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Canadian businesspeople may think our country's HazMat regulations are difficult to understand, but they're a treat compared to their US counterparts. We offer a primer for those importing or exporting south of the border.

by Jerry Cox



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It's time for "plain language" on U.S. HazMat regulations
— a primer for Canadian companies

Straight Talk

The Government of Canada explicitly obligates its officials to use "plain language" when they communicate environmental, health, safety and other requirements. Canadian industry faces federal regulations that are complicated, technical and expensive, but their government is at fault if it fails to spell out "musts" and "must nots" in language that is "clear, ... easy to understand and useful."

The United States government follows exactly the opposite approach. Its Hazardous Materials Regulations (HMRs), which govern the transportation of dangerous goods to, from and within the States, exemplify bureaucratic gobbledygook run amok.

It's critical that Canadian companies and organizations operating on both sides of the border or shipping goods into the United States understand U.S. HMRs and the language around them.

It's tempting to laugh off fractured syntax, run-on sentences and compound incorporations by reference, but the HMRs expose companies and individuals to potentially ruinous liability every day. At greatest risk is the shipping manager who decides to roll the dice after quick perusal of regulations that currently run more than 1,160 pages.

Allegations that cozy relations between regulators and industry led to the Deepwater Horizon fiasco portend a whole new level of scrutiny for shipments of goods that could explode, burn or pollute. That makes now the best time to understand how the HMRs are structured and to make note of the most fundamental "musts" and "must nots" under U.S. law.

"At greatest risk is the shipping manager who decides to roll the dice after quick perusal of regulations that currently run more than 1,160 pages."



by Jerry Cox

LAWYER-CHEMIST STEW

The HMRs and the statute that created them were written by lawyers in the U.S. Congress and several federal government agencies. They had plenty of help from chemists, engineers and other technocrats in various industries. The technical group knows all about the characteristics of the products they manufacture and ship, but could never boil it down into sentences a liberal arts major could understand.

The results are not entirely bad, however. Uncle Sam deserves credit for recognizing that, with more than 3,000 different kinds of “HazMat” crossing the country in half a billion annual shipments, there is no “one-size-fits-all” solution. Unfortunately, thousands of exemptions from hundreds of requirements make this particular set of regulations look like a chunk of Swiss cheese — dropped at the center of a maze that would make a lab rat dizzy.

The best news is that HazMat shipments are extremely safe. Serious incidents in the United States declined steadily between 1998 and 2008. Nowadays, according to recent congressional testimony, the movement of hazmat produces an injury 0.00002 percent of the time. Because death occurs in a fraction of those cases — just 0.000014

percent of the time — people who work with HazMat are four times more likely to get struck and killed by lightning than to die in a HazMat-related accident.

HazMat shippers and carriers also need to avoid getting struck by legal lightning — fines, criminal sanctions and tort liability. The best way to do that is by heart certain basic “musts” and “must nots.”

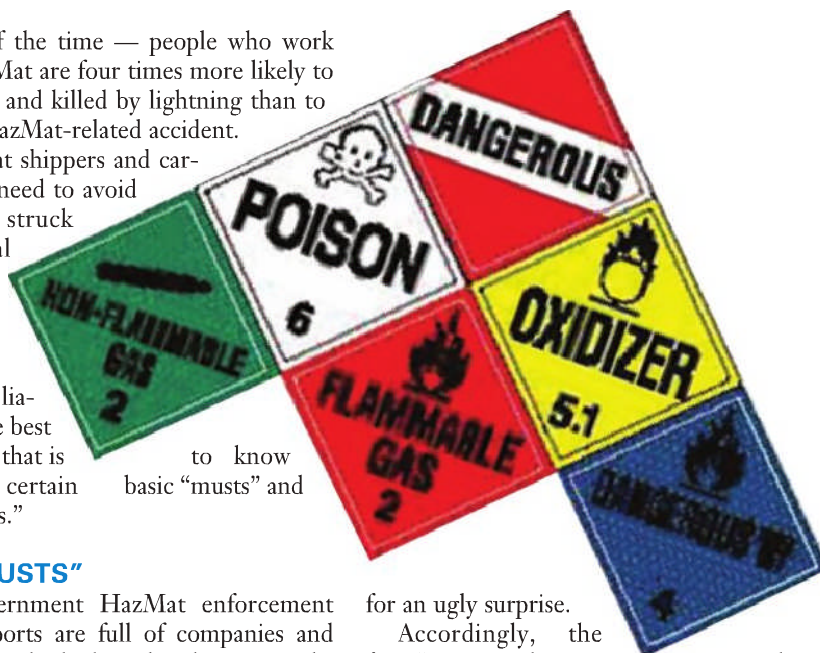
THE “MUSTS”

U.S. government HazMat enforcement action reports are full of companies and individuals who had no clue they were subject to the HMRs. Any shipper who sends a package and any trucker, airline or other carrier who transports anything is at risk of discovering too late that the goods, in fact, show up on the Hazardous Materials Table (HMT) and are, therefore, HazMat. This enables anybody with access to the company mailroom to set his employer up

for an ugly surprise.

Accordingly, the first “must” is that anyone who so much as breathes on a HazMat shipment must become familiar with the HMT. The current version runs 141 pages (not counting appendices and the tables to the appendices), but it is the “decoder ring” for the entire compliance process.

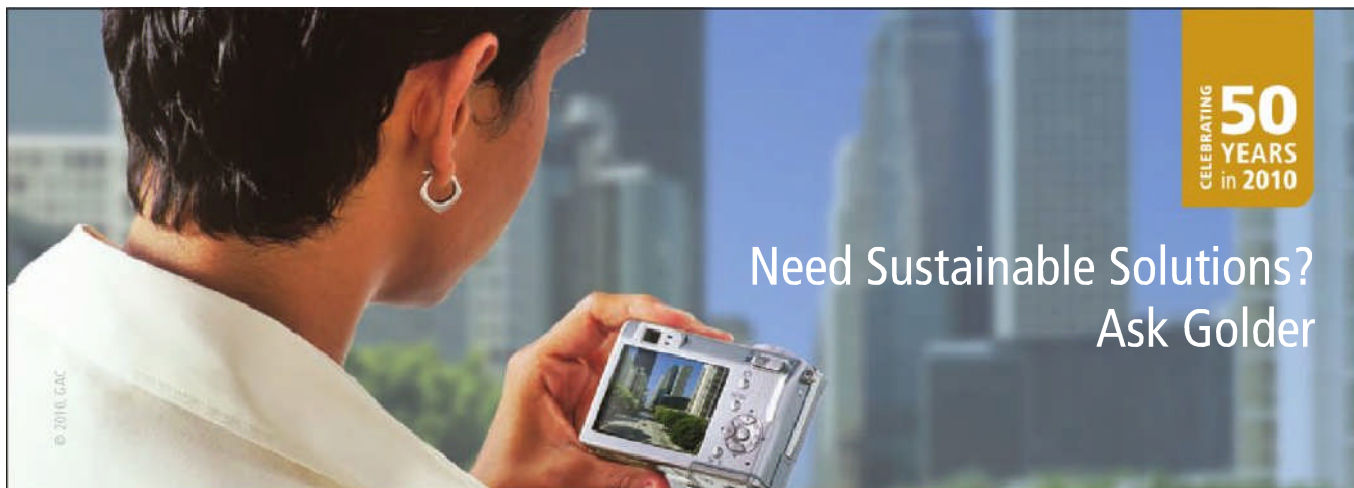
For a shipper, the first step is simple. A manager needs only to slide a finger to



“Unfortunately, thousands of exemptions from hundreds of requirements make this particular set of regulations look like a chunk of Swiss cheese.”

Foolish Assumptions about Compliance with U.S. HMRs

- **The hazmat laws don't apply to us because we aren't in the business of shipping hazmat.** Unless you are the only person in your company with access to a FedEx slip, your company has shipped one of the 3,000 substances the U.S. government considers HazMat.
- **I can't be held responsible for complying with regulations that don't make a lick of sense.** You can "knowingly" violate the law merely by knowing what you did, not that your action violated some requirement.
- **We can't be held responsible for other people's mistakes.** The HMRs are worded to drag in just about anybody who had any role in any shipment that violates the regulations. Other people's mistakes can become your mistakes in the blink of an eye.
- **DOT fines are minuscule, compared to what OSHA, EPA and other U.S. agencies impose, so I can just treat them as a cost of doing business.** The HazMat community found this to be true — before the Deepwater Horizon exploded and sank into the Gulf of Mexico. Look for more enforcement activity and higher penalty demands from U.S. agencies.
- **The best way to avoid enforcement action is to avoid disclosing that there's HazMat in a shipment.** You can expect future shipments to receive greater scrutiny from carriers and from government agents, especially after DOT implements new statutory authority to open and search packages, regardless of whether they've been declared as HazMat.
- **We get our paperwork right most of the time, so we have nothing to worry about.** There is nothing easier for a trained government investigator to spot than errors in filling out HazMat paperwork and there's no greater source of fines in enforcement actions.
- **Our company doesn't need — well, can't afford — more than one HazMat specialist.** OK. So all you have to do is make sure absolutely nothing gets shipped out until she gets back from vacation or sick leave.



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the first column to the right of the description. An infectious substance shows up as Class 6. Anhydrous ammonia is in Class 2. If the best description for a lading is an “environmentally hazardous solid,” it’s in the cats-and-dogs category, Class 9.

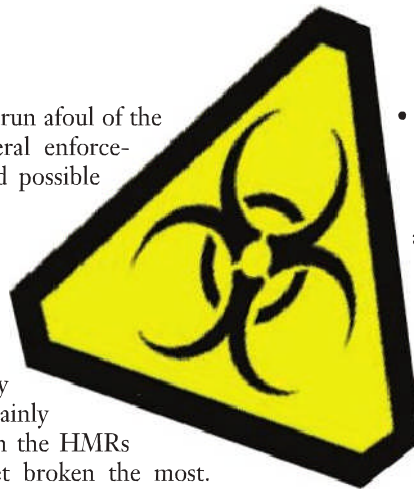
Classing HazMat is just the beginning for a HazMat employee. HazMat employers are required to certify that their employees were educated and tested on the whole set of rules that apply to HazMat shipments. For example, employees also need to know how to describe the shipment in ways that are useful to emergency response personnel, in case there’s an accident en route, what kinds of packaging they may use and whether a specific box or drum is compatible with the lading and permitted on a plane, train, truck or ship. Employers and employees alike must also understand just how painful and

expensive it can be to run afoul of the HMRs and face federal enforcement proceedings and possible court action.

THE “MUST NOTS”

Some HMR requirements are absolutely explicit. Oddly enough, the most plainly stated requirements in the HMRs are the rules that get broken the most. Shipping managers should tattoo into their palms, like Sarah Palin’s “poor man’s teleprompter,” the following list of things they “must not” do:

- fail to disclose in shipping papers the presence of HazMat or omit details like the proper shipping name and hazard class;



- rely on a “special permit” unless absolutely certain it is still valid and available;
- assume requirements for one mode of transportation apply to a different mode;
- omit an emergency contact telephone number or list a number they haven’t tested to make sure it works; and

• rely on information posted on any website, provided in any article (including this one) or count on a Letter of Interpretation from the regulators themselves, because none of these are binding on federal enforcement officials. The “musts” and “must nots” described



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above pretty much lay out all the plain language there is to find in the U.S. HMRs. The rest is wickedly complicated.


Mandatory tattooing of HazMat employees' palms may violate a host of other requirements, so employers need other ways to keep out of trouble with U.S. Department of Transportation enforcement officers. Effective training — from true professionals, not the CEO's Uncle Fred — offers the best hope of success, but it costs money to keep everyone current. The biggest "must," therefore, for anyone subject to the U.S. HMRs is to recognize that HazMat training certificates worth paying for do not come in a quilted, multiply double roll.

HMM



Jerry Cox is an attorney in Washington, DC, and the author of *Transportation of Hazardous Materials in Plain English Packaging*. A cum laude graduate of Princeton University and the University of Virginia School of Law, Cox was staff counsel on transportation issues in the United States Senate. Contact Jerry at jcox@potomacstrategyassociates.com

Jerry Cox's book *TRANSPORTATION OF HAZARDOUS MATERIALS IN PLAIN ENGLISH PACKAGING* can be found at this website: <http://www.lulu.com/product/paperback/transportation-of-hazardous-materials/6039127>




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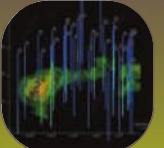
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