

Sampling of Trade and Transportation Export Compliance Developments

1. Are You a Shipper of Hazardous Materials? (Do You Understand Your Compliance Obligations?)
November 12, 2012
2. New Regulatory Barriers to Nano, Chemical and GMO Developments
March 6, 2013
3. U.S. Exercises New Authority to Ban High-Tech Exports
March 28, 2013



Corey L. Norton

Keller and Heckman LLP

1001 G Street, NW, Suite 500 West

Washington, DC 20001

202.434.4303, norton@khlaw.com

<http://www.chemeximlaw.com/>

@CNortonExport

@CNortonImport

Are You a Shipper of Hazardous Materials? (Do You Understand Your Compliance Obligations?)

Trent Doyle, Partner

Nov 12, 2012

Batteries, aerosols, lubricants, cleaning supplies, fuels, refrigerants, and various other materials which may be present at cellular sites or used by telecommunications personnel in the field are subject to regulation as hazardous materials (hazmats) under the U.S Department of Transportation (DOT) Hazardous Materials Regulations (HMR), 49 C.F.R. parts 100 - 185. As a result, shipments of those materials must be conducted in compliance with special marking, labeling, packaging, and documentation requirements set out in the HMR and persons who prepare shipments of these products must have completed DOT hazmat training. Failure to strictly comply with these obligations can lead to significant monetary penalties and potential tort liability (if an accident or shipping incident were to occur). For example, the simple act of over-nighting an equipment kit which included a single small aerosol can such as WD-40® or a can of compressed air for dust removal to a field engineer in a remote location could result in a penalty of \$70,000 or more if the package was not properly declared and prepared for shipment.

Hazardous materials (*i.e.*, hazmats; also known as "dangerous goods" in other countries) are materials capable of posing unreasonable risk to health, safety, and property when transported. DOT regulates materials in nine different hazard classes and some of these hazard classes are further divided into divisions that correspond to particular hazard concerns or properties. The nine hazard classes (*i.e.*, Class 1 – Class 9) encompass explosives, gases, flammable and combustible liquids, flammable solids, water reactive materials, oxidizers, organic peroxides, poisonous materials, infectious materials, radioactive materials, corrosives, environmentally hazardous substances, and miscellaneous hazardous materials. The DOT Hazmat Table (49 C.F.R. § 172.101) lists numerous materials which DOT has determined to be hazardous. Importantly, even if a material is not specifically listed in the Table it may still be regulated as a hazmat if its properties meet any of the hazard class definitions.

Each shipper is charged with the responsibility of determining how the material it desires to ship is classified under the HMR. A material safety data sheet (MSDS) can assist the shipper in making such a determination. Frequently, the MSDS will contain the supplier's recommended DOT hazmat classification; however, that classification is not necessarily determinative as it may be based on facts associated with the supplier's shipment that are not applicable to the new shipment. For example, a material that is to be repackaged or shipped by a different mode of transport may result in a different hazard classification. Also, special permits, competent authority approvals, or other regulatory relief may be available. Ultimately, each shipper is responsible for correctly classifying and preparing the materials it intends to ship.

Depending on the nature and quantity of material to be shipped and the mode of transport, various opportunities exist for relief from some, but typically not all, of the HMR requirements. While there is no blanket relief for shipping lesser quantities of hazmats, certain materials are eligible for relief from some of the requirements under *de minimis*, small quantity, limited quantity, and/or consumer commodity provisions of the HMR. A permitting process also exists by which parties may obtain regulatory relief through a special permit if they can demonstrate that the shipments at issue will achieve an equivalent

level of safety to what is required in the HMR or are consistent with the public interest and will provide adequate protection against risks inherent to transportation. Also, the transport of certain hazmats by telecomm personnel in private vehicles for use at a job site (as compared to having those products shipped by another carrier to the site) may be eligible for relief from regulatory requirements under the HMR's materials of trade exception (49 C.F.R. § 173.6).

Various government authorities assist in the enforcement of the HMR, including the Federal Aviation Administration (FAA), Federal Motor Carrier Safety Administration (FMCSA), Federal Railroad Administration (FRA), Pipeline and Hazardous Materials Safety Administration (PHMSA), and the U.S. Coast Guard. Not surprisingly, air shipments are especially scrutinized and air carriers (e.g., FedEx®, UPS®, DHL, *etc.*) are required to notify the FAA if they discover a package that is non-compliant with the HMR. This will trigger an investigation by an FAA agent which will typically result in the FAA contacting the shipper and requesting further information on the parties involved in the preparation of the shipment. In some instances, the FAA may conduct a compliance inspection at the facility where the shipment originated. Besides requesting information on the particular shipment in question, including a MSDS for the hazmat, the agent will usually ask to see the shipper's DOT hazmat training records.

DOT hazmat training is a fundamental requirement of the HMR and compliance in this area receives heavy attention during Agency inspections and enforcement actions. Inadequate training is one of the most frequently cited violations of the HMR. Each *hazmat employee* of a *hazmat employer* must be trained. DOT defines these two terms rather broadly. The definition of a hazmat employer includes a person (company) who uses one or more of its employees in connection with transporting hazmats in commerce; causing hazmats to be transported or shipped in commerce; or representing, marking, selling, certifying, offering, manufacturing, *etc.*, packaging as qualified for use in transporting hazmats. The term *hazmat employee* includes, for example, one who performs or supervises any of the following functions:

- (i) classifying material as hazardous;
- (ii) selecting proper shipping name for material;
- (iii) selecting packaging for hazmats;
- (iv) packaging hazmats for shipment;
- (v) marking or labeling hazmats for shipment;
- (vi) preparing shipping papers;
- (vii) managing the loading area where air, rail, or ground shipments of hazmats are handled;
- (viii) loading and unloading hazmats for shipment;
- (ix) placarding the hazmat container or truck that will transport such hazmat; or
- (x) driving a motor vehicle carrying a hazmat.

Each hazmat employee must complete four, or, in some cases, five, types of hazmat training specified in 49 C.F.R. § 172.704(a). These include:

- General Awareness - to provide familiarity with the requirements of the HMR and enable the employee to recognize and identify hazmats;
- Function-Specific - focuses upon the requirements of the HMR that are specifically applicable to the functions (*i.e.*, job tasks) the subject employee performs (*e.g.*, how to select the appropriate packaging, mark the package, label the package, complete shipping papers, *etc.*);

- Safety Training – encompasses emergency response information, steps for protecting the employee from hazards associated with hazmats, and methods and procedures for avoiding accidents;
- Security Awareness - provides an awareness of security risks associated with the transport of hazmats and methods designed to enhance transportation security and how to recognize and respond to security threats; and
- In-Depth Security training – only applicable to employees of shippers of certain quantities and type of hazmats (*e.g.*, large bulk quantities of certain gases, flammable liquids and other materials; any quantity of explosives, radioactive materials, poisons by inhalation; *etc.*) that are required to develop and implement a security plan to address security risks related to transportation of hazmats. Hazmat employees of these employers must receive in-depth training on such plans.

In addition to completing the above-described training, hazmat employees that operate motor vehicles carrying hazmats must complete driver training per 49 C.F.R. § 177.816.

An individual who becomes a new hazmat employee, or one who changes job functions, may perform those functions prior to completion of the DOT training as long as the employee performs those functions under the direct supervision of a properly trained and knowledgeable hazmat employee and completes the requisite training within 90 days. Each hazmat employee must be retrained in all types of hazmat training every three years.

Although DOT is reasonably prescriptive in defining the content of the training, it does not prescribe a method of instruction or who may conduct such training. DOT does not "certify" or endorse training providers. Training may occur on-site, off-site, via lectures, large-group discussion, hands-on activities, over the Internet, or via self-study. It can be directed by the employer, outside vendor, or other private or public entity. The key is that the training must cover the topics specified in the DOT regulations and each participant must be tested on the content (though DOT does not prescribe the form /mode of testing or set minimum criteria for passing).

Finally, the hazmat employer must maintain a record of current training, inclusive of the preceding three years, for each hazmat employee as long as that individual is employed by that employer in a hazmat capacity and for ninety (90) days thereafter. This record must include:

- (i) the hazmat employee's name;
- (ii) the most recent training completion date of that individual's hazmat training;
- (iii) a description, copy, or identification of the location of training materials;
- (iv) the name and address of the person providing the training; and
- (v) certification that the hazmat employee has been trained and tested in accordance with the HMR.

* * *

As highlighted above, shipping hazmats can trigger a host of regulatory responsibilities, including detailed training requirements. Becoming aware of what materials are regulated as hazmats and the corresponding regulatory requirements are critical first steps in developing a robust compliance program that will help companies manage the risks inherent to the transportation of such materials.

CHEMICAL EXPORT/IMPORT LAW BLOG

New Regulatory Barriers to Nano, Chemical and GMO Developments?

By Corey Norton on March 6, 2013

Last week's export/import compliance panel at ACC & SOCMA's GlobalChem conference identified possible new regulatory burdens on emerging biotech and chemical research. In addition to very interesting comments from Leon Hayward of Customs about a chemicals center of expertise and Marianne Rowden of AAEI about chemical industry trade issues, Elizabeth Scott Sangine shared helpful insights into regulatory issues the U.S. Commerce Department is reviewing with respect to synthetic chemicals, genetically modified pathogens, nano delivery methods and proprietary work on other sensitive materials. Ms. Sangine is the director of the Chemical and Biological Controls Division within the Commerce Department's Bureau of Industry and Security ("BIS").

The point of Ms. Sangine's comments on this issue was that, while her office has broad responsibility for export controls and domestic technology transfers regarding many sophisticated materials, technologies **and** equipment, a priority is the review of possible export restrictions on cutting edge work in the areas noted above (pathogens, nano etc.). Her comments suggested to me that Commerce might exercise its relatively new authority over emerging technologies to regulate this type of work.

Last April, Commerce amended its export control regulations to give it the authority to rapidly enact new export controls on emerging technologies that are sensitive for a foreign policy or national security reason. (For export compliance folks out there, this was the rule creating the 01(521 ECCNs and corresponding EAR supplement.) I wrote a brief alert on this. The idea is that, should the government conclude that new research being done on nano delivery methods, for example, raises concerns about how a bad actor might use those methods contrary to our national interests, the government can immediately impose a prohibition on sharing that research with overseas partners and even with many foreign scientists working in the United States. In publishing this new authority, Commerce said that its practice would be not to use this authority without first consulting with its Technical Advisory Committees, but the regulations permit the government to act quickly without such review.

Commerce has not yet used this authority, but it could at any time. From the GlobalChem comments, it appears that Commerce might use its new authority in the not too distant future to prohibit certain sharing and development of technologies regarding synthetic chemicals, GM pathogens, nano delivery and proprietary work on other sensitive materials.

Companies working in these areas should review whether the government might have reason to be interested in their work, particularly if it were to fall into the wrong hands. If there is any basis to think the government would be interested, it is worth evaluating whether that work could become subject to these new regulatory restrictions. This is an example where advance planning can help avoid significant disruptions in the company's plans for continued domestic and international development.

U.S. EXERCISES NEW AUTHORITY TO BAN HIGH-TECH EXPORTS

Mar 28, 2013



KELLER AND HECKMAN LLP
SERVING BUSINESS THROUGH LAW AND SCIENCE®

The U.S. Commerce Department has exercised for the first time its new authority to prohibit exports and domestic transfers of certain high-tech items. A Federal Register notice published today says that the new prohibition is effective immediately and applies to pretty much any unlicensed export of certain biosensor systems and related parts, described in more detail below, to anywhere other than Canada. Also prohibited is the sharing of related software and technology with many foreign national employees in the United States or abroad. The Commerce Department is accepting comments for sixty days.

The biosensor systems covered are those that are capable of detecting the following aerosolized bioagents: anthrax, ricin, Botulinum toxin, Francisella tularensis, orthopoxvirus and Yersinia pestis. The prohibition would only apply to biosensor systems that also have the following characteristics:

- Can show results in three minutes or less,
- Have an integrated bioaerosol collector and identifier,
- Contain antibodies for any listed bioagent and
- Utilize bioluminescence as a process.

Companies that export (as a sale, for an affiliate's use or for any other purpose) such items or that export or share related software or technology domestically will now possibly be subject to a penalty of \$250,000 or more per unlicensed transaction. (As a side note, companies working with other similar detection and monitoring systems are already subject to export restrictions.)

Today's action is the first time the U.S. government has used a new authority it created a year ago next month. It is referred to as the '0Y521' provision - a reference to a U.S. government export control list. That authority permits the government to immediately control the export of products, materials, equipment, software and technology it does not currently control but has come to believe raise a foreign policy concern (be it military or intelligence advantage or some other concern). The item that is then controlled can remain controlled for at least three years while the U.S. government considers possible efforts to have multilateral export control regimes also impose related restrictions.

The 0Y521 authority allows the government to implement new export controls on sensitive items very quickly and without public notice. Any company that is engaged in cutting edge technological developments that might cause the U.S. government some concern were the technology to fall into the wrong hands should consider this authority.

In particular, such companies should review the likelihood that the U.S. government would want to restrict the company's ability to conduct international business or use non-U.S. national employees in its operations.

For more information please contact Corey Norton at 202.434.4303 or norton@khlaw.com.

Please visit Corey Norton's Chemical Export/Import Law Blog and follow him on Twitter @CNortonExport and @CNortonImport.