Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Management and Budget has determined that this rule does not constitute a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 12 CFR Part 701

Charitable contributions, Credit unions.

By the National Credit Union Administration Board on April 15, 1999.

Becky Baker,

Secretary of the Board.

For the reasons set forth above, NCUA amends 12 CFR part 701 as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, and 1789. Section 701.6 is also authorized by 31 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.*, 42 U.S.C. 1861 and 42 U.S.C. 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

2. Part 701 is amended by adding § 701.25 to read as follows:

§ 701.25 Charitable contributions and donations.

(a) A federal credit union may make charitable contributions and/or donate funds to recipients not organized for profit that are located in or conduct activities in a community in which the federal credit union has a place of business or to organizations that are tax exempt organizations under Section 501(c)(3) of the Internal Revenue Code and operate primarily to promote and develop credit unions.

(b) The board of directors must approve charitable contributions and/or donations, and the approval must be based on a determination by the board of directors that the contributions and/or donations are in the best interests of the federal credit union and are reasonable given the size and financial condition of the federal credit union. The board of directors, if it chooses, may establish a budget for charitable contributions and/or donations and authorize appropriate officials of the federal credit union to select recipients and disburse budgeted funds among those recipients.

[FR Doc. 99–9931 Filed 4–20–99; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

Federal Aviation Administration Policy on Enforcement of the Hazardous Materials Regulations: Penalty Guidelines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: General statement of policy.

SUMMARY: This document states that FAA policy on determining the sanction amounts in FAA enforcement actions addressing violations of the Department of Transportation Hazardous Material Regulations (HMR). This policy statement provides guidance for agency personnel in the exercise of the FAA's prosecutorial discretion in enforcement cases concerning transportation of hazardous materials by air. The guidance should aid in analysis of the facts and circumstances of each case so as to arrive at an appropriate sanction in light of the statutorily defined penalty considerations. The analytical framework should also promote a relative consistency in determining civil penalties for violations of the HMR.

EFFECTIVE DATE: April 14, 1999.

FOR FURTHER INFORMATION CONTACT: Bill Wilkening, Office of Civil Aviation Security, Dangerous Goods and Cargo Security Division, telephone: (202) 267–9864, facsimile (202) 267–5760, email: Bill.Wilkening@faa.gov, mailing address: ACO–800, 800 Independence Avenue, S.W., Washington, D.C. 20591, or Allan H. Horowitz, Enforcement Division, Office of the Chief Counsel, telephone (202) 267–3137, facsimile (202) 267–5106, email: *Allan.Horowitz@faa.gov*, mailing address: AGC–300, 800 Independence Avenue, S.W., Washington, D.C. 20591.

SUPPLEMENTARY INFORMATION:

Background

Congress determined that the unregulated transportation of hazardous materials constitutes a threat to public safety in all forms of transportation. Congress addressed that threat in 1974 by enacting the Hazardous Materials Transportation Act (HMTA). By 1990, Congress determined that effective enforcement of the HMTA required more severe action, and enacted the Hazardous Materials Transportation Uniform Safety Act of 1990, Public Law No. 101–615, 1990 U.S. Code Congress. & Admin. News 104 Stat. 4605. The primary effect of this 1990 revision of the HMTA was to raise the maximum civil penalty for violation of any regulation enacted under the HMTA to $25,000, and, for the first time, to require a $250 minimum penalty for any such violation. The HMTA was recodified in 1994 and is now referred to as the ''Federal hazardous material transportation law,'' 1994 U.S. Code Congress. & Admin. News 108 Stat. 759, codified at 49 U.S.C. 5101–5127. In the 1994 recodification, Congress specifically stated that the recodification created no substantive change to the earlier form of the statute.

The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 (note), as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, April 26, 1996, provides a mechanism for adjustments for monetary civil penalties for inflation in order to maintain the deterrent effect of monetary civil penalties and promote compliance with the law. Under the statute, the new civil penalty maximums cannot be applied unless they are implemented by regulation. On December 20, 1996, the FAA published a final rule (61 FR 6744), implementing the statute for each civil penalty subject to the FAA's jurisdiction. On January 21, 1997, the FAA published a correction to the final rule (62 FR 4134). The final rule is codified at 14 CFR Part 13, Subpart H. Pursuant to 14 CFR 13.305(d), the maximum civil penalty that may be assessed for a violation of the Federal hazardous material law or a hazardous material regulation is now $27,500.

Congress assigned the responsibility for the enforcement of the Federal hazardous material transportation law to the Secretary of Transportation. Within the Department of Transportation, the Research and Special Programs Administration (RSPA) adopts the Hazardous Materials Regulations (HMR), 49 CFR parts 171 through 178, which govern the transportation of hazardous materials (Hazmat). Although RSPA has some enforcement responsibilities, the responsibility for enforcing the HMR with respect to civil aviation is delegated by the Secretary of Transportation to the FAA. 49 CFR 1.47(k).

The HMR set forth regulations for the transportation of Hazmat. A knowing violation of the statute or of the HMR can support the assessment of a civil

penalty between $250 and $27,500. A person acts knowingly when the person has actual knowledge of the facts giving rise to the violation; or a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge. 49 U.S.C. 5123(a)(1)(A). The civil penalties authorized under the statute apply to EACH violation of any regulation set forth in the HMR. Moreover, under the statute, each continuing violation of the HMR can constitute a separate violation for each day a violation continues. In section 5124 of the statute, Congress prescribed criminal penalties for a willful violation of the Federal hazardous material transportation law or the HMR; willful violations require evidence of both knowledge of the laws and regulations and intent to violate them.

Part 13 of the Federal Aviation Regulations—Investigative and Enforcement Procedures (14 CFR Part 13) governs the procedures applicable to enforcement of the HMR by the FAA. Hazmat violations occurring on or after August 2, 1990, may be dismissed by an administrative law judge (ALJ) if a Notice of Proposed Civil Penalty has not been issued within 2 years of the violation, unless good cause for delay has been shown. 14 CFR 13.208(d).

Consideration of Statutory Criteria

In determining the sanction to be assessed, penalty criteria set forth in 49 U.S.C. 5123 must be considered. These criteria are the nature, circumstances, extent, and gravity of the violation, the degree of culpability of the violator, any history of past violations, the ability to pay, any effect on the ability to continue to do business, and other matters as justice requires. Some of these considerations already are factored to some extent into the categories in the Hazardous Material Sanction Guidance Matrix. The statutory factors are further considered under the weighting analysis that is performed to indicate the amount of civil penalty within the appropriate range, i.e., at the minimum, moderate, or maximum portion of the sanction range. To comply with the underlying purposes of the Federal hazardous material transportation law and HMR, a sanction should be imposed that is sufficiently deterrent but not excessive.

The Hazardous Materials Sanction Guidance is designed to promote better consistency so that similar penalties are imposed in similar cases. The Matrix ranges are intended to reflect the nature, circumstances, extent, and gravity of the case as compared with other types of cases. Each case, however, must be evaluated on its own facts. A sanction may differ from the Matrix ranges when the facts and circumstances of a case support either a greater or lesser penalty. When a special agent believes that a penalty should exceed the Matrix ranges, the agent should consult with legal counsel before further processing of the Enforcement Investigative Report (EIR). This consultation is not necessary in the case of a recommended penalty that is less than that provided in the Matrix. In either situation, the basis for the decision to go outside the ranges should be explained in detail.

Violations of Part 175 of the HMR, which establish particular requirements for air carriers and other aircraft operators, are contained in a separate matrix. However, such operators often offer hazardous materials for air transportation, as well as accept and transport them. For this reason, such operators may be liable for violations both as a business entity within the Hazardous Materials Sanction Guidance Matrix, as well as specific air carrier violations.

Use of the Sanction Guidance

This guidance provides agency personnel with a systematic way to evaluate a case and arrive at an appropriate penalty, considering all the relevant statutory criteria including any mitigating and aggravating circumstances. Statutory considerations have been factored into the various ranges within the Sanction Guidance Matrix. Determination of where a sanction lies within these ranges is aided by a series of weighting questions that probe the various aggravating and mitigating factors that may exist in a case.

First, the weighting analysis is performed. Agency personnel respond to a series of questions to determine the aggregate weight of the case. The aggregate weight of the case helps determine the sanction amount of each violation group within the established ranges of the Matrix.

It is important to note that determination of where the sanction lies within the Matrix is not the result of a mathematical computation. Evaluation of the case is based on the totality of the facts and circumstances. Generally, if the answer to a particular question represents a more significant aspect of a case, greater consideration should be given to that answer. For example, violations involving an extremely dangerous substance, even in minute quantities, might warrant a penalty at the maximum end of the range or even a penalty exceeding the Matrix ranges.

Under the Sanction Guidance Matrix, agency personnel determine the category of violator the person falls within (e.g., business entity that regularly offers, accepts, or transports Hazmat) and the offense category (e.g., undeclared shipment within Hazmat quantity limitations). The sanction ranges under the various violator categories take into account the relative culpability of the violator. Similarly, the offense categories address the nature, circumstances, and gravity of the particular offense. After determining the appropriate categories and intersecting box of the Matrix, agency personnel then determine which subcategories of offenses (e.g., shipping papers) are alleged to have been violated. Based on the weighting analysis performed in Section I, an appropriate penalty is assigned for each of the applicable violation groups. The penalty amount for each relevant violation group is added together to reach the recommended sanction.

Under Section III of the Guidance, the special agent then considers other relevant factors, including evidence of corrective action. A recommended sanction may be reduced prior to the issuance of a Notice of Proposed Civil Penalty when there is adequate reliable information concerning the corrective actions taken by a respondent. Corrective actions that justify reduction of the recommended penalty must exceed the minimum legal requirements. The special agent also attempts to provide information concerning the alleged violator's size, financial condition, and ability to pay a recommended sanction.

When an EIR is forwarded to legal counsel for enforcement action, counsel with give appropriate consideration to the recommended sanction. FAA legal counsel will also review the factors, analysis, and determinations under the Hazardous Materials Sanction Guidance. Any basis for deviating from the recommend sanction is ordinarily explained to, and discussed with, the investigating special agent. Final determination of the sanction amount proposed in the Notice of Proposed Civil Penalty is ordinarily a product of joint decisonmaking and approval of the investigating agent and the legal office.

Federal Aviation Administration Hazardous Materials Sanction Guidance

This Sanction Guidance is divided into three sections:

I. Case Analysis,
II. Utilization of the Sanction Guidance Matrix (Matrix), and
III. Consideration of other Statutory Factors.

The Sanction Guidance Matrix is contained in Figure 1 and the Risk Categories are contained in Figure 2.

I. Case Analysis (Evaluation of Statutory Assessment Factors)

This section contains a series of questions designed to assist special agents and attorneys in evaluating a particular case. The question review factors involving the nature, circumstances, extent and gravity of the violation, the violator's degree of culpability, and the violator's history of prior violations. Some of these factors are already considered to some extent within the various categories of the Sanction Guidance Matrix. The questions in this section provide additional consideration of the statutory factors and examine the existence of aggravating and mitigating factors in a case.

The agent/attorney answers each question in Section I and determines if a relative weight of minimum, moderate, or maximum should be assigned based on the response to the question. With the exception of Question A.1., not all questions will apply to a given fact situation. Question A.1., which addresses the nature of the hazardous material(s) involved, is the only question that always receives a ''yes'' answer to one of its subquestions and is considered in every case. The aggravating or mitigating factors addressed in the questions only apply to the case when the question receives a ''yes'' response. Questions receiving a ''no'' response do not affect the weighting of the case and are not considered. For example, if the violation resulted in harm to persons or property, that may be an aggravating factor in the case. However, the fact that the violation did not result in injury or damage, is *not* a mitigating factor and should not result in penalty mitigation. In many instances, the answers to most or all of the questions will be ''no'' and the only relevant weighting factor in this section will be the risk category of the material identified in Question A.1.

In determining the final aggregate weight of the case, the responses to each of the questions do not have to be equally considered. Determination of whether the overall case should have a minimum, moderate, or maximum weight cannot be determined with mathematical certainty. Generally, if the answer to a question demonstrates that the factor at issue represents a more significant aspect of the case, greater consideration is given to that factor. The final aggregate weight is based on the totality of the facts and circumstances of the case. Once determined, the final aggregate weight is then utilized to arrive at the recommended sanction for each applicable violation group on the Sanction Guidance Matrix (Fig. 1).

A. The Nature, Circumstances, Extent, and Gravity of the Violation

(Factors Concerning the Shipment)

1. What Material(s) Was Offered, Transported, or Accepted for Air Transportation?

(Figure 2 divides hazardous materials of particular classes, divisions, and packing groups into three risk categories: Category A, Category B, and Category C. Find the material(s) at issue in Figure 2 and answer the questions below.)

a. Is the material(s) offered, transported, or accepted in Category A?
If yes, assign a Maximum weight.

b. Is the material(s) offered, transported, or accepted in Category B?
If yes, assign a Moderate weight.

c. Is the material(s) offered, transported, or accepted in Category C?
If yes, assign a Minimum weight.

Guidance Note: The categories in Figure 2 represent the inherent risk of danger to air transportation posed by the material. If there is more than one type of hazardous material involved in the shipment, answer this question using the hazardous material in the highest risk category.

2. What Quantity of the Material(s) Was Offered, Transported, or Accepted for Air Transportation?

a. Did the package(s) exceed the authorized quantity limitations by a *significant* amount?
If yes, consider a Moderate or Maximum weight depending on the degree to which the limitation was exceeded.

Guidance Note: The Matrix, discussed in Section III, takes into account the factual situations where the quantity limitations for the material are exceeded. This part of the analysis is intended to determine whether further aggravating circumstances exist where quantity limitations are exceeded by a significant amount. Whether this factor is assigned a moderate or maximum weight will depend on the degree by which the quantity limitation was exceeded.

Example: The quantity limitation for gasoline on a passenger plane is 5 liters per package. If a violator offers 30 liters in a single package on a passenger plane, this may result in a maximum weight for this factor.

b. Were there multiple packages in the shipment?
If yes, consider a Moderate or Maximum weight, depending on the number of packages and total amount of hazardous material being transported in violation.

Guidance Note: A package means a packaging plus its contents. There may be multiple packages in one shipment or overpack. Multiple packages often represent multiple violations. Under the Sanction Guidance, this fact is considered an aggravating circumstance rather than a direct multiplier of the sanction for each violation. Each case, however, must be evaluated on its particular facts. A very large number of packages may result in such an egregious case that the overall weight of the case is so high that a penalty beyond the maximum point in the range is warranted.

An investigation will occasionally reveal several shipments from the same offeror over a period of several days, all of which involve violations of the HMR. These independent acts of offering usually are consolidated into one EIR and addressed in one Note of Proposed Civil Penalty. However, for purposes of determining the appropriate sanction, each separate shipment with a separate air waybill or shipping papers, separate destination, and/or any other evidence establishing it as a separate shipment is ordinarily considered as a separate incident for purposes of applying the sanction guidance analysis. It is suggested that the separate shipments be treated as individual counts in the EIR and the Notice of Proposed Civil Penalty, with each count having its own sanction derived from application of this guidance. Note, there must be sufficient evidence to support each count.

3. Did the Shipment Cause Damage or Harm to Persons or Property, or Interfere With Commerce?

If yes, consider a Moderate or Maximum weight.

Guidance Note: The fact that no damage occurred as a result of the shipment is not a mitigating factor. However, damage or harm may aggravate the nature, circumstances, extent, and gravity of the violation. Depending on the degree of damage caused by the shipment and/or the existence of other aggravating factors, departure from the ranges may be justified.

B. Violator's Degree of Culpability

(The Matrix, Figure 1, considers the relative culpability of the violator. This section of the analysis further evaluates the degree of culpability of the violator.)

1. Is the Violator the Manufacturer of the Hazardous Material?

If yes, consider a Maximum weight.

Guidance Note: A manufacturer of a hazardous material is expected to have complete knowledge of the nature of the hazardous material and thus, a high degree of culpability will ordinarily be imputed to it.

2. Did Someone Other Than the Violator Prepare the Shipment for Transportation?

If yes, consider a Minimum or Moderate weight.

Guidance Note: Facts supporting an affirmative answer to this question may be cause to mitigate culpability and/or pursue a

separate enforcement action against other responsible parties who handled the shipment. A shipper that reships materials received from another person in the same packaging is independently responsible for ensuring the shipment complies with the HMR. Nevertheless, the reshipper is generally considered to have a lesser degree of culpability for compliance of the package as received. However, if the reshipper unpacks and/or repackages the shipment, the reshipper remains as culpable as the original shipper and generally is not accorded mitigation under this weighting factor. (For purposes of this section, a ''reshipper'' refers to a person, other than the original offeror, who offers a shipment of hazardous material for transportation.)

3. Did the Violator Reasonably Rely on Incorrect Information From Another Source?

If yes, consider a Minimum weight.

Guidance Note: Detrimental or reasonable reliance on another party may be a mitigating factor when considering the violator's degree of culpability. For example, reliance on an inaccurate Material Safety Data Sheet (MSDS) may be mitigating.

4. Does the Violator Have a History of Previous HMR Violations?

If yes, consider a Moderate or Maximum weight.

Guidance Note: To establish a violation history, a prior violation must be an actual finding of violation pursuant to a legal enforcement action. Special agents should attempt to determine the corporate structure of the violator and whether other business entities or names are or have been used by the entity in order to obtain a complete violation history. The number and age of violations should be considered. Ordinarily, findings of violation more than 5 years old carry less weight, unless a continuing pattern of violation exists.

C. Other Factors

Each case must be evaluated on its particular facts. As such, many cases may present unique scenarios and aggravating or mitigating factors that are not routinely seen. If an aggravating or mitigating circumstance exists that is not adequately addressed elsewhere in the sanction guidance, it may be included and assigned a weight under this section. The factor should be clearly identified and explained in the analysis portion of the EIR and carefully scrutinized by legal counsel.

Guidance Note: For example, a shipment of a single package containing several different hazardous materials may present an aggravating factor. The degree of seriousness of this factor will increase if the hazardous materials are incompatible with each other and, therefore, create an increased risk.

Mitigating factors may also exist that have not been adequately considered. For example, a shipment containing a *de minimis* quantity of material or an amount that would have qualified under the small quantity exception of § 173.4 may present a mitigating factor if as a result there was a reduced risk to safety in transportation.

D. Determine the Final Aggregate Weight of the Case

All the responses/weights are evaluated to determine a final aggregate weight of the case (Minimum, Moderate, and Maximum). Questions receiving a ''no'' response will not be included in this evaluation. To determine the final aggregate weight, the agent/attorney must exercise his/her discretion in light of the statutory factors and knowledge of the particular facts of the case. The facts of the particular case will dictate the relative importance of each of the weighting factors in reaching a final aggregate weight. The final aggregate weight should be decided as a result of careful analysis, not a mathematical averaging. It is possible that a single weighting factor may outweigh all others. The agent/attorney's analysis should always be explained in this regard.

Example: A case involving a hazardous material in the lowest risk category may be evaluated to have a maximum weight because of the large quantity shipped or the damage resulting from the shipment.

II. Utilize the Matrix (Figure 1)

The sanction ranges under the offeror and offense categories of the Sanction Guidance Matrix reflect the relative culpability of the violator and the nature, circumstances, extent, and gravity of the case. Consideration of these particular statutory factors under the Federal hazardous material transportation law is built into the Matrix. Further analysis of the statutory factors is required to determine the appropriate sanction within the ranges established under the Matrix. This analysis is performed in Section 1. After determining the final aggregate weight of the case under the Section 1 analysis, that weight is applied to the appropriate matrix range to identify the recommended sanction amount for each of the relevant violation groups and for the case as a whole. Although the Notice of Proposed Civil Penalty may cite numerous violations of a particular part or subpart of the HMR, unless upward departure is justified, a single penalty amount for each violation group is ordinarily used to reach the full sanction.

A. Instructions

1. Identify the appropriate category for the type of entity and the nature of the offense involved in the case. Refer to the Definitions Section that follows the Matrix in Figure 1 for guidance. Go to the intersecting box and identify the applicable sanction range for each violation group.

2. Apply the conclusion reached in the Section I weighting analysis to assign a sanction amount within the minimum, moderate, or maximum portion of the sanction range for each relevant violation group. The recommended civil penalty at this stage is the sum of the sanctions for each of the applicable violation groups. A sanction should not be assessed for a violation group if there have been no violations of that part or subpart of the HMR. The sanction amount for each violation group need not be identical but ordinarily is within the portion of the particular sanction range that represents the overall weight of the case.

3. Departure from the Matrix ranges—The Matrix is designed to cover the majority of cases involving violations of the HMR. The facts and circumstances of a particular case, however, may justify either an upward or downward departure from the Matrix ranges. This sanction guidance anticipates and encourages departure from the Matrix ranges when justified. A case involving violations in which the nature, circumstances, extent, and gravity of the incident are particularly severe or egregious, may justify upward departure from the Matrix. If the investigating agent believes, based upon the facts of a case, that a penalty should exceed the Matrix ranges, the agent should consult with legal counsel before further processing of the EIR. Conversely, the investigating agent may believe that mitigating factors justify a downward departure from the Matrix range. Consultation with legal counsel is not necessary in the case of a recommended penalty that is less than that provided in the Matrix. In either situation, however, the agent is to provide a detailed explanation of the basis for the decision to go outside the ranges.

4. Violations of Part 175 regulations, which establish particular requirements for air carriers and other aircraft operators, are contained in a separate matrix. However, such operators often *offer* Hazmat for air transportation as well as accept and transport it. As such, the operator may be liable for violations as a business entity within the main Matrix as well as for the specific Part 175 violations.

III. Impact of Other Statutory Factors

The Federal hazardous material transportation law also requires consideration of a violator's ability to pay a civil penalty, the impact of the civil penalty on the violator's ability to

continue to do business, and other matters that justice requires. Consideration of these factors may result in adjustment of the recommended civil penalty calculated in Section II. In situations where the agent or attorney is in possession of mitigating information, such as inability to pay the recommended civil penalty or corrective action taken, reduction of the recommended penalty may be appropriate. Mitigating information should be sufficiently reliable, uncontroverted, and documented in order to support reduction of the recommended civil penalty prior to issuing the Notice of Proposed Civil Penalty.

A. Ability To Pay/Continue in Business

Historically, the FAA has considered these factors after the issuance of the Notice of Proposed Civil Penalty due to the absence of reliable financial information on which to base a reduction prior to the issuance of a Notice. This Sanction Guidance recommends that the special agent make efforts to obtain reliable information regarding the violator's size and financial condition for review prior to the issuance of a Notice. This information will be transmitted to the legal office for consideration. It is recognized that it may not always be possible for the special agent and/or attorney to obtain reliable financial information on a particular respondent, that financial circumstances change and that information may be provided after the issuance of the Notice that may warrant further consideration of a respondent's ability to pay.

1. The investigating agent will attempt to include financial information as an exhibit in the EIR. It is anticipated that this information, if available, will be obtained from reliable financial data bases. Financial documentation should include, but need not be limited to, information concerning the violator's corporate structure, business address, officers, number of employees, and gross revenues.

2. The investigating agent provides a statement or comment with respect to the financial information obtained but ordinarily does not evaluate the financial condition of a respondent with respect to its ability to pay a proposed civil penalty. The investigating agent's statement should encompass areas such as the number of employees, gross revenues, and nature of business of the violator.

3. FAA legal counsel reviews the financial information provided in the EIR and evaluates its sufficiency and relevance to the recommended civil penalty. Legal counsel may determine if more current information exists concerning the financial condition of a respondent and if that information substantially differs from the information available at the time of preparation of the EIR. If there is a basis for determining that the recommended sanction is inappropriate based upon the financial information provided in the EIR, the recommended sanction is adjusted prior to issuance of the Notice of Proposed Civil Penalty. This is a preliminary consideration of a company's ability to pay. As such, pre-Notice adjustment of a recommended civil penalty does not preclude further consideration of a respondent's financial claims after issuance of the Notice.

4. If legal counsel determines that a respondent qualifies as a small business entity, counsel may consider that status under the Small Business Regulatory Enforcement Fairness Act (SBREFA) with respect to the appropriateness of the recommended civil penalty. A respondent's status as a small business entity may be considered in conjunction with analysis of the statutory factors.

B. Corrective Action

The most common ''other matter'' that the FAA takes into consideration is corrective action. Corrective action that results in mitigation is remedial action that exceeds the minimum legal requirements. The primary factors in determining the appropriate amount of penalty reduction are the extent and timing of the corrective action. In other words, mitigation is determined on the basis of how much corrective action was taken and how quickly the action was taken. Systemic change intended to prevent future violations should be given greater consideration. Similarly, corrective action that commences upon the violator's first notice of the violation ordinarily is given greater credit than corrective action that commences only after the Notice of Proposed Civil Penalty has been issued.

Mitigation of a recommended civil penalty based upon corrective action should be referenced in the Notice of Proposed Civil Penalty so that the respondent is on notice that credit already has been given for said action.

MATRIX AND DEFINITIONS

[Figure 1]

Offense categories	A. Individual	B. Business entity	C. Business entity that uses or handles Hazmat in the course of business	D. Business entity that regularly offers, accepts, or transports Hazmat
I. Declared Shipment:				
1. Shipping Papers	250–500	250–1,000	500–2,000	1,000–5,000
2. Labels	250–500	250–1,000	500–2,000	1,000–5,000
3. Markings	250–500	250–1,000	500–2,000	1,000–5,000
4. Packaging	250–500	250–1,000	500–2,000	1,000–5,000
5. Training	.....	250–1,000	500–2,000	1,000–5,000
6. Emerg. Response	250–500	250–1,000	500–2,000	1,000–5,000
7. Release into Environ	250–500	250–1,000	500–2,000	1,000–5,000
8. Other	250–500	250–1,000	500–2,000	1,000–5,000
II. Undeclared Shipment Within Hazmat Quantity Limitations:				
1. Shipping Papers	250–1,000	1,500–7,500	2,500–10,000	5,000–12,000
2. Labels	250–1,000	1,500–7,500	2,500–10,000	5,000–12,000
3. Markings	250–1,000	1,500–7,500	2,500–10,000	5,000–12,000
4. Packaging	250–1,000	1,500–7,500	2,500–10,000	5,000–12,000
5. Training	.....	1,500–7,500	2,500–10,000	5,000–12,000
6. Emerg. Response	250–1,000	1,500–7,500	2,500–10,000	5,000–12,000
7. Release into Environ	250–1,000	1,500–7,500	2,500–10,000	5,000–12,000
8. Other	250–1,000	1,500–7,500	2,500–10,000	5,000–12,000

MATRIX AND DEFINITIONS—Continued

[Figure 1]

Offense categories	A. Individual	B. Business entity	C. Business entity that uses or handles Hazmat in the course of business	D. Business entity that regularly offers, accepts, or transports Hazmat
III. Undeclared Shipment Hazmat Forbidden on, or exceeds qty limits for, Passenger Aircraft:				
1. Shipping Papers	500–5,000	5,000–15,000	7,500–20,000	10,000–27,500
2. Labels	500–5,000	5,000–15,000	7,500–20,000	10,000–27,500
3. Markings	500–5,000	5,000–15,000	7,500–20,000	10,000–27,500
4. Packaging	500–5,000	5,000–15,000	7,500–20,000	10,000–27,500
5. Training		5,000–15,000	7,500–20,000	10,000–27,500
6. Emerg. Response	500–5,000	5,000–15,000	7,500–20,000	10,000–27,500
7. Release into Environ	500–5,000	5,000–15,000	7,500–20,000	10,000–27,500
8. Other	500–5,000	5,000–15,000	7,500–20,000	10,000–27,500
IV. Undeclared Shipment Forbidden on, or exceeds qty limits for, All Aircraft:				
1. Shipping Papers	500–27,500	7,500–27,500	10,000–27,500	15,000–27,500
2. Labels	500–27,500	7,500–27,500	10,000–27,500	15,000–27,500
3. Markings	500–27,500	7,500–27,500	10,000–27,500	15,000–27,500
4. Packaging	500–27,500	7,500–27,500	10,000–27,500	15,000–27,500
5. Training		7,500–27,500	10,000–27,500	15,000–27,500
6. Emerg. Response	500–27,500	7,500–27,500	10,000–27,500	15,000–27,500
7. Release into Environ	500–27,500	7,500–27,500	10,000–27,500	15,000–27,500
8. Other	500–27,500	7,500–27,500	10,000–27,500	15,000–27,500
V. Intentional or Deliberate Violation	Consult Legal	Consult Legal	Consult Legal	Consult Legal

Air carrier and other aircraft operator violations	E. Group I & II air carriers and other aircraft operators	F. Group III & IV air carriers and other aircraft operators
Failure to comply with Parts 171, 172, or 173 requirements of the HMR as an offeror of Hazmat	(1)	(1)
Improper acceptance of Hazmat for air transportation (i.e., quantity, labeling, marking, packaging, and shipping papers) See 49 CFR 175.30(a) (1)–(4)	5,000–27,500	2,500–15,000
Failure to inspect Hazmat shipment properly. See 49 CFR 175.30 (b), (c), (d), (e)	10,000–27,500	5,000–15,000
Improper storage/securing of Hazmat aboard aircraft	10,000–27,500	5,000–15,000
Failure to provide Hazmat training, maintain records of training, or meet minimum requirements for Hazmat training	10,000–27,500	5,000–15,000
Failure to notify FAA properly of incident/discrepancies in Hazmat shipment	5,000–15,000	1,000–5,000
Failure to provide notice to the pilot-in-command	5,000–15,000	1,000–5,000
Other Part 175 violations	5,000–15,000	1,000–5,000

[1] Use main Matrix.

Definitions

(a) *Air Carrier and Other Aircraft Operator Groups (I, II, III, IV)*—Air carriers and other aircraft operators are divided into two categories for purposes of determining an appropriate sanction. These categories track the air carrier groups established in FAA Order No. 2150.3A, Appendix 1, Compliance/Enforcement Bulletin 92–1, but also includes any operator of an aircraft that is operated ''in commerce'' as defined in the Federal hazardous materials law, including Part 129 Foreign Air Carriers, Part 125 Operators, and Part 91 Operators. Group I is comprised of air carriers and other aircraft operators with annual operating revenue of $100,000,000 or more. Group II is comprised of air carriers and other aircraft operators that hold Part 121 certificates or have 50 or more pilots or operate 25 or more aircraft, with annual operating revenue of less than $100,000,000. Group III is comprised of air carriers and other aircraft operators that do not meet the criteria for Group II with (1) 6 to 49 pilots, or (2) 6 to 24 aircraft. Group IV is comprised of all other air carriers or aircraft operators not meeting the criteria for Groups I, II, or III.

(b) *Business Entity*—The violator is a business, corporation, partnership, Sub-S Corporation, sole proprietor, association, or any type of commercial entity. An individual who offers a hazmat shipment in air transportation in the course of his/her self-owned business falls into this category. Includes all entities defined under the HMR's definition of ''person,'' (49 CFR 171.8) with the exception of an individual as defined herein.

(c) *Business Entity that Regularly Offers, Accepts, or Transports Hazardous Materials in the Course of its Business.*—A manufacturer or distributor of Hazmat falls into this category. A freight forwarder would also fall into this category. The aspect of ''regularly'' offering covers a business entity that offers Hazmat with some anticipated frequency or purports to do so, e.g., a catalogue company that offers hazardous material to its customers would fall into this category, even though its actual sale or transportation of the Hazmat is infrequent or limited.

(d) *Business Entity that Uses, Handles Hazmat in the Course of Its Business*—This category encompasses the business that utilizes Hazmat in its business but does *not* offer it for transportation on a regular basis, as described above. For example, a manufacturer of a non-Hazmat product that uses Hazmat in the manufacturing process could fall into this category. It must be established that

the company ordinarily does not offer the Hazmat it utilizes for transportation, and the shipment in this instance represents an isolated incident. This type of business is held to a higher standard than the business entity that has no regular involvement with Hazmat. The described business entity receives the subject hazardous material in transportation and uses it in its business; thus, it is clearly on notice of the hazardous nature of the material and the regulatory requirements to which the Hazmat is subject.

(e) *Declared Shipment*—A declared shipment, for purposes of this matrix only, is one that complies with one or more of the communicative requirements of the HMR, i.e., it has markings, labels, and/or partially-correct shipping papers. A package that has shipping papers that declare the contents as hazardous material but is otherwise not marked or labeled falls into this category. Similarly, a properly marked and labeled package that lacks shipping papers also falls into this category. A case falls into this category where there is clear indication that the offeror made some attempt to give notice of the hazardous nature of the shipment.

(f) *Forbidden or Exceeds Quantity Limits for Passenger Aircraft*—A shipment falls into this category if the quantity of Hazmat per package exceeds the quantity limitations for passenger-carrying aircraft or if the particular hazardous material is forbidden in air transportation on passenger aircraft.

(g) *Forbidden on or Exceeds Quantity Limits for All Aircraft*—A shipment will fall into this category if the quantity of hazardous material per package exceeds the allowable amount for both passenger and cargo aircraft or the Hazmat is absolutely forbidden in air transportation.

(h) *Hazmat*—A ''hazardous material,'' as defined in 49 CFR 171.8, includes and is interchangeable with the term ''dangerous goods, '' as used in the International Civil Aviation Organization (ICAO) Technical Instructions.

(i) *Individual*—An individual who offers a shipment of hazardous material in his/her personal capacity without any business purpose or as part of a commercial enterprise on the part of the individual.

(i) *Intentional or Deliberate Violation*—A shipment falls into this category when there is evidence that the offeror, acceptor, air carrier, or aircraft operator had knowledge of the requirements of the HMR and willfully circumvented or attempted to circumvent those requirements. For example, an offeror who places a properly marked and labeled Hazmat shipment along with properly completed shipping papers, into an overpack marked as ''printed material,'' has committed an intentional or deliberate violation. In this type of case, the investigating agent shall consult with FAA legal counsel and follow agency guidance for potential criminal violations of the HMR.

(k) *Undeclared Shipment*—This is a shipment that has no indication of its hazardous material contents and/or no indication that the offeror communicated the hazardous nature of the shipment's contents to persons who accept or transport.

(l) *Within Hazmat Quantity Limitations*—The amount of hazardous material is within the quantity limitations per package as established in the § 172.101 Table (49 CFR 172.101) for the type of aircraft on which the shipment traveled. For example, if the shipment was offered for transportation on a passenger aircraft, the quantity of hazardous material was within the established limit for transportation by passenger aircraft. If the shipment was offered for transportation on a cargo aircraft, the quantity limitations for cargo aircraft apply.

RISK CATEGORIES

[Figure 2]

Category ''A'' (Maximum Weight)

Category ''A'' materials are materials that when released in the confines of an aircraft can potentially have a catastrophic effect on an aircraft's ability to continue safe flight, resulting in a crash or emergency landing causing injury or death to passengers and flightcrew, as well as persons on the ground.

Class 1	Explosives: Division 1.1, 1.2, 1.3.
Class 2	Compressed Gases All 2.1, 2.2 with Subsidiary Risk 5.1 and All 2.3 PIH Zones A–D.
Class 3	Flammable Liquids PG I, II, and (PIH).
Class 4	Division 4.1 Flammable Solids PG I, & (Matches).
	Division 4.2 Spontaneously Combustible Materials PG I (Pyrophoric).
	Division 4.3 Dangerous When Wet PG I.
Class 5	Division 5.1 Oxidizing Liquids and Solids PG I, II, e.g., ''Chemical Oxygen Generators''.
	Division 5.2 Organic Peroxides PG II (Type A, B, C, or D).
Class 6	Division 6.1 Poisonous Liquids PG I (PIH).
Class 7	Cargo Aircraft Only Quantities on Passenger Aircraft.
Class 8	Corrosive Material Liquid PG I and (PIH).

Forbidden Materials (See 49 CFR 173.21 & ICAO Technical Instructions).

Forbidden Hazmat listed in Dangerous Goods Table 49 CFR 172.101.

Category ''B'' (Moderate Weight)

The materials listed in Category ''B'' are materials that may not pose an immediate threat to the safety of a flight, but can cause death or injury to persons due to unintended releases in aircraft cabin areas, and potential damage to aircraft structures over a longer period of time due to undiscovered releases on aircraft structural components.

Class 1	Division 1.4, 1.5, 1.6, All Compatibility Groups.
Class 3	PG III Flammable Liquids.
Class 4	Division 4.1 Flammable Solids PG II, III.
	Division 4.2 Spontaneously Combustible Materials PG III.
	Division 4.3 Dangerous When Wet PG II, III.
Class 5	Division 5.1 Oxidizing Liquids or Solids PG III.
	Division 5.2 Organic Peroxides (Type E, F, G).
Class 6	Division 6.1 Poisonous Liquids PG I, II (NON–PIH).
	Division 6.2 Infectious Substances.

RISK CATEGORIES—Continued

[Figure 2]

Class 7	Radioactive Materials, yellow label III, yellow label II, and white label I.
Class 8	Liquids PG II, III Solids PG I, II, III.

Category "C" (Minimum Weight)

The materials listed in Category "C" are materials that present the least amount of risk to the transportation system.

Class 2	2.2 Nonflammable Gas.
Class 6	Division 6.1 Packing Group III.
Class 7	All other RAM (LSA, LTD QTY, Instruments and Articles).
Class 9	Miscellaneous Dangerous Goods (ORM–D and Consumer Commodity).

Note: This guidance is not intended to replace the experienced judgment to a special agent who is convinced, based on the evidence and facts of a case, that the failure of an air carrier, shipper, freight forwarder, or passenger to follow established regulations has posed a risk to aviation safety.

Issued in Washington, DC on April 14, 1999.

Jane F. Garvey,

Administrator.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 202, 240, 242 and 249

[Release No. 34–41297; File No. S7–12–98]

RIN 3235–AH41

Regulation of Alternative Trading Systems; Technical Amendment

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; technical amendment and revised compliance date.

SUMMARY: The Securities and Exchange Commission is modifying the compliance dates for Rule 301(b)(3) and making a technical change to Rule 202.3. These and other rules and rule amendments relate to the regulation of alternative trading systems and exchanges and were published on December 22, 1998 (63 FR 70844). The effective date for the other rules and amendments published in 63 FR 70844 remains April 21, 1999, except for the effective date for §§ 242.301(b)(5)(i)(D) and (E) and §§ 242.301(b)(6)(i)(D) and (E), which remains April 1, 2000.

DATES: Effective Date: April 21, 1999 for amendment to § 202.3.

Compliance Date: Alternative trading systems must comply with § 242.301(b)(3) with respect to the 50 securities listed in Schedule A by August 23, 1999; with respect to the securities listed on Schedules A and B by September 28, 1999; with respect to the securities listed on Schedules A, B and C by April 25, 2000; and with respect to all securities by June 20, 2000.

FOR FURTHER INFORMATION CONTACT: Elizabeth King, Senior Special Counsel, at (202) 942–0140, Constance Kiggins, Special Counsel, at (202) 942–0059, and Kevin Ehrlich, Attorney, at (202) 942–0778, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Background

On December 8, 1998, the Securities and Exchange Commission ("Commission") adopted new rules and rule amendments to allow alternative trading systems to choose whether to register as national securities exchanges, or to register as broker-dealers and comply with additional requirements under Regulation ATS, depending on their activities and trading volume.[1] The effective date for most of these new rules and rule amendments is April 21, 1999. The Commission stated in the adopting release that, prior to April 21, 1999, it would publish a list of those securities with respect to which alternative trading systems must comply with Rule 301(b)(3) on April 21, 1999 and those securities with respect to which alternative trading systems must comply with Rule 301(b)(3) on August 30, 1999. Rule 301(b)(3) requires an alternative trading system to provide to a national securities exchange or national securities association, for inclusion in the public quotation system, the prices and sizes of its best priced buy and sell orders, that are displayed to more than one person, in each covered security in which the alternative trading system represents 5% or more of the total trading volume.[2]

II. Delay of the Compliance Dates for Rule 301(b)(3)

One major alternative trading system has indicated that it will be unable to comply with the requirements of Rule 301(b)(3) by the original compliance dates without putting the operation of its system at serious risk of failure. The operational failure of a major alternative trading system could interfere with the markets as a whole. Accordingly, the Commission believes it necessary to adjust the compliance dates for Rule 301(b)(3) as follows:

August 23, 1999: Compliance with Rule 301(b)(3) with respect to the 50 Nasdaq securities listed on Schedule A, attached in the appendix.

September 28, 1999: Compliance with Rule 301(b)(3) for the 50% of Nasdaq securities listed on Schedules A and B, attached in the appendix.

April 25, 2000: Compliance with Rule 301(b)(3) for the 75% of Nasdaq securities listed on Schedules A, B, and C, attached in the appendix.

June 20, 2000: Compliance with Rule 301(b)(3) for all Nasdaq securities.

Schedules A, B, and C were created by ranking all covered securities traded on Nasdaq by their January 1999 volume, and including an equal number of securities from each decile. Some securities that were not traded on Nasdaq in January 1999 may commence trading on Nasdaq subsequently. Alternative trading systems may wait until June 20, 2000 to comply with Rule 301(b)(3) with respect to these securities.

All other compliance dates for the rules and rule amendments adopted last December remain the same. The Commission encourages those alternative trading systems that are able to comply with Rule 301(b)(3) on April 21, 1999 to do so.

[1] Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998).

[2] 17 CFR 242.301(b)(3). For purposes of Regulations ATS, a "covered security" includes all exchange-listed, Nasdaq NM securities, and Nasdaq Small Cap securities, other than debt and convertible securities. *See* Rule 11Ac1–1(a)(6), 17 CFR 240.11Ac1–1(a)(6); Rule 300(g), 17 CFR 242.300(g).