



U.S. Department of Transportation

Pipeline and Hazardous Materials Safety Administration

JUN 1 9 2017

Mr. Timothy W. Wiseman Managing Partner Scopelitis, Garvin, Light, Hanson & Feary, P.C. 10 West Market Street, Suite 1400 Indianapolis, IN 46204

Reference No. 16-0193

Dear Mr. Wiseman:

This letter is in response to your November 17, 2016, e-mail requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) applicable to exceptions for transporting alcoholic beverages. Specifically, you ask several questions about alcoholic beverages that comply with § 173.150(d) and whether they must also comply with § 173.150(g) to be excepted from the HMR.

You provided the following information:

- The Pipeline and Hazardous Materials Safety Administration (PHMSA) added § 173.150(g) to the HMR in 2014 to incorporate special permits that were originally issued to provide relief from the requirements in § 173.150(d).
- Both § 173.150(d) and (g) appear to provide exceptions for transporting alcoholic beverages under different conditions, making it unclear if an alcoholic beverage that complies with § 173.150(d) must also comply with § 173.150(g).
- In a letter of interpretation issued under Reference No. 16-0094 (Sept. 15, 2016), PHMSA stated § 173.150(d)(1) does not require additional hazardous materials communication when a package meets one of the exceptions in that paragraph.

We have paraphrased and answered your questions as follows:

- Q1. You ask for confirmation of your understanding that the three conditions set forth in § 173.150(d)(1) are disjunctive, such that the satisfaction of only one of the conditions entitles a person to a complete exception from the HMR. For example, a shipment of alcoholic beverages that exceed 24 percent alcohol by volume (ABV) but are contained in an inner packaging of 5 L (1.3 gallons) or less would be eligible for the exception.
- A1. Your understanding is correct. When alcoholic beverages, as defined in 27 CFR 4.10 (wine) and 27 CFR 5.11 (distilled spirits), are transported by motor vehicle, vessel, or rail, these materials are not subject to the requirements of the HMR if they meet any one

- of the criteria prescribed in § 173.150(d)(1)(i), (d)(1)(ii), or (d)(1)(iii). The wine or distilled spirits must either: (1) contain 24 percent or less ABV; (2) be contained in an inner packaging of 5 L (1.3 gallons) or less; or (3) be a Packing Group III alcoholic beverage contained in a packaging of 250 L (66 gallons) or less.
- Q2. You ask if a shipment of alcoholic beverages that satisfies any of the conditions set forth in § 173.150(d)(1) is completely excepted from the HMR, or if it must also meet the quantity limitations set forth in § 173.150(g) in order to be excepted.
- A2. A package of alcoholic beverages, that is wine or distilled spirits as defined in 27 CFR 4.10 and 5.11, respectively, that complies with 49 CFR 173.150(d)(1) is excepted from the HMR and is not required to comply with § 173.150(g).
- Q3. You ask how § 173.150(d) and (g) are supposed to be reconciled concerning alcoholic beverages.
- A3. The exceptions for alcoholic beverages in § 173.150(d) and those for <u>limited quantities</u> of retail products that contain ethyl alcohol in § 173.150(g) are stand-alone provisions meant to be applied separately from one another. The provisions for § 173.150(d) are discussed earlier in Answer A1. Section 173.150(g) applies to limited quantities that are defined by § 171.8 as the maximum amount of a hazardous material for which there is a specific labeling or packaging exception.
- Q4. You ask if the term "alcoholic beverage" in § 173.150(d) encompasses only wine and distilled spirits, as defined in 27 CFR 4.10 and 5.11, or if it also includes malt beverages such as beer. For example, would a shipment of beer containing only 4 percent ABV qualify for the exception found in § 173.150(d)(1)(i)? If not, could that same shipment of beer qualify for the exception found in § 173.150(g), assuming the quantity limitations are met?
- A4. "Alcoholic beverage" as it is used in § 173.150(d)(1) and (d)(2) introductory paragraphs only encompasses wine as defined in 27 CFR 4.10 and distilled spirits as defined in 27 CFR 5.11. PHMSA restricts this exception to wine and distilled spirits and certain packaging and modal criteria because the Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau controls for these products make it unnecessary from a transportation safety standpoint to subject them to the HMR (see Docket No. HM-102 (40 FR 22263; May 22, 1975)). Additionally, the Hazardous Materials Table (HMT; § 172.101 Table) lists "Alcoholic beverages" as United Nations (UN) identification number "UN3065." UN3065 is defined by the UN Recommendations on the Transport of Dangerous Goods Dangerous Goods List as alcoholic beverages with more than 70

percent ABV to be in Packing Group (PG) II and alcoholic beverages with more than 24 percent ABV but not more than 70 percent ABV to be in PG III. Under this definition, and to respond to your example, beer with a 4 percent ABV is not a hazardous material and, therefore, not subject to the HMR.

I hope this information is helpful. Please contact us if we can be of further assistance.

Sincerely,

T. Glenn Foster

Chief, Regulatory Review and Reinvention Branch

Standards and Rulemaking Division

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Edmonson \$173.150 Exceptions 16-0193

Dodd, Alice (PHMSA)

From:

INFOCNTR (PHMSA)

Sent:

Friday, November 18, 2016 4:26 PM

To:

Hazmat Interps

Subject:

FW: Request for Guidance

Attachments:

PHMSA 173.150 Interpretation Rqst.pdf

Follow Up Flag:

Follow up

Flag Status:

Flagged

Hi Shante/Alice,

Please submit this as a letter of interpretation. Please let me know if you have any questions.

Thanks, Jordan

From: twiseman scopelitis.com

Sent: Thursday, November 17, 2016 7:47 AM

To: INFOCNTR (PHMSA)

Subject: Request for Guidance

Please find the attached letter requesting guidance concerning the proper interpretation of 49 C.F.R. 173.150. -Tim

Timothy W. Wiseman

Partner

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November 17, 2016

VIA E-Mail (infocntr@dot.gov)

U.S. DOT PHMSA Standards and Rulemaking Division Attn: PHH-10 East Building 1200 New Jersey Avenue, SE Washington, DC 20590-0001

Re: Request for Official Interpretation

Dear Sir/Madam:

This question concerns the interplay between two exceptions for Class 3 (flammable and combustible liquids) found in 49 C.F.R. § 173.150. Specifically, subsections (d) and (g) of the regulation both appear to exempt the transportation of alcoholic beverages under certain conditions. It is not clear, however, whether a shipment that satisfies the conditions of subsection (d) must also satisfy the conditions of subsection (g) in order to be completely exempt from the Hazardous Materials Regulations ("HMRs"). Accordingly, we respectfully request that PHMSA provide clarification on the issues addressed in greater detail below.

49 C.F.R. § 173.150 provides, in pertinent part:

- (d) Alcoholic beverages.
 - (1) An alcoholic beverage (wine and distilled spirits as defined in 27 CFR 4.10 and 5.11), when transported via motor vehicle, vessel, or rail, is not subject to the requirements of this subchapter if the alcoholic beverage:
 - (i) Contains 24 percent or less alcohol by volume;

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- (ii) Is contained in an inner packaging of 5 L (1.3 gallons) or less; or
- (iii) Is a Packing Group III alcoholic beverage contained in a packaging 250 liters (66 gallons) or less;

- (g) Limited quantities of retail products containing ethyl alcohol.
 - (1) Beverages, food, cosmetics and medicines, medical screening solutions, and concentrates sold as retail products containing ethyl alcohol classed as a flammable liquid or flammable solid containing not more than 70% ethyl alcohol by volume for liquids, by weight for solids are excepted from the HMR provided that:
 - (i) For non-glass inner packagings:
 - (A) The volume does not exceed 16 fluid ounces in capacity for liquids; or
 - (B) For volumes greater than 16 fluid ounces but not exceeding 1 gallon the company name and the words "Contains Ethyl Alcohol" are marked on the package;
 - (C) Solids containing ethyl alcohol may be packaged in non-glass inner packagings not exceeding 1 pounds capacity;
 - (D) For weight greater than one pound up to 8 pounds the company name and the words "Contains Ethyl Alcohol" are marked on the package.
 - (ii) For glass inner packagings:
 - (A) The volume does not exceed 8 fluid ounces in capacity; or
 - (B) For volumes greater than 8 fluid ounces to 16 fluid ounces the company name and the words "Contains Ethyl Alcohol" are marked on the package;
 - (C) Solids containing ethyl alcohol may be packaged in glass inner packagings not exceeding ½ pound;
 - (D) For weight greater than $\frac{1}{2}$ pound up to 1 pound the company name and the words "Contains Ethyl Alcohol" are marked on the package.
 - (iii) The net liquid contents of all inner packagings in any single outer packaging may not exceed 192 fluid ounces. The net solid contents of all inner packagings in any single outer packaging may not exceed 32 pounds. The gross weight of any single outer package shipped may not exceed 65 pounds; Inner packagings must secured and cushioned within the outer package to prevent breakage, leakage, and movement.



It is our understanding that subsection (d) has been included in the HMRs in some form since the mid-80s. Subsection (g), on the other hand, was only recently added in 2014 as a result of numerous special permits that had been granted to afford the relief now provided by that subsection.

In our view, the addition of subsection (g) creates a bit of ambiguity as to the applicability of subsection (d). The confusion lies in the fact that both provisions appear to offer exceptions for the transportation of alcoholic beverages¹ but do so under starkly different conditions. Thus, it is not clear whether a shipment that meets the conditions of subsection (d) must also meet the conditions of subsection (g) in order to be exempt from the HMRs.

By way of example, a shipment of wine containing 24 percent or less alcohol by volume seemingly qualifies for a complete exception from the HMRs under Section 173.150(d)(1)(i), regardless of the quantity at issue. However, the addition of subsection (g) to the regulation makes it appear as if that same shipment of wine must also meet the quantity limitations spelled out in subsection (g) in order to be exempt.

We assume that was not PHMSA's intention when it added subsection (g). Indeed, in a recent interpretation, PHMSA was asked whether "alcohol beverages meeting the exception in 173.150(d)(1) require additional hazardous materials communication." See PHMSA Interpretation No. 16-0094 (Sept. 15, 2016). PHMSA responded that "the answer is no" because "when you meet one of the three exceptions listed in 173.150(d)(1), none of the other provisions of the HMR apply for transportation by rail, highway, or vessel." Nevertheless, out of an abundance of caution, we respectfully request guidance on the following questions:

- 1. Please confirm that the three conditions set forth in 49 C.F.R. § 173.150(d)(1) are disjunctive, such that the satisfaction of *only one* of the conditions entitles a person to a complete exception from the HMRs. For example, a shipment of alcoholic beverages that exceed 24 percent alcohol by volume but contained in an inner packaging of 5 L (1.3 gallons) or less would be eligible for the exception.
- 2. Is a shipment of alcoholic beverages that satisfies any of the conditions set forth in 49 C.F.R. § 173.150(d)(1) completely exempt from the

¹ Subsection (d) applies specifically to "alcoholic beverages," whereas subsection (g) applies to, among other things, "beverages" containing ethyl alcohol. It is not clear from the regulation whether there is a distinction between "alcoholic beverages" and "beverages containing ethyl alcohol," but we assume there is not.



HMRs, or must it also meet the quantity limitations set forth in 49 C.F.R. § 173.150(g) in order to be exempt?

- 3. How are subsection (d) and (g) of 49 C.F.R. § 173.150 supposed to be reconciled?
- 4. Does the term "alcoholic beverage" in 49 C.F.R. § 173.150(d) encompass only wine and distilled spirits as defined in 27 C.F.R. §§ 4.10 and 5.11, or does it also include malt beverages such as beer? For example, would a shipment of beer containing only 4% alcohol by volume qualify for the exception found in 49 C.F.R. § 173.150(d)(1)(i)? If not, could that same shipment of beer qualify for the exception found in subsection (g), assuming the quantity limitations are met?

We appreciate your consideration of these questions. If you need any additional information, please contact me.

Very truly yours,

/s/Timothy W. Wiseman

4813-0395-2188, v. 1

