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## **PHMSA ON THE OFFENSIVE:** How You Can Stay Off Their Radar

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For months, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) has been promising to increase its enforcement efforts. If there was any doubt before, there is none now: PHMSA intends to act on these promises. All vendors must be aware that PHMSA is focusing on violations big and small and is tracing violations back to suppliers.

Within the last two years, PHMSA imposed a six figure civil penalty on a major retailer for failing to comply with the hazardous materials regulations (“HMR”). Since then, PHMSA has performed follow-up inspections of that retailer to ensure its ongoing compliance with the HMR. But PHMSA isn’t just targeting one particular retailer. It appears that, as part of its proactive new enforcement model, PHMSA is investigating major retailers and distribution centers to see if the retailer or any of its vendors has violated the HMR. And PHMSA isn’t just looking for leaking packages and undeclared hazmat shipments. It’s got its eye out for minor violations too.

An example of one of these “minor” violations is improper font size on markings. Companies must ensure that markings are sized properly, within a fraction of an inch, or risk receiving a compliance visit from PHMSA. While this kind of violation may seem insignificant, it can lead to big fines. As PHMSA steps up its enforcement efforts, it is more important than ever for hazmat companies to remain vigilant in complying with the HMR, down to the last detail. This is especially true in light of the recent increases in the maximum civil penalties.

On December 31, 2009, PHMSA increased the maximum and minimum civil penalties for a violation of the HMR. The maximum civil penalty has increased to \$55,000 and to \$110,000 for a violation resulting in death, serious illness, severe injury to any person, or substantial destruction of property. The minimum penalties have increased to \$275 and to \$495 for a violation related to training.

Even smaller violations can lead to large fines. When assessing a civil penalty, PHMSA considers a company’s history of past violations and may increase the fine accordingly. If your company has had a number of violations, even if none of them caused injury or destruction of property, the size of the PHMSA penalties will start to rapidly inflate. In addition, each shipment constitutes a separate violation. This is known as the venetian blinds approach and is based on the Federal Aviation Administration’s sanction model.



Moreover, the proposed civil penalty oftentimes accounts for numerous violations within a single category. For example, if shipping papers were not included with the hazmat shipment, the proposed civil penalty could include not only a violation for failing to include shipping papers, but violations for failure to prepare shipping papers, failure to describe the hazardous material, failure to include a shipper's certification, and so on. In light of all this, fines for what may seem like a minor problem can start to add up. However, there are ways you can limit your exposure..

First, make sure to correct mistakes as soon as they happen. Oftentimes, a company that has received numerous sanctions for the same violation will receive a higher civil penalty than a company with a history of different violations. Of course, companies should always strive to be in full compliance with the HMR, but mistakes happen. If you receive a notice of probable violation of the HMR, immediately correct the violation and take steps to ensure it does not happen again. PHMSA takes corrective action into account when assessing the civil penalty.

Second, know the limits of PHMSA's enforcement power. There are some legal limits on issuing repetitious sanctions. For example, a proposed penalty should not include alleged violations of introductory sections of the HMR and they should not include numerous sanctions within one category. Consider a company that fails to include shipping papers with a hazmat shipment. Instead of piling on another violation for each specific rule regarding shipping papers, PHMSA should treat it as a single violation of the HMR.

The Wicks Group, PLLC provides legal and consulting services and has significant experience in resolving matters related to domestic and international hazardous materials laws, regulations, and policy. If you have any doubts as to whether you are in full compliance with all aspects of the HMR and the terms of any special permit or approval your company may hold, professionals at The Wicks Group can assist you in determining which rules apply to you, how best to comply with those rules, and how to respond to an enforcement action. For more information, contact Glenn P. Wicks or Lindsay McGuire at (202) 457-7790.

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