



### Feature Article

## 'Undeclared' No More

*Undeclared hazmat incidents are often the result of "once-in-a-blue-moon" shipments that companies failed to consider in their risk analysis.*

*by Jacki Burns*

When assessing their compliance programs, many companies are diligent when focusing on training, documentation, and facilities maintenance. However, recent changes adopted by the Research and Special Programs Administration branch of the U.S. Department of Transportation expand the hazardous material incident reporting requirements. These will significantly increase the regulatory burden for carriers and dramatically increase the risk of fines and penalties for careless shippers.

The final rule includes revisions to the Hazardous Material Incident Report form, modification of the telephonic notification requirements, and changes in report retention requirements; but it is the mandatory reporting of "undeclared hazardous material" that will be a wakeup call to all hazardous material shippers.

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### Undeclared Hazardous Material Reporting

Reporting requirements are nothing new to those who manage compliance issues for their organizations. Many government agencies require reporting of specific incidents, events, or company activities that involve the storage, handling, use, or transportation of hazardous material. The U.S. Department

of Transportation is no exception.

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DOT has required carriers to report incidents in transportation for well more than a decade, defining an incident as any unintentional release (leaks and spills) of a hazardous material from a package in any quantity. However, beginning Jan. 1, 2005, shipments of an "undeclared hazardous material" discovered during the course of transportation are to be reported on the same forms historically reserved for the reporting of spills.

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"Undeclared hazardous material" is a term new to the regulation, by which RSPA defines to mean a hazardous material subject to any of the shipping paper, marking, labeling, or placarding requirements of 49 CFR 172, or any alternative marking requirements specified in 49 CFR 173, that is "offered for transportation in commerce without any visible indication to the person accepting the hazardous material for transportation that a hazardous material is present, on either an accompanying shipping document, or the outside of a transport vehicle, freight container or package."

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Historically, shippers had the luxury of discreet notification by a common or commercial carrier when issues related to undeclared hazardous material shipments needed to be corrected. DOT was rarely informed of such events, and therefore no fines or penalties were imposed upon the shipper as a result. This change, however, requires those who discover undeclared hazardous material in transportation to notify DOT via a Hazardous Material Incident Report within 30 days of the discovery of such a shipment.

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Notification of the shipper that an incident report was filed regarding the discovery of undeclared hazardous material is optional; however, notification that its shipment is being investigated may come in the form of contact by RSPA/DOT after the agency has reviewed the incident report. While RSPA has not explicitly stated it expects to use these reports to issue fines and penalties against any company identified as shipping undeclared hazmat, it would not be inappropriate for the agency to do so.

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### **Electronic Filing Options**

RSPA recognizes that expanding the reporting requirements, as well as increasing the amount of data required on each report, will result in additional costs for any company required to file an incident report. However, RSPA hopes to offset some of those costs by allowing Hazardous Material Incident Reports to be submitted via hard copy or electronic means, including the acceptance of fax, e-mail, and Internet-based submissions. Prior to this change, incident reports were accepted in only hard-copy form in duplicate.

With the option of electronic filing, hazardous waste manifests, once required attachments to incident reports involving hazardous waste, also are no longer required to accompany these reports. In lieu of providing a copy of the manifest, the revised incident form requires that the hazardous waste manifest number be included in the report. As a means of eliminating what

RSPA perceived as possible "duplicate reporting," RSPA plans to access information regarding waste manifest details from the relevant regulatory agency.

RSPA plans to work closely with industry to develop a system that would enable acceptance of "batch" incident data. While this reporting enhancement concept appears to still be in its infancy, commercial carriers, large distributors, manufacturers, and other companies that have a heavy reporting burden will benefit greatly from such a tool.

### **Expanded Reporting Responsibilities**

Historically, incident reporting burdens were solely the responsibility of the carrier of a hazmat shipment. However, RSPA recognized the responsible party in possession of the item at the time an incident occurred or was discovered could be a person other than the carrier--such as a shipper, receiver, or warehouse employee. In order to gather the most accurate and detailed information regarding the incident, RSPA has expanded the reporting responsibilities to "each person in physical possession of a hazardous material at the time that any of the [specified] incidents occurs during transportation."

It is important to note, however, that though the shipper or receiver may indeed find itself in a position in which it is required to report an incident, the obligation to file a report exists only while the item is considered to be "in transportation." Incidents that occur "pre-transportation" (such as during the packaging of the material) or after transportation has been completed (such as unpacking a drum or box) are not considered reportable incidents for the purposes of this regulation. RSPA has referenced another final rule published Oct. 30, 2003 (RSPA-98-4952) as an important tool for recognizing when a material is "in transportation."

Activities are only defined as "loading" when carried out by carrier personnel or in the presence of carrier personnel. In other words, if the carrier is not present while moving a hazardous material (such as moving the item to a staging area on a loading dock), then the hazmat, although packaged, marked, and labeled for transport, is technically not "in transportation" until the carrier arrives and the packing is moved as a means of loading a vehicle/transferring possession to the carrier.

The same limitations apply to the unloading of a hazardous material package/pallet, although the receiver appears to have a slightly broader reporting window than a shipper in terms of defining "in transportation." RSPA defined "unloading" to mean the removal of packaged or containerized hazardous material from a transport vehicle, aircraft, or vessel, after the hazardous material has been delivered to the consignee (receiver) and "prior to the delivering carrier's departure from the consignee facility or premises."

This last portion of the definition is critical to the reporting requirement

because it indicates that, even though the transport vehicle/freight container has been emptied and possession of the hazmat has transferred to the recipient, a hazmat package is still considered "in transportation" until the carrier has left the facility. Any incidents that occur before the carrier has left the premises would be considered reportable, including the discovery of undeclared hazardous material. However, once the carrier leaves the premises, any subsequent incident or discovery would not be considered reportable under this new standard.

In its justification for modifying the current reporting requirements, RSPA seemed particularly focused on incidents or discovery that occurred during the temporary storage of hazardous materials shipments. Under the previous reporting requirements, incidents that occurred at transportation facilities such as marine terminals, transportation hubs, and cross-dock facilities were exempted from reporting if the employees at these facilities did not perform carrier functions. However, under the new reporting requirements, these employees would be required to file a report in the event of an incident or undeclared hazardous material discovery because, under the October 2003 rule, these packages would still be considered "in transportation." RSPA anticipates this expansion of the reporting requirements to include in-transit storage facilities will increase the annual number of reports received by 10 percent.

### **Gauging the Impact**

Any regulatory change that appears to increase a company's vulnerability or regulatory burden can seem overwhelming. There are some fairly straightforward methods to assess and control the risks associated with these changes, however.

**1. Stay informed and current.** Understanding the regulation, including the purpose, scope, and limitations of the changes, is always an important first step to assessing your company's risk. For quick regulatory analysis, trade organizations, consultants, and industry publications are often valuable. However, the best source for detailed information regarding a federal regulatory change often is the Federal Register, which is published by the National Archives and Records Administration. For up-to-date Federal Register publications, as well as a searchable archive, consider visiting the Government Printing Office at [www.gpoaccess.gov/fr/index.html](http://www.gpoaccess.gov/fr/index.html).

**2. Know your risk.** Hazmat transportation doesn't have to be your core business in order for your company to bear the regulatory burden of compliance. Have employees at your organization ever sent office supplies (markers, glues, etc.) to off-site employees or locations? Or perhaps sent touch-up paints to a customer after a product arrived damaged? Undeclared hazmat incidents are often the result of such "once-in-a-blue-moon" shipments that companies failed to consider in their risk analysis. Providing a quick awareness training to key employees every three years will seem a small price to pay when compared to addressing a potential DOT or FAA penalty.

**3. Take a tip from the inspectors.** Regulatory inspectors often request

copies of training records, reports, and other required documents as a first order of business during an inspection, regardless of the reason for instigating the inspection. Why? Because reviewing a company's records is an effective means of gaining insight into the state of a company's compliance program as a whole. Reviewing your company's regulatory reporting and training records as the first course of business when conducting your own risk assessment can be an easy way to jump-start your evaluation.

To review this final rule in its entirety, as well as additional comments regarding this regulatory change, visit RSPA's Web sites at <http://hazmat.dot.gov/rules/68fr-67745.htm> and <http://hazmat.dot.gov/rules/69fr-30113.htm>.

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*Jacki Burns is a Transportation Specialist for 3E Company (www.3ecompany.com) of Carlsbad, Calif.*



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