

DOT Publishes Third Lithium Battery Proposal; Complete Harmonization Delayed Again

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The ongoing U.S. Department of Transportation (DOT) saga of regulation of air shipments of lithium batteries took a new turn on January 7, 2013, when DOT published its third Notice of Proposed Rulemaking (NPRM) on lithium batteries since January 2010. 78 Fed. Reg. 1,119. DOT also published on January 7 two final rules (HM-215L and HM-215K) that generally harmonize the U.S. hazardous materials regulations (HMR) with, among other standards, the 2012 Edition of the International Maritime Dangerous Goods (IMDG) Code and the 2013-2014 International Civil Aviation Organization (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Air. Those standards govern the international transportation of dangerous goods by sea and air, respectively. The HM-215L final rule also incorporates by reference the international dangerous goods regulations and various standards into the U.S. HMR, which authorizes shippers in the U.S. to package and offer their hazardous materials in accordance with the international regulations and standards instead of forcing companies to comply with a dual system of regulations.

Understanding the new rules and proposal requires some background. Incorporating by reference the lithium battery provisions in the 2013-2014 ICAO Technical Instructions is a step toward the harmonization mandate of the FAA Modernization and Reform Act of 2012. Moreover, those provisions are significantly more stringent than the existing lithium battery regulations in the U.S. HMR.

But the 2012 Act did not expressly require that DOT drop previously adopted regulations when it harmonized with the international rules. This is the subject of the NPRM: should both sets of standards remain on the books, so that shippers whose product is travelling only in the U.S. can continue to comply with the old rules, rather than the newer

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international requirements?

Several examples demonstrate the difference between the two rules. For one thing, under the ICAO Technical Instructions, if a shipper offers for air transport more than two batteries in a single outer package, a host of additional requirements apply to that shipment. These include mandatory employee training, additional labeling and markings on packages, and shipping paperwork. In addition, airlines generally charge a “hazmat fee” on these types of “fully-regulated” hazardous materials shipments. By comparison, the U.S. HMR currently authorizes for air transport up to 12 consumer-type lithium batteries in a single outer package with no labeling requirements, paperwork or employee training.

As another example, the new 2013-2014 ICAO Technical Instructions have a five-kilogram “net weight” battery limit per package for equipment manufacturers who ship their products with consumer-type lithium batteries. These shipments also require package labeling and shipping documentation under most circumstances. In contrast, the existing lithium battery regulations in the U.S. HMR provide broad exemptions from package labeling and documentation requirements for shipments of equipment containing consumer-type lithium batteries.

If the new lithium battery regulations in the 2013-2014 ICAO Technical Instructions are adopted by DOT for domestic air transport in place of existing regulations—rather than just referenced as an alternative—there could be some economic impact on a number of companies that would have to change their existing shipping practices. This likely would include many small businesses. Whether that impact is significant enough for DOT to reconsider dropping the older regulations for domestic air transport remains to be seen.

In order to gain a better understanding of these possible impacts, the NPRM includes a list of questions for public comment. These include questions relating to the potential unintended consequences or confusion if DOT does not drop preexisting U.S. provisions and mandate compliance with the 2013-2014 ICAO Technical Instructions for domestic air shipments of lithium batteries.

Some businesses may prefer to maintain the two options, but most are expected to favor complete harmonization—that is, dropping the older U.S. provisions. Not only does this seem more consistent with the FAA Modernization and Reform Act of 2012, but the significant differences between the older U.S. lithium battery regulations and the 2013-2014 Technical Instructions would likely create a significant challenge for the airlines, which handle thousands of packages containing lithium batteries on a daily basis. It also would make enforcement very difficult for the various enforcement branches within DOT.

Comments on the NPRM are due by March 8, 2013.