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DOT's Enhanced Procedures for Enforcement of Hazardous Materials Transportation Law (Apr. 2011)

Overview

The Department of Transportation (DOT), through the Pipeline and Hazardous Materials Safety Administration (PHMSA), has issued regulations at 49 C.F.R. Part 109 implementing enhanced inspection, investigation and enforcement authority under the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005. 76 Fed. Reg. 11,569. These rules, which take effect on May 2, 2011, establish a number of important procedures that investigators at PHMSA, the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA) and the Federal Railroad Administration (FRA), will follow when assessing whether or not a shipment complies with the packaging, hazard communication, and handling requirements of the U.S. Hazardous Materials Regulations (HMRs) and, more importantly, stopping the movement in transportation of non-compliant shipments, including undeclared hazardous materials.

According to DOT these new procedures, "will enhance and allow us to respond immediately and effectively to conditions or practices that pose serious threats to life, property, or the environment." This article briefly summarizes the most salient aspects of the procedures.

Opening of Packages and Removal from Transportation

The new rule codifies DOT's long-standing position that hazardous materials transportation and Federal constitutional law permit investigators to open suspected non-compliant shipments notwithstanding the absence of a search warrant. Under new 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 requirements of the HMR, the investigator may stop movement of the package and open any component not immediately adjacent to the hazardous materials contained in the package.



The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the DOT's enforcement of Federal hazardous materials transportation law.

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Examples of factors that investigators may rely upon in forming a “reasonable and articulable” belief include package appearance, conflicting information between the shipping papers and the package markings, the identity of offeror or carrier, an odor emanating from a container and anonymous tips. The new rule also provides that an investigator may remove a suspected package and related packages in a shipment from transportation for up to forty-eight hours, provided a written explanation of the basis for removal is furnished to the person in possession of the package. 49 C.F.R § 109.7.

Detention and Transportation of Packages for Further Analysis

Under certain circumstances, an investigator may direct that a package be transported to a facility for further examination and analysis; the investigator may direct either the offeror, packaging manufacturer, tester of the package or carrier to transport the package. Although not set forth in the regulatory text, DOT explained in the preamble to the rule that if subsequent examination reveals that package complies with the HMRs, the operating agency that required the testing will pay for the transportation and analysis. However, DOT maintains that under the “discretionary function” exception to the Federal Tort Claims Act, it will not compensate parties for monetary losses incurred as a result of any transportation and analysis ordered by the agency. Significantly, the new rules are silent as to which party ultimately bears the cost of transportation – the consignor, carrier or consignee – when analysis reveals noncompliance with the HMRs after a package is detained and transported to a facility for further analysis.

Issuance of Emergency Orders

The new rules establish procedures for the issuance of orders setting forth emergency restrictions, prohibitions and recalls and out-of-service orders, without advance notice or an opportunity for a hearing. The agency may issue such orders where it determines that a violation of Federal hazardous materials transportation law, including the HMRs, or the existence of an unsafe condition or practice, constitutes an “imminent hazard.” An imminent hazard is defined under new 49 C.F.R. § 109.1 as “the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.” Out-of-service orders will be issued to prohibit the movement of: (i) aircraft and most other modes of transportation containing packages that constitute an imminent hazard; and (ii) the packages themselves. Upon receipt of an out-of-service order, the party in possession of the package must remove the package from transportation until it is brought into compliance with the out-of-service order. New 49 C.F.R. § 109.19 establishes procedures for the review and reconsideration of emergency orders, with decisions of an PHMSA’s Assistant Administrator constituting final agency action—immediately appealable to the appropriate Courts of Appeal for the United States under 49 U.S.C. § 5127.

Conclusion

These new rules are intended to expand enforcement mechanisms available to inspectors, including the issuance of emergency orders to close down shipping companies with poor safety records and issuing immediate recalls of faulty packaging. Shippers of particularly time-sensitive packages, including perishable hazardous materials, pharmaceuticals and perishable medical products, should exercise vigilance to ensure compliance with special packaging, hazard communication, labeling, shipping paper, marking, and maximum quantity limitation requirements under the HMRs to avoid the unnecessary detention of their shipments, or worse, issuance of emergency orders and/or subsequent enforcement action and civil penalties. Carriers, for their part, are well-advised to recall their ongoing obligations under the HMRs to train personnel on the recognition of hazardous materials and equip personnel with emergency response information, self-protection measures and accident prevention methods and

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procedures. Air carriers that accept declared hazardous materials in particular are required to conduct inspections to ensure that shipments comply with the quantity limitation, shipping paper, marking, labeling and packaging requirements of the HMRs; failure to conduct such inspections could constitute a violation of the HMRs' prohibition against an air carrier offering or accepting any hazardous materials that are not prepared in accordance with the HMRs.

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