

Shipping HAZMAT? Do it Right or Pay the Price!

By Peter Quinter, pquinter@becker-poliakoff.com



If your company ships hazardous materials (a/k/a “HAZMAT”), a single misstep could cause your business to incur hundreds of thousands of dollars in penalties.

In fact, every day HAZMAT shippers are slapped with penalties issued by the Federal Aviation Administration (FAA), and the penalties are huge now that it’s \$50,000 for each violation.

If you think “Well, I made only one mistake--I won’t get caught,” or if you think you can talk yourself out of getting a penalty like you do a speeding ticket, think again. When the FAA investigates an incident and issues a penalty, you can bet what you think is just one violation will quickly become multiple violations.

FAA regulations require properly marking, printing, labeling, describing, packing, and classifying HAZMAT. Other FAA regulations concern the training of employees and recordkeeping of shipments. Understanding the FAA’s regulations, policies, and procedures in HAZMAT penalty cases is a necessary first step to mitigating what can be exorbitant penalties.

The FAA issues penalties for violation of the Department of Transportation Hazardous Materials Regulations (HMR) found at 49 CFR Parts 171 to 185, which were issued pursuant to the Federal Hazardous Materials Transportation Law, 49 U.S.C. Sections 5101 to 5127. The FAA penalties have increased from \$10,000 to now \$50,000 for each violation of the HMR that occurred after August 10, 2005. It is common for the FAA to issue a penalty for hundreds of thousands of dollars against a company for illegally shipping, or even attempting to ship, a HAZMAT on an aircraft, including air shipments provided to FedEx, UPS, or DHL.

The FAA HAZMAT Penalty Procedures

The most common scenario occurs when an undeclared HAZMAT shipment is provided to an airline, and the airline reports the suspected violation to the FAA. An FAA Special Agent with extensive experience in HAZMAT is immediately dispatched, and the Agent conducts an inspection and investigation of (a) the shipper, (2) the freight forwarder, and/or (3) the airline. The Agent often interviews and obtains written statements from persons involved in the incident. The Agent then submits a Report of Investigation to the nearest FAA legal office, called the Office of the Regional Counsel, for review by its lawyers. The FAA lawyers then decide whether or not the violation should result in a written warning or a civil monetary penalty, and if so, what the amount of the penalty should be, and to which individual or company should the penalty be issued.

The FAA attorney then formally issues a “Notice of Proposed Civil Penalty” against the company or person who shipped or attempted to ship the HAZMAT. The Notice is usually addressed to the President of the company, and it specifies the facts and circumstances of the violation, cites the applicable sections of the HMR, and concludes with a demand for payment of the civil penalty.

The FAA offers the alleged violator some choices in a standard form attached to the Notice. Basically, your options are to (1) pay the penalty in full, (2) deny any violation and ask for a formal hearing, (3) make an offer of settlement, or (4) ask for a telephonic and/or in-person informal conference with the FAA attorney to explain what happened and negotiate a lower, or no, penalty. The form must be completed and returned to the FAA attorney within 30 days with the selection of one of the choices above, and officially identifying the name and contact information for the attorney representing the company which received the penalty from the FAA.

I have handled many FAA HAZMAT cases from all over the United States. I have also lectured extensively on the topic of "Mitigating Civil Penalties Issued by the FAA For HAZMAT Violations", including at the Dangerous Goods by Air 2001 Conference & Exhibition (February 14, 2001) sponsored by the International Air Transport Association (IATA), Keeping Dangerous Goods Safe in a Secure World (May 1, 2003) also sponsored by IATA, and Dangerous Goods Symposium for Instructors (November 9, 2006), sponsored by Labelmaster.

In the many cases that I have handled, I have always requested an informal conference with the FAA attorney. Informal conferences give the company an opportunity to explain to the FAA its version of what happened and why it happened, and to allow the company, through its attorney, to present mitigating factors to reduce what otherwise may be a huge penalty. After the informal conference has completed, and hopefully a reasonable settlement was achieved, the FAA attorney will issue a formal "Order Assessing Civil Penalty" which restates the agreed facts, the relevant sections of the HMR which the company admits to violating, and the amount of the agreed settlement penalty.

Good Arguments to the FAA

The FAA has certain criteria set forth at 14 CFR Section 13.16(c) that it uses to evaluate the amount of a penalty. They generally are categorized as:

- (1) the nature, circumstances, extent, and gravity of the violation; and
- (2) the degree of culpability, and history of prior violations, and the ability to pay.

What is not stated is perhaps more important, and that is what corrective action has been taken by the company to prevent a recurrence of a similar violation. The extent and timing of such corrective action are significant factors in successfully mitigating penalties. Companies should consult the current Hazardous Materials Sanction Guidance Matrix found at Appendix A to 49 CFR Part 107.

Some Things to Remember

1. Immediately get a knowledgeable attorney involved as soon as a HAZMAT incident occurs which could lead to an FAA investigation and penalty; and
2. Communicate with the assigned Special Agent during the investigation, and then the attorney within the Office of Regional Counsel **before** the issuance of a penalty.

With the penalties now \$50,000 for each HAZMAT violation combined with more than 100 Special Agents within the FAA's Office of Hazardous Materials, and a priority of the FAA to enforce hazardous materials regulations, 2009 and 2010 are very likely to be record years for collection of penalties by the FAA.

Go to www.customsandinternationaltradelaw.com to view this and other posts to the Customs and International Trade Law Blog. Make sure to fill in your email address in the "subscribe" box so you can receive updates.

For any questions regarding FAA Penalties for HAZMAT or Dangerous Goods, or for more information, please contact Peter Quinter at pquinter@becker-poliakoff.com or (954) 270-1864.