

DOT Raises the Bar on Penalties, Emphasizes the Importance of Responding Carefully to Even a First Alleged Violation

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On October 2, 2013, the U.S. Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) published in the Federal Register a Revised Statement of Policy updating baseline assessments for frequently cited hazardous materials regulations (HMR) violations. The 20-page guidelines are neither binding nor mandatory, and do not have the force of law. However, the baselines serve as a starting point for PHMSA enforcement branches to handle analogous violations similarly and, historically, have been treated with respect by administrative law judges.

Under the guidelines, the maximum civil penalty for a "knowing violation" of HMR increased from \$55,000 to \$75,000, or from \$110,000 to \$175,000 if the violation resulted in death, serious illness, severe injury, or substantial destruction of property. This change to the guidelines is consistent with the maximum civil penalties authorized under the HMR that went into effect earlier this year. PHMSA also modified the guidance on how to adjust penalties in cases of aggravating and mitigating circumstances, multiple counts, and prior violations.

Of particular importance for companies facing a first alleged violation, the guidelines now provide that if the agency finds that a company has been cited for an identical violation within the six-year period, penalties can be increased 100%. This means that companies should take seriously negotiations to settle even a single violation that mars an otherwise perfect record—future penalties could increase geometrically.

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To help companies focus on likely areas of noncompliance, the guidelines also contain an expanded list of frequently cited violations. These include, but are not limited to, security plans, special permits and approvals, undeclared shipments, shipping papers, and emergency response requirements.

In addition, the guidelines now include baseline assessments for shippers who offer cigarette lighters, explosives, radioactive materials, compressed gases in cylinders, oxygen generators, or batteries for transport. The baseline penalties for batteries range from \$1,000 to \$40,000 per violation and include eight entries for lithium batteries and one for lead batteries, which reflect the agency's ongoing concerns regarding the transport of lithium batteries, as well as equipment packed with lithium batteries.