

Aviation Insights: Air Shipments and FAA Enforcement of the Hazardous Materials Regulations (updated April 2019)

The U.S. Hazardous Materials Regulations (“HMR”), 49 C.F.R parts 100 through 185, cover a broad range of commercial activities and apply to any person who offers or causes a hazardous material to be transported in commerce (e.g., consignors/shippers and freight forwarders), or transports a hazardous material in commerce and performs pre-transportation functions (e.g., U.S. and foreign air carriers). The Federal Aviation Administration (“FAA”) has responsibility for enforcement of the HMR with respect to shipments offered for transportation by air. As a matter of FAA enforcement policy and well-settled case law, U.S. and foreign air carriers may be held responsible for their ground handling agents’ violations of the HMR.

The HMR apply even where preparation of hazardous materials for shipment is incidental to a company’s business. Any company that offers such materials for transportation by air, particularly manufacturers and retailers of hazardous materials, should ensure that all covered employees comply with applicable HMR requirements, including special packaging, labeling, shipping paper, marking, maximum quantity, and training rules. This article briefly summarizes the FAA’s legal enforcement process for alleged violations of the HMR.

Letter of Investigation

Where the FAA has obtained information indicating possible violations of the HMR, the agency will issue a Letter of Investigation (“LOI”) to the target entity, i.e., the respondent. The LOI identifies potential violations and provides an opportunity to present an explanation and any mitigating circumstances. LOIs may also be accompanied by requests for documentation, such as shipping records, underlying material safety data sheets, and training records substantiating that its personnel, i.e., hazmat employees, have received initial and recurrent function-specific training on compliance with the HMR.



The firm’s practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the FAA’s enforcement of Federal hazardous materials transportation law. For further information regarding the matters discussed in this article, please contact either of the following attorneys:

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Any business subject to an outstanding LOI should carefully consider the scope of statements made in its reply letter, since the response becomes part of the FAA's enforcement investigative record and will be considered by the FAA attorney when determining the number of violations alleged and the size of the proposed civil penalty. All too often a business will hastily draft and transmit to the FAA a well-intentioned and apologetic reply that admits all the allegations and promises to never repeat the same offense(s) again, only to have such statements used against the business. Instead, specific mitigating circumstances should clearly be presented in the letter, consistent with official FAA policies, procedures, and guidance. Consequently, businesses should closely coordinate their written response to the FAA's LOI with experienced aviation counsel.

On-Site Assessment, Inspection of Shipments and Emergency Orders

In addition to issuing LOIs and assessing civil penalties for violations (discussed below), the FAA's authority to provide for the safe transportation of hazardous materials extends to on-site inspections of private businesses. Agency guidance to field offices states that where entry is refused the FAA may resort to the issuance of an administrative inspection warrant to gain access. Violations uncovered during such a visit could constitute grounds for a separate LOI and possible civil penalties.

Hazardous materials transportation and Federal constitutional law also permit investigators to open suspected non-compliant shipments, even without a search warrant. Under 49 C.F.R. § 109.5, where an investigator has an "objectively reasonable and articulable" belief that a package may contain hazardous material and does not comply with the HMR requirements, the FAA may stop movement of the package and open any component not immediately adjacent to the hazardous materials contained in the package. The FAA may further direct that a package be transported to a facility for examination and analysis and may require an offeror or carrier to so transport the package. Finally, the FAA may issue orders setting forth emergency restrictions, prohibitions and (for manufacturers of packaging and components of packaging) recalls, without advance notice or an opportunity for a hearing, where it determines that a violation of Federal hazardous materials transportation law, including the HMR, or the existence of an unsafe condition or practice, constitutes an "imminent hazard."

Enforcement Action: The Proposed Civil Penalty

If, after reviewing the reply to the LOI, the contents of the investigative file, and the recommendations of the special agent, the FAA concludes that sufficient evidence exists to prove that the alleged violations occurred and further enforcement action is warranted under the FAA's policies and sanctions guidance (i.e., action beyond a letter of warning or letter of correction entered into with the respondent), an FAA attorney will issue a Notice of Proposed Civil Penalty ("NPCP").

As an initial matter, Federal hazardous material transportation law distinguishes between violations of the HMR that are "knowing" (when a person has actual knowledge of the facts giving rise to a violation), "willful" (knowledge of the laws and regulations and a specific intent to violate them), or "reckless" (deliberate indifference or conscious disregard for the consequences of the underlying conduct).

Importantly, a "knowing" violation occurs even where persons do not know the act or omission constitutes a specific violation of the HMR. Therefore, an unintentional mistake—which may occur due to the complexity of the packaging, labeling, shipping paper, marking, maximum quantity, and training rules, including mistakes made by inattentive employees—is enough to constitute a violation of the HMR.

The maximum civil penalty for a knowing violation of the HMR is \$79,976 (or \$186,610 when the violation results in death, serious illness, or severe injuries to any person, or substantial destruction of property); there is no minimum civil penalty for violations, other than violations related to training (\$481). Much to the

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frustration of respondents and their attorneys, the FAA will often allege that a single act or omission constitutes multiple violations of the HMR. Where the amount in controversy exceeds \$400,000, and the parties do not reach settlement, the FAA is required to bring a civil suit in Federal court.

Willful or reckless violations are prosecuted as criminal offenses, with more severe penalties than those assessed for knowing violations (which are subject to civil penalties only). If the FAA concludes that criminal penalties are appropriate, the case is referred to the Department of Justice. For a willful or reckless violation, monetary fines under the Federal Criminal Code (Title 18) and a maximum prison term of five years (or 10 years for release of a hazardous material that results in death or bodily injury) apply.

In certain cases, the FAA may decide to issue a news release identifying the respondent, the alleged violations and proposed civil penalty. As a general rule, the FAA will not negotiate the contents of a news release nor will it negotiate on whether or not to release one.

Statutory Factors and the Proposed Civil Penalty

Under 49 U.S.C. § 5123, the FAA must consider several factors when determining an appropriate civil penalty amount, including: (i) the nature, circumstances, extent and gravity of the violation; (ii) the degree of culpability of the violator; (iii) any history of past violations; (iv) the violator's ability to pay and the effect on its ability to continue to do business; and (v) other matters as justice requires. The FAA has implemented a penalty matrix that reflects some of these factors. Agency investigative personnel follow the matrix when determining the appropriate civil penalty, with adjustments reflecting the nature, circumstances, extent and gravity of the alleged violations. By way of example, certain aggravating factors such as whether the shipment caused damage to persons or property, or interfered with commerce, as well as a history of previous violations, will normally increase the proposed civil penalty. The FAA does not consider an entity's absence of prior violations to be a mitigating factor, given that compliance is the expected norm under its enforcement philosophy.

Settlement

After a NPCP has been issued, the respondent may choose to either: (i) pay the proposed amount; (ii) submit documentation that no violation occurred or that the penalty is unwarranted under the circumstances; (iii) request a reduction in the proposed amount supported by the justification; (iv) request an informal conference with an FAA attorney; or (v) demand a hearing before an Administrative Law Judge ("ALJ"). Where the case goes to a hearing, the FAA's special rules of practice apply, including agency rules for evidence, discovery, testimony and subpoenas.

An informal conference presents the greatest opportunity to reduce both the number of alleged violations as well as the size of the proposed civil penalty and does not waive any right to a future hearing before an ALJ if a settlement cannot be reached. However, it is very important that the respondent be prepared to adequately demonstrate at the informal conference that a reduction is warranted under FAA rules and enforcement policy. Preparation for an informal conference should include a request for releasable portions of the agency's investigative file.

At a minimum, the following questions should be thoroughly examined before an informal conference: (i) has the agency properly considered each of the statutory factors under Section 5123 and its enforcement matrix? (ii) does the proposed civil penalty order unnecessarily include multiple alleged violations for essentially the same act or omission? (iii) is the agency fully aware of all corrective actions undertaken since receipt of the LOI? (iv) have significant expenditures or remedial actions been undertaken to warrant an offset in the proposed civil penalty? (v) was there reasonable reliance on incorrect information supplied by a third party when offering the shipment?

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After the informal conference, the FAA will issue a final notice of civil penalty which may reflect either a negotiated settlement in lieu of further litigation, or the FAA's final position on the appropriate penalty amount—which may be higher or lower than initially proposed.

Nevertheless, during this interim period between the informal conference and final notice of civil penalty, it is advisable to continue to assess the merits of the FAA's case and likelihood of successfully dismissing some or all of the charges in a hearing before an ALJ. For example, a formal hearing may be appropriate where the agency has misapplied Federal hazardous material transportation law (including agency rules and case precedent), the proposed penalty is disproportionate or excessive, or a disputed issue requires a finding of fact.

Other Matters

The FAA has established guidelines addressing issues such as civil penalties and small business entities, as well as additional requirements applicable to air carriers and freight forwarders, and recurrent training requirements for covered hazmat employees. Additionally, air carriers are required under the HMR to report certain discrepancies involving passenger baggage (e.g., unauthorized hazardous materials) or cargo (e.g., improper descriptions, certifications, markings, labeling or packaging, or undeclared hazardous materials), and failure to comply with such reporting requirements constitutes grounds for FAA enforcement action.

Conclusion

The FAA's enforcement of the Federal hazardous material transportation law is far reaching and involves considerable agency discretion. Maintaining continuing awareness of changes to the HMR and FAA enforcement guidelines is critical to avoiding FAA enforcement action.

Once an FAA investigation of possible violations begins, however assistance of competent aviation regulatory counsel is essential to effectively navigate the HMR and fully develop the administrative record for a possible appeal from an unfavorable decision. Therefore, counsel should be engaged at all steps of the process—from replying to the LOI and devising appropriate remedial and corrective measures to representing the company during settlement negotiations and appealing the matter to an ALJ. In sum, effective planning and advocacy is the key to successfully reducing the FAA's proposed civil penalty amount.