



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

Office of the
Chief Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

Int. No. 89-1-RSPA

INTERPRETATION

SOURCE: Mr. Clifford J. Harvison
President
National Tank Truck Carriers, Inc.
2200 Mill Road
Alexandria, Virginia 22314

FACTS: National Tank Truck Carriers, Inc. (NTTC) has requested a follow-up interpretation to Int. No. 88-1-RSPA concerning persons responsible as "offerors" (or "shippers") under regulations issued pursuant to the Hazardous Materials Transportation Act (HMTA).

The essence of Int. 88-1-RSPA is as follows:

Any person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned to the offeror or shipper by the HMR is legally responsible under the HMR for their proper performance. Performance or attempted performance of any offeror or shipper functions may be evidence of responsibility under the HMR for performance of other offeror or shipper functions. No single commercial act, such as a sale or transfer of ownership, is necessarily determinative of that responsibility.

NTTC's request also recognizes that the earlier Interpretation stated that the key issue in determining regulatory responsibilities under the Hazardous Materials Regulations (HMR), 49 CFR Parts 171-179, is determining which parties perform which functions and that this involves a case-by-case determination based on all relevant facts.

Accepting that premise and recognizing that answers to detailed hypothetical questions may not be appropriate or applicable to actual cases occurring in the future, NTTC nevertheless sets forth a series of hypothetical fact patterns and requests answers to questions concerning them.

Many of NTTC's questions seem to assume erroneously that there is only one offeror in any given fact situation. In actuality there may be one or more offerors, jointly and severally responsible for compliance with the HMR, in any transportation scenario-- depending upon the details of that scenario.

INTERPRETATION: NTTC's hypothetical fact patterns and related questions are set forth below, and each question is followed by the answer of the Research and Special Programs Administration.

FACT PATTERN #1

Company A is engaged in the production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, the primary function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by Company A. Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets". There are no prior or existing agreements, between Company A and Company Z, regarding product ownership or taking title to the product.

Question--

For the purposes of applicability of 49 CFR Parts 170-179, is Company A the "shipper" (or "offeror")?

Answer-- In Fact Pattern #1, absent additional facts, Company A is an offeror of hazardous materials for transportation and, as such, is responsible for compliance for all offeror and shipper responsibilities (e.g., §§ 171.2, 172.3, 173.1, and 173.22). Although there are no facts indicating that Company Z is an offeror, if Company Z loads its own vehicles or issues shipping papers, it would be performing offeror functions and be responsible for doing so in compliance with the HMR. Also, Company Z is a carrier and may not accept for transportation or transport hazardous materials without complying with numerous HMR provisions applicable to those functions (e.g., §§ 171.2 and 177.817).

FACT PATTERN #2

Company A is engaged in the production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, the primary function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by Company A. Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets".

By prior contractual agreement, Company A agrees to permit Company Z to load its trucks (at Company A's "facilities") 24 hours a day with no representative of Company A in attendance during the loading operations. Access to Company A's facilities is accomplished by keys and/or electro-mechanical devices provided by Company A.

Question--

For the purposes of applicability of 49 CFR Parts 170-179, is Company A the "shipper" (or "offeror")?

Answer-- Company A and Company Z are both offerors. Either or both would be responsible for compliance with particular requirements of the HMR. Nothing in the given facts has relieved Company A of its responsibilities to classify the materials, prepare shipping papers, certify the shipment (§ 172.204), and provide required placards (§ 172.507). However, if Company Z performs offeror functions, § 173.1 requires that it do so in accordance with the HMR. Such functions might include selection of proper packaging (§§ 173.22(a)(2) and 173.24) and loading (§§ 173.30 and 177.834).

The extent of the joint and several responsibility of Companies A and Z as offerors would be determined, in part, by the terms of their contract with each other.

FACT PATTERN #3

Company A is engaged in production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, one function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by Company M. Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets".

Company M is engaged in the retail and/or wholesale distribution of petroleum products under the brand names of Company A. By prior agreement between Companies A and M it is agreed that ownership of the product shall pass from Company A to Company M, prior to transportation from Company A's facilities. Said "prior agreement" further specifies that Company Z will provide transportation services between Company A's facilities and Company M's facilities.

Questions--

- (1) For the purposes of applicability of 49 CFR Parts 170-179, is Company A the "shipper" (or "offeror")?
- (2) For the purposes of applicability of 49 CFR Parts 170-179, is Company M the "shipper" (or "offeror")?

Answer-- As discussed in the Fact Pattern #1 answer, Company A is an offeror, and Company Z would be responsible for proper performance of any offeror functions which it undertakes. Company M has not become an offeror solely by virtue of its acquisition of ownership of the hazardous materials prior to transportation. If Company M directs the activities of Company A or otherwise undertakes offeror functions, Company M is responsible for their proper performance. This issue was discussed in Int. No. 88-1-RSPA:

No single factor . . . conclusively determines legal responsibility for performance of "offeror" functions under the HMR. For example, transfer of ownership of the hazardous materials from the oil company to the purchaser does not, in itself, absolve the oil company of responsibility under the HMR for performance of "offeror" functions or impose them upon the purchaser.

On the other hand, the oil company's original ownership does not necessarily result in the oil company being responsible under the HMR for performance of all "offeror" functions. The ownership of the hazardous materials before, during or after the transportation of hazardous materials is only one of many relevant factors which must be considered in determining regulatory liability under the HMR.

FACT PATTERN #4

Same fact pattern as that described in #3 (above), except that the "prior agreement" stipulates that the transportation will be performed in motor vehicles owned by Company M.

Questions--

- (1) For the purposes of applicability of 49 CFR Parts 170-179, is Company A the "shipper" (or "offeror")?
- (2) For the purposes of applicability of 49 CFR Parts 170-179, is Company M the "shipper" (or "offeror")?

Answer-- Company A is an offeror. On the "offeror" issue, this fact pattern is the same as Fact Pattern #1, and there are no facts indicating that Company M is an offeror. If Company M directs the activities of Company A or otherwise undertakes offeror functions, Company M is responsible for their proper performance.

FACT PATTERN #5

Same fact pattern as that described in #3 (above), except that the agreement specifies that Company M will "arrange for transportation".

Questions--

- (1) For the purposes of applicability of 49 CFR Parts 170-179, is Company A the "shipper" (or "offeror")?
- (2) For the purposes of applicability of 49 CFR Parts 170-179, is Company M the "shipper" (or "offeror")?

Answer-- Company A is an offeror. More information would be required concerning Company M's undertaking to "arrange for transportation" in order to determine to what extent, if any, Company M is an offeror. If Company M is contractually or otherwise responsible to perform any of the functions assigned by the HMR to the offeror, it is legally responsible under the HMR for the proper performance of those functions.

FACT PATTERN #6

Same fact pattern as that described in #3 (above), except that the agreement specifies that Company A will "arrange for transportation".

Questions--

- (1) For the purposes of applicability of 49 CFR Parts 170-179, is Company A the "shipper" (or "offeror")?
- (2) For the purposes of applicability of 49 CFR Parts 170-179, is Company M the "shipper" (or "offeror")?

Answer-- Company A is an offeror. As in Fact Patterns #3 and #4, there are no facts sufficient to indicate that Company M is an offeror.

ADDITIONAL QUESTION A


Would there be any change in the determination of "shipper" (or "offeror") if the prior agreement between Companies A and M stipulated that ownership or title to the product transferred "at the time of delivery" to Company M's facilities?

Answer-- Assuming that this question refers to Fact Pattern #3, Company A remains an offeror, and there is no basis on which to determine that Company M is an offeror.

ADDITIONAL QUESTION B

Would there be any change in the determination of "shipper" (or "offeror") if the prior agreement between Companies A and M stipulated that ownership or title to the product transferred "at the time of loading (or transfer)" into cargo tanks (regardless of ownership of the cargo tanks)?

Answer-- Again assuming that this question refers to Fact Pattern #3, Company A remains an offeror. However, Company M has not become an offeror solely by virtue of its acquisition of ownership of the hazardous materials at the time of loading or transfer into cargo tanks -- a time later than that hypothesized in Fact Pattern #3.


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Chief Counsel

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CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Interpretation 89-1-RSPA: ABSTRACT

All relevant facts are considered in determining which persons are responsible for compliance with HMR provisions imposing responsibilities upon offerors of hazardous materials. A company from whose facilities bulk liquid hazardous materials are transported generally is an offeror of those hazardous materials regardless of the ownership of those materials. However, other persons may become jointly and severally liable as offerors under the HMR by undertaking, or contracting to undertake, responsibilities imposed upon offerors by the HMR.

Interpretation 89-1-RSPA: KEY WORDS

Hazardous Materials, Offer of for Transportation

Hazardous Materials, Ownership of

Offeror

Offering

Ownership

Shipper

Interpretation 89-1-RSPA: SECTIONS AFFECTED

49 CFR 171.2

49 CFR 172.3

49 CFR 172.204

49 CFR 172.507

49 CFR 173.1

49 CFR 173.22

49 CFR 173.24

49 CFR 173.30

49 CFR 177.817

49 CFR 177.834