

Aviation Regulatory Bulletin

January 2007

Shipment of Hazardous Materials by Air and FAA Civil Penalty Enforcement Process

The penalties for shipping hazardous materials or waste (“hazmat”) improperly are severe. For example, the Federal Aviation Administration (FAA) collected over \$3.7 million in civil penalties for hazardous materials regulation (HMR) violations in 2004 and likely attempted to assess over \$6 million in civil penalties. Unfortunately, many companies do not fully understand the HMRs or realize that the companies are subject to the FAA’s jurisdiction. To make matters worse, many companies do not have in place proper hazmat shipping procedures or employee hazmat training to prevent HMR violations.

The first step in the enforcement process is typically a telephone call from the shipper or the FAA seeking information about a particular shipment. The next step is usually a Letter of Investigation (LOI) from the FAA, requesting an explanation of the facts and circumstances, which must be provided within 10 to 15 days. Depending on the relevant facts and the company’s response to the LOI, the FAA may (1) dismiss the matter, (2) issue a Notice of Proposed Civil Penalty (NPCP) seeking a substantial civil penalty or (3) in the worst-case scenario, refer the matter to the U.S. Department of Transportation Office of Inspector General (OIG) for criminal prosecution. Without question, the HMR enforcement process is complex and often frustrating and, as a result, many companies fail to maximize their bargaining position during initial communications with the FAA. This article provides an overview of the HMR enforcement process and discusses some of the ways in which companies may maintain a favorable negotiating position during the HMR civil enforcement process.

A number of governmental entities are involved in the regulation of hazardous materials transportation. The federal hazardous materials laws authorize the Secretary of the U.S. Department of Transportation (DOT) to regulate the transportation of hazardous materials. The Pipeline and Hazardous Materials Safety Administration (PHMSA) writes the HMRs implementing the requirements of the federal law. The FAA has sweeping jurisdiction regarding HMR enforcement.

The FAA may enter upon, inspect and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties relate to: (1) the manufacture, fabrication, marking, maintenance, reconditioning, repair, testing, or distribution of packages or containers for use by any person in the transportation of hazardous materials in commerce; or (2) the transportation or shipment by any person of hazardous materials in commerce. *See*, 49 U.S.C. § 5121(c)(1). In short, FAA special agents have a significant amount of authority to investigate alleged HMR violations.

Penalties and Negative Publicity

Since the 1996 ValuJet accident and the September 11, 2001 terrorist attacks, the FAA and the Transportation Security Administration (TSA) have increased their surveillance of cargo shipments and hazmat. Specifically, the FAA has hired an army of special agents and attorneys to investigate and enforce the HMRs. Similarly, the TSA has hired hundreds of special agents to search for undeclared hazmat hidden in cargo shipments that could pose a significant security threat. As is often the case, if the TSA finds an undeclared hazmat shipment that does not fall within its security enforcement mandate, the TSA will refer the matter to the FAA for enforcement. The FAA's primary method of enforcing the HMRs is through the issuance of civil penalties, which often can lead to negative publicity for target companies. As noted above, although the FAA collected over \$3.7 million in civil penalties in 2004, the total proposed civil penalty amount was likely in excess of \$6 million. HMR civil penalties range from \$250 to \$100,000 per violation, while criminal penalties range from \$250,000 to \$500,000. Criminal penalties also can involve imprisonment for not more than ten years per violation. As a general matter, hazardous materials civil penalties are usually higher than other Federal Aviation Regulation violations because a typical undeclared hazardous material shipment can involve at least eight separate regulatory violations, resulting in a maximum civil penalty in excess of \$250,000. Companies are often justifiably shocked by the size of the civil penalty for shipping, for example, a single can of spray paint or a pint of adhesive.

Companies also can be surprised when the FAA issues a press release, usually entitled "Civil Penalty Proposed Against Company X for Alleged Hazardous Materials Violations." The FAA usually issues press releases for enforcement actions involving proposed penalties of \$50,000 or more and may issue its press release before companies have the opportunity to respond to the allegations, which may be without merit. While the public has a right to know about the FAA's activities, such right should be balanced with the rights of companies. The mere allegation of hazmat violations places companies in a negative light among their industry peers and often leads to unwarranted negative consequences. Also, if the allegations are later deemed unfounded during settlement discussions or at a hearing, the FAA is unlikely to issue a retraction.

Letter of Investigation Response

At the start of its investigation, the FAA will send a company an LOI, informing the company of the allegations and seeking an explanation. This is a critical juncture in the enforcement process because it is the first opportunity to respond to the allegations. The FAA hopes that the company will admit to everything—which frequently happens—and the special agent will then send the case to the FAA attorney to issue the NPCP. Rarely, if ever, do companies benefit from admitting to the violations. Instead, it is best to discuss the case with an experienced enforcement attorney to assess the merits of the FAA's case before submitting a response. It is important to note that the enforcement process is an adversarial process and companies frequently have the mistaken perception that the FAA special agent is a friend only seeking some information to "clear up this misunderstanding" and that the case will simply be closed with a slap on the wrist. The FAA seldom closes hazmat cases with a slap on the wrist.

An LOI response should stress only those items that are (i) exculpatory based on well-established FAA precedent and (ii) mitigating based on the FAA policy guidance. It is very difficult to defend a company against a hazmat NPCP after the company has admitted to the allegations. A company also should highlight any immediate proactive corrective action. We routinely advise companies on simple, inexpensive corrective actions that the FAA views very favorably and that the FAA considers as a basis to mitigate a civil penalty.

After the FAA's receipt of the LOI response, the FAA special agent may request additional information regarding the facts, any additional corrective action, and/or the presence of an employee hazmat training program. Upon completion of the investigation, the FAA special agent will forward the case to an FAA attorney for further enforcement action. The LOI response will become part of the Enforcement Investigative Report (EIR). The EIR contains all the necessary enforcement information: witness statements, airway bills, shipment photos, material data safety sheets, civil penalty recommendations, etc.

Informal Conference and Settlement Negotiations

Upon receipt of the EIR, the FAA attorney will assess the merits of the case and determine whether to seek a civil penalty consistent with the special agent's recommendation or deviate from the special agent's guidance. The FAA attorney will prepare an NPCP setting forth the specific allegations and the basis for the civil penalty amount. The NPCP also will advise a company of its options, which include accepting a finding of violation and paying the entire civil penalty amount or requesting an informal conference. Depending on the facts, it is usually wise to request an in-person informal conference.

At the informal conference, the company should be thoroughly prepared to address all aspects of the case and the methodology underlying the FAA's civil penalty calculation. The FAA uses its civil penalty guidelines to determine the proper penalty amount based on various facts and circumstances. However, the FAA's calculations are very subjective and involve a significant amount of prosecutorial discretion. The guidelines contain a series of questions designed to assist in the FAA's evaluation of a case. The questions involve: (i) the nature and circumstances of the violation, (ii) the violator's culpability, (iii) shipment preparation, (iv) prior violation history, (v) damage or harm to persons, and (vi) other aggravating or mitigating factors. The FAA also will consider a company's ability to pay the proposed civil penalty and whether the company has taken any corrective action.

Settlement negotiations with the FAA can be contentious depending on the particular FAA region or FAA attorney. Our experience has shown that some FAA attorneys take a more aggressive position during settlement negotiations, while others are more reasonable. Perhaps two of the most frustrating aspects of settlement negotiations are the FAA's unwillingness to accept voluntary disclosures and its unwillingness to issue compromise orders.

The FAA will not accept voluntary disclosures for hazardous materials violations, despite its willingness to do so for every other type of regulatory violation. The FAA's position is that airlines already are obligated to report hazmat violations under the HMRs and therefore the FAA may not accept voluntary disclosures. The regulations do not prohibit non-airline voluntary disclosures. In fact, most of the companies that violate the HMRs are not airlines. As a result, there have been cases where well-intended companies inform the FAA of a hazmat violation only to receive an NPCP based on the same facts that the company disclosed to the FAA.

The FAA civil penalty enforcement guidelines provide that the FAA may compromise any civil penalty action with the payment of a civil penalty, but without a finding of violation. This allows the FAA and a company to settle a matter without costly and time-consuming litigation, which ultimately serves the public interest. However, the FAA has taken the position as a matter of policy that it will not compromise hazardous materials civil penalty actions. Accordingly, companies that are sensitive to the impact of a finding of violation are forced to weigh the costs of litigation and the impact of a finding of violation. Unfortunately, the FAA has no real litigation costs or risks, despite the very real drain on the FAA's scarce resources.

If the parties are unable to reach a settlement, the FAA will issue a Final Notice of Proposed Civil Penalty, and the company will have the option to pay the proposed civil penalty or request a hearing. It usually makes sense to request a hearing because such a request preserves a company's due process rights and it extends the time in which to reach a settlement. When a company requests a hearing, the FAA will serve the company with the complaint, which is identical to the NPCP. The company then is required to file an answer to the complaint. Simultaneously, the case is referred to the docket of an Administrative Law Judge (ALJ) to conduct a settlement conference and set the discovery schedule, hearing location, and hearing date.

The complexity of the hearing will depend on the facts and circumstances. In general, most hearings last one or two days depending on the number of witnesses. The ALJ may require the parties to file post-hearing briefs. The ALJ will likely render his decision two or three months later. A party may then appeal an unfavorable ALJ decision to the FAA Administrator. The parties may have to wait several months for FAA Administrator decisions. Unfavorable FAA Administrator decisions may be appealed to the United States Court of Appeals.

In sum, the hazardous materials compliance and enforcement process can be frustrating and time-consuming. Accordingly, it makes sense to discuss the matter with an experienced hazmat enforcement attorney before responding to the FAA's LOI request. Our experience has shown that many reasons often exist to reduce a civil penalty and that it is worth the effort to defend a hazmat case vigorously. The best advice we can offer is to avoid the enforcement process entirely by ensuring that your company has a comprehensive hazmat training and compliance program. As with most regulatory programs, proper prevention and pre-planning can reduce the risk of exposure. We routinely assist companies with hazmat program compliance efforts and would welcome the opportunity to assist your company.

For more information, please contact David M. Hernandez at 202-312-3340 (office); 202-403-1678 (mobile); or e-mail at dhernandez@vedderprice.com.

David M. Hernandez is a Shareholder with the law firm Vedder, Price, Kaufman & Kammholz, P.C., one of the nation's leading aviation regulatory and finance law firms. Mr. Hernandez specializes in aviation and aerospace regulatory matters and is a member of the Aircraft and Equipment Finance Practice Groups. He adds a valuable skill set well suited for a wide range of aviation and regulatory issues. A graduate of the U.S. Air Force Academy and Northwestern University School of Law, Mr. Hernandez is a former U.S. Department of Transportation Honors Attorney and a former FAA Trial Attorney/Prosecutor. Mr. Hernandez also earned a master's degree in Business Administration from Monmouth University while serving on active duty as an Aircraft Maintenance Officer in the U.S. Air Force.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

Copyright © 2007 Vedder, Price, Kaufman & Kammholz, P.C. *Aviation Regulatory Bulletin* is a periodic publication of Vedder, Price, Kaufman & Kammholz, P.C. and should not be construed as legal advice, tax advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your lawyer concerning your specific situation and any legal questions you may have.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national full-service law firm with approximately 235 attorneys in Chicago, New York, Washington, D.C. and in Roseland, New Jersey. The attorneys in the firm's Aircraft and Equipment Finance Groups represent lessees, lessors, financiers and related parties, both domestic and international, in a broad range of equipment finance transactions, including those involving aircraft, railcars, locomotives, vessels, computers, medical equipment, industrial production equipment, satellites, cars and trucks.

Principal Members of the Equipment Finance and Aircraft Finance Groups:

Chicago:

Jonathan H. Bogaard
Dean N. Gerber
Timothy W. O'Donnell
Geoffrey R. Kass
Joshua D. Gentner
John T. Bycraft
Ronald J. Rapp
Jordan R. Labkon
James P. Lambe
Milos V. Kovacevic
Nirav A. Patel
Patrick J. Stoklas
Ryan J. Opeka
Kiran S. Advani
Robert J. Hanks
Imran M. Rahman

New York:

John I. Karesh
Francis X. Nolan, III
Donald A. Wassall
Denise L. Blau
John E. Bradley
Ronald Scheinberg
Jeffrey T. Veber
Jay S. Zwerling
Amy S. Berns
Christine L. Carver
Cameron A. Gee
Ji W. Kim
Daniel Barlin
Justin M. Patrick

Washington, D.C.:

Edward K. Gross
Theresa Mary Peyton
David M. Hernandez
Philip M. Livingston
Nisha Saxena

Related Disciplines:

Douglas J. Lipke (Insolvency)
Thomas P. Desmond (ERISA)
John T. Blatchford (Securities)
Ernest W. Torain, Jr. (Securities)

Chicago

222 North LaSalle Street
Chicago, Illinois 60601
312-609-7500
Fax: 312-609-5005
Contact: Dean N. Gerber

New York

805 Third Avenue
New York, New York 10022
212-407-7700
Fax: 212-407-7799
Contact: Ronald Scheinberg

Washington, D.C.

875 15th Street, N.W., Suite 725
Washington, D.C. 20005
202-312-3320
Fax: 202-312-3322
Contact: Theresa Mary Peyton

New Jersey

Five Becker Farm Road
Roseland, New Jersey 07068
973-597-1100
Fax: 973-597-9607
Contact: John E. Bradley