



# Aviation Group Client Update

Date: September 24, 2013

Contact: Lisa A. Harig, Partner  
Washington DC Office  
[lharg@mklawdc.com](mailto:lharg@mklawdc.com)  
+1 703 247 5487

Lindsay W. McGuire, Associate  
New York Office  
[lmcguire@mklawny.com](mailto:lmcguire@mklawny.com)  
+1 516 364 1095

## PHMSA ISSUES NPRM ON FAILURE TO PAY CIVIL PENALTIES

On Monday, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a [Notice of Proposed Rulemaking](#) (NPRM) requesting public comment on its proposal to amend the Hazardous Materials Regulations (HMR) to penalize nonpayment of a civil penalty. Specifically, PHMSA's has proposed prohibiting any person who fails to pay a civil penalty as ordered, or who fails to comply with a payment agreement, from performing activities regulated by the HMR until payment is made. The rule is prospective, not retroactive, and would affect only orders that assess penalties issued on or after the effective date of the final rule. The NPRM discusses the following major points:

- The proposed rule change would authorize the following four agencies to apply the proposed provisions as an augmentation of their current enforcement and debt collection practices: (1) the Federal Aviation Administration (FAA), (2) the Federal Motor Carrier Safety Administration (FMCSA), (3) the Federal Railroad Administration (FRA), and (4) PHMSA.
- A fifth agency, the United States Coast Guard (USCG), would be not be affected by this proposed rule change. The USCG is responsible for enforcing the HMR in connection with certain transportation or shipment of hazardous materials (HazMat) by water.
- For PHMSA enforcement, violations that do not substantially impact safety (handled through the ticket process under 49 CFR § 107.310) would be exempt from the proposed rule.
- Once an enforcement action is adjudicated or settled, the responsible agency issues an order that outlines the civil penalty and any payment arrangements.
- Under the proposed rule change, if payment was not received within 45 calendar days of the payment due date, the responsible agency would send the respondent a Cessation of Operations Order (COO), notifying the respondent that it must cease HazMat operations on the 91<sup>st</sup> calendar day after failing to make payment, unless payment is made.
- The proposed rule would allow the respondent to appeal the COO within 20 days of receipt in accordance with the responsible agency's appeal procedures.
- The COO appeal would not allow the respondent to reargue the merits of the penalty. The only information sufficient to prevent the COO from taking effect would be (1) proof of payment, (2) proof of bankruptcy debtor status and an inability to pay, or (3) an emergency Stay issued by a Federal Circuit Court with jurisdiction over the matter. The responsible agency could, however, agree to rescind the COO if an acceptable payment plan is arranged.
- Persons that continue to conduct regulated activities in violation of the COO would be subject to additional penalties, including criminal prosecution pursuant to 49 U.S.C. § 5124.
- PHMSA interprets the statutory exemption from the effects of this proposed rule change for Chapter 11 debtors as requiring the agency to provide not a complete exemption, but rather to



seek a determination from the bankruptcy court of a debtor's ability to pay a civil penalty claim prior to imposing the prohibition on HazMat operations after nonpayment.

Comments are due on or before **November 25, 2013**. If you have any questions regarding the proposed rule change, the enforcement process, or if you would like assistance in the preparation or submission of comments, please contact our office.

\* \* \* \* \*

McBreen & Kopko's Aviation Group represents air carriers, fixed base operators (FBOs), airport managers, aviation service providers, and business aircraft owners and operators on a wide range of aviation issues including regulatory matters, commercial transactions, aircraft finance matters, and bankruptcy and creditors' rights.