

## *Hazmat shipping: The broadening definition of “offeror”*

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Expanding transportation security concerns have increased the scope of activities subject to applicable federal regulations. It seems the more government agencies analyze potential threats and devise ways to combat them, the broader government concern grows about who and what should be regulated.

The Research and Special Programs Administration (RSPA) of the U.S. Department of Transportation recently promulgated new regs, to take effect October 1, 2005, clarifying who is subject to federal Hazardous Materials Regulations (HMR). The HMR imposes on those subject to them a complex program mandating specified packaging, marking, stowage, documentation, movement and security of hazmat cargo. Of course, many in our industry would just as soon not have to worry about HMR requirements, as those governed by the new definitional regs are subject to auditing, civil fines, criminal punishment, and other governmental intervention.

At first blush, one might assume that an “offeror” of hazardous materials in transportation is, gee, a shipper who owns dangerous cargo and hands it over – i.e., “offers” it – to a carrier for transport. While that’s true, the definition is far broader, at least when RSPA’s new regs take effect. Per RSPA’s summary of its final rule, the new definition of “person who offers or offeror” when determining the scope of the HMR’s applicability is:

. . . any person who performs or is responsible for performing any pre-transportation function required by the HMR or who tenders or makes the hazardous material available to a carrier for transportation in commerce. A carrier is not an offeror when it performs a function as a condition of accepting a hazardous material to another carrier for continued transportation without performing pre-transportation function.

The agency’s discussion about its rationale in adopting new provisions (available in the Federal Register) shows just how complex this issue is in the context of security concerns. By its nature, most transportation is a chain of sequential events. It typically commences with suppliers; moves through warehouses, drayage operators, longshoremen and/or other such specialists; proceeds through one or more modes of transportation (which often includes interlining or connecting carriers); then comes back through warehouses, drays, and other providers. Any number of participants in the transportation process might qualify as an “offeror” under the term’s common meaning.

The most obvious confusion, one which the new rule tries to clear up, regards interlining and connecting carriers that hand off freight to each other as part of the same haul. The

new reg addresses this concern by differentiating “pre-transportation” and “transportation” services, with only providers of the former being considered “offerors.” A carrier that merely transships to another is performing transportation services, and wouldn’t be subject to the HMR on a given load.

Providers are entitled to assume their predecessors in the chain have complied with the HMR, such that the hazmat security wheel need not be reinvented at each link in the transportation process. There may be more than one “offeror” in a transport, but just because you're handing off freight doesn't mean you're one of them.

That concept is subject to a prevailing caveat: if an interlining/connecting carrier or other player knows – or by reasonable effort and care should know – that an HMR reg has been violated somewhere in the process prior to its receipt of freight, then that player becomes subject to the HMR itself and responsible for violations its chronological predecessor may have committed.

But what exactly are “pre-transportation” services, and how are they distinguishable from transportation services? A number of hazmat shippers and carriers expressed concern to RSPA about this dichotomy. Industry practice varies by locale and sector. In some circumstances, shippers prepare bills of lading and other documentation; in others, carriers, intermediaries and/or others attend to those tasks. Sometimes shippers block and brace, sometimes carriers do, sometimes someone else does. With regard to essentially the same activity, an entity could be an offeror sometimes, and sometimes not. Indeed, the feds might make an argument that someone was performing pre-transportation services – documentation, etc. – for freight that was already in transit!

RSPA is “sympathetic” to this unrest. The agency recognizes players’ concern that they not be held responsible for someone else’s no-no’s, especially when they have no control over the matter. But in response, RSPA does little more than point to the general concept that a player will held “responsible only for the specific pre-transportation functions it performs or is required to perform.” Participants are not “jointly and severally liable,” meaning in law-speak that two HMR violators will be liable only to the extent of their individual wrongdoing. A more simplified rule, says RSPA, just can’t be applied.

The new definition of “offeror” of hazmat freight is of little comfort to the industry groups who voiced concern in its drafting. Broad interpretational and enforcement discretion is given with regard to the reg’s underlying concept that no one gets blamed for someone else’s violation if that someone reasonably didn’t know about it. But to be sure, carriers, forwarders and others should do all possible to develop a record for each shipment showing they exercised reasonable care to ensure no HMR reg was violated – even by someone else.

**Ref: Federal Register: July 28, 2005 (volume 70, No. 144) pp. 43638-43644; HMR, 49 CFR 171-180.**