under the HMRs, every entity that offers hazardous materials for transportation must describe the HazMat on a shipping paper. The description includes the proper shipping name, hazard class, identification number and packaging group. The Hazardous Materials Table (HMT) is a table provided in the HMRs that is used to assign proper shipping names, classes, identification numbers and packaging groups. The HMT is located at 49 CFR 172.101.

One of the major communication requirements under the HMRs is use of proper shipping papers. Shipping papers are documents that alert anyone reading them to the hazards of the materials in the package. In addition to describing the hazard of the material, shipping papers must include an emergency response phone number. The phone number provided has to be monitored and available 24 hours a day during all times when the HazMat is in transportation. If anything happens to the HazMat while it is being shipped, emergency responders may need to call to obtain more information on the material. Therefore, it is also important that the phone number provided be of a person who is knowledgeable about the HazMat being shipped. Alternatively, shippers can provide the phone number of a person who has immediate access to another person with HazMat knowledge.

As occasional shippers of hazardous materials, many companies may not have the type of knowledge required to help an emergency responder. If that is the case, the HMRs allow companies to contract with hazardous materials service providers who are qualified to provide pertinent information to emergency responders. This is a good idea if your business is not equipped to have a 24-hour phone number or does not have a staff member who is highly knowledgeable about a material that you only occasionally ship. If you have a valid contract with a service provider, then you can use the provider's phone number on the shipping papers.

Training

Once a company determines that it is a HazMat shipper, a major responsibility is to provide employee HazMat training. Upon inspection, many companies receive violations for failure to provide proper training. As an initial matter, training must be provided to all HazMat employees. A HazMat employee is a person who is employed by

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a hazardous materials employer (e.g., a shipper) and who directly affects hazardous materials' transportation safety. The definition includes any employees who load, unload or handle HazMat, and any employees who prepare HazMat (or HazMat shipping papers) for transportation.

Most of the training requirements of the HMRs are contained in Parts 172 and 173. All employees who handle HazMat need to have general awareness training. This is a basic training that provides awareness of the regulations and the HMR communication requirements. In addition to this general training, the HMRs require employers to provide function-specific training to various types of employees. For example, an employee who prepares shipping papers must be taught the necessary knowledge and skills for complying with the shipping paper rules.

Safety and security training are also required under the HMRs. Safety training should provide information on the hazards posed by certain materials, as well as information on personal protective measures the employee should use when dealing with those materials. Security training, on the other hand, must provide awareness of any security risks associated with HazMat transportation. Other training requirements exist under the HMRs, depending on the mode of transport: Air, vessel and highway transportation all have specific modal requirements. These modal training requirements are contained in Parts 175, 176 and 177 of the HMRs.

The HMRs do not require particular sources of training, but it is the responsibility of the employer to determine that the training is adequate and covers all bases. Training can be in any format, such as lecture, conference or interactive video. Employees must be trained when hired, and employers must provide updated training every three years. If an employee changes job function, he must also receive new training at that time.

Employers have to keep records of the training provided to each HazMat employee. Many penalties arise for failure to keep proper training records, which employers frequent-

ly must provide to DOT officials during inspections. The records must include the following: the HazMat employee's name, date of the most recent training, copies of the training materials that were used, name and address of the person who provided the training and certification that the employee was trained. These records can be in any format, paper or electronic, as long as they are readily available.

Packaging

Hazardous materials cannot be shipped in just any package or container. Rather, HazMat shipments must meet certain packaging standards, depending on what packaging group the material falls into. The HMRs provide for three packaging groups that are differentiated by the "degree of danger" of the HazMat. Once you have determined that you are dealing with a regulated material, you should consult the Hazardous Materials Table, which will tell you the packaging group of the material you are shipping. It is a shipper's responsibility to determine that the packaging it uses for a hazardous material is authorized under the HMRs. The shipper also needs to ensure that each package it uses to offer hazardous materials for transportation meets certain tests. Depending on the material being shipped, testing can include drop tests, leak-proof tests, vibrations tests and stacking tests.

A recent enforcement story

In 2010, the FAA administrator affirmed a \$12,000 civil penalty against a small equipment brokerage company that unintentionally failed to declare a shipment of hazardous material.¹¹ The brokerage, which managed the eBay auction of items for companies, packed and shipped an engine containing approximately one quart of gasoline inside the fuel reservoir. Unaware of the marking, labeling and packing requirements under the HMRs, the brokerage simply boxed the engine and shipped it via DHL.

In affirming the assessment of a \$12,000 penalty, the FAA stressed that it didn't matter that the violations were unintentional, or that the company was a first-time violator. For penalty purposes, these are not mitigating factors. The administrator stressed that even if the brokerage only occasionally handled hazardous material, it should have been aware of the HMRs.

In an attempt to lower the penalty amount, the brokerage argued that its corrective action should be used as a mitigating factor. A few months prior to the FAA hearing, the company's owner was trained on hazardous materials by watching a slide show on the DOT website. The administrator noted that under certain circumstances, corrective action may be considered in setting a penalty amount, but the corrective action has to be "swift, comprehensive and positive." Positive means action to prevent future viola-

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tions. Although the slide show was positive, it was not swift or comprehensive because the owner watched it nine months after the incident.

Not only was the penalty affirmed, but the administrator also noted that \$12,000 would help achieve compliance because it contained sufficient “bite.” This case and other cases like it are important reminders that the government is not generally sympathetic to shippers who aren't aware of their duties under the HMRs.

Conclusion

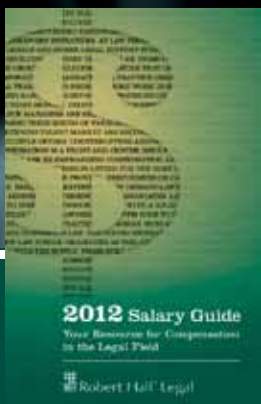
As this article suggests, it is easy for companies to get caught in the net of HazMat enforcement. Remember that whether your company is big or small, whether your company ships HazMat every day or once every few years, the rules are the same. Although failing to comply with the hazardous materials regulations and defending any resulting enforcement actions can be costly to your company, this article is intended to help you mitigate the impacts of enforcement and avoid such enforcement in the first place. 

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NOTES

- 1 www.phmsa.dot.gov/hazmat/risk.
- 2 49 CFR § 172.3. The term “shipper” is not specifically defined in the HMRs; however, the term is used colloquially as a type of “offeror,” defined broadly by the HMRs as any person who (1) performs, or is responsible for performing, any of the pre-transportation functions required under the HMRs for transportation of a hazardous material; (2) tenders or makes a hazardous material available to a carrier for transportation in commerce; or both (1) and (2). 49 CFR § 171.8.
- 3 49 CFR § 107.329.
- 4 49 CFR § 107.333.
- 5 Appendix A to 49 CFR Part 107.
- 6 President Obama's fiscal year 2013 budget request includes a 37 percent funding increase for PHMSA. The increased funding would be used in part to boost HazMat enforcement by increasing the number of investigators. A recent PHMSA press release stated that the agency has “closed a record number of enforcement orders for the past three years, but [has] more work to do.” PHMSA Press Release & Budget Overview, available at <http://phmsa.dot.gov/staticfiles//PHMSA/DownloadableFiles/Press%20Releases/PHMSA%20Release%20on%202013%20Budget%20Request%20-%20Feb%202012.pdf>.
- 7 PHMSA 2007 Enforcement Notice, available at www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/Enforcement_Notice_07.pdf.
- 8 PHMSA 2010 Enforcement Notice, available at www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/2010%20Penalty%20Action%20Report%20II..pdf.
- 9 DOT Hazmat Intelligence Portal, available at https://hip.phmsa.dot.gov/analyticsSOAP/saw.dll?Dashboard&_scid=qB*jUN6nH5g.
- 10 For example, each year, many *Amazon.com* merchants inadvertently send HazMat to the company's fulfillment warehouses. The company, which does not ship HazMat and therefore bans HazMat from its fulfillment centers, is forced to destroy these materials, many of which are common household items such as hair coloring kits, nail polish and hair spray. See www.auctionbytes.com/cab/abn/y12/m01/i25/s02.
- 11 In the Matter of Atlas Frontiers, LLC, Docket No. CP07NM0009 (FAA June 16, 2010), available at www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc400/civil_penalty/CaseFile/view/2010/2010-10.pdf.
- 12 A sample of a list of potential hazardous materials can be found at www.ups.com/content/us/en/resources/ship/hazardous/common_items.html?WT.svl=SubNav.

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