DEPARTMENT OF TRANSPORTATION
MATERIALS TRANSPORTATION BUREAU
WASHINGTON, D.C. 20590

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 175

[Docket No. HM-168; Amdt. Nos. 171-55; 175-15]

Hazardous Materials Aboard Aircraft

AGENCY: Materials Transportation Bureau (MTB), Research and Special Programs Administration, Department of Transportation.

ACTION: Final rule.

SUMMARY: This final rule amends certain regulations pertaining to the transportation of hazardous materials aboard aircraft. Specific changes are (1) restatement of § 175.5 pertaining to the applicability of Part 175 by removing the reference to "civil" aircraft and adding an exception for government-owned aircraft and, with certain limitations, aircraft operated on behalf of a government; (2) a revision to the exception in § 175.5, for aircraft of United States registry under lease to and operated by foreign nationals outside the United States; (3) the adoption of a new § 175.31 to require the reporting of certain discrepancies in hazardous materials shipments detected following the acceptance of shipments for transportation aboard aircraft; and (4) a revision of § 175.85 to provide clarification of the term "accessible" and to exclude certain classes of materials from the accessibility requirements of the section.

EFFECTIVE DATE: October 1, 1980.

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SUPPLEMENTARY INFORMATION: On December 11, 1978, the MTB published a notice of proposed rulemaking (Docket HM-168, Notice 78-13; 43 FR 57928) which addressed four issues involving the transportation of hazardous materials aboard aircraft. The MTB's actions and significant public comments concerning the proposals contained in the Notice are discussed in the following paragraphs.

Applicability of Part 175. There has been much confusion concerning the applicability of the Hazardous Materials Regulations (HMR) to nongovernment-owned aircraft which are "used exclusively" by a government. In order to lessen the possibility of noncompliance due to any misunderstanding, the MTB has determined that it is necessary to clarify the applicability of the HMR in this area. This amendment prescribes the requirements which define exclusive direction and control (by a government) of nongovernment-owned aircraft to provide a clear distinction between the applicability and inapplicability of regulations issued under the Hazardous Materials Transportation Act, (HMTA) (49 U.S.C. 1801 *et seq.*).

The proposal contained in Notice 78-13 has been adopted with certain revisions. The changes include a shortening of the prescribed minimum lease period from 180 days to 90 days and an editorial revision of § 175.5 for the purpose of clarity.

The proposal to delete the word "civil" from Appendix B of Part 107 was handled in the final rule to Docket HM-166B (45 FR 13087: February 28, 1980).

Four comments submitted by certain Federal agencies criticized the proposal to require that aircraft be chartered or leased for a minimum of 180 days as a condition of exclusive use. Two of the commenters requested periods of 30 days or 60 days on the premise that the shorter periods are more in keeping with their current utilization of leased aircraft. Upon review of submitted data concerning aircraft utilization, the MTB has reduced the minimum lease period to 90 days. It is believed that this change will cover the majority of these government leasing arrangements, thus easing the burden of compliance on the agencies involved. It is the MTB's opinion that a stipulated leased period of less than 90 days would be inconsistent with the intent of this rulemaking action.

Two of the critical commenters suggested that any minimum lease period is unacceptable. One suggested that any shipment accompanied by a government courier or custodian should be excepted from the HMR. The MTB disagrees with this suggestion. The accompaniment of a shipment by a government representative is, of itself, irrelevant with regard to determining the applicability of the HMR to the shipment. The other commenter contended that the operations of a government agency are not in commerce and hence not subject to the HMR. The MTB disagrees with this contention. For transportation by aircraft, a government's hazardous materials shipments are subject to the HMR (1) when the government uses aircraft (civil or private) for commercial purposes (as in the case of certain foreign airlines which operate within the United States and are owned by foreign governments); and (2) when a government uses a nongovernment-owned aircraft which is not established as being under its exclusive direction and control.

One commenter suggested that provision be made to except government-owned, contractor-operated aircraft from compliance with the HMR. The MTB does not believe it necessary to incorporate the suggested provision. If government-owned aircraft are operated exclusively within the government's own sphere of activities for non-commercial purposes, regulations issued under the HMTA do not apply to such operations. Non-commercial operations are conducted by certain Federal, state and local government agencies and by government subdivisions such as state universities.

Aircraft Leased to Foreign Nationals. This action is taken in recognition of an obligation of the United States under the Chicago Convention. Chapter 3.5, Annex 6, Part 1 of the Convention provides that explosives and other dangerous articles, except where necessary for operation, navigation or safety of an aircraft, may only be carried if their carriage is approved by the aircraft's state (nation) of registry and they are in conformance with the regulations of that state.

Prior to this amendment, Part 175 did not apply to aircraft of United States registry which were under lease to and operated by foreign nationals outside the United States. Historically, the exception was included in the regulations in recognition of the difficulty the U.S. Federal Aviation

Administration has had in obtaining compliance with Part 175, and other parts of the HMR which are incorporated by reference in Part 175, in those operations. Unfortunately, the language of the exception did not include a requirement that an equivalent body of regulations must be complied with in lieu of Part 175 to insure that United States obligations under Annex 6 of the Chicago Convention would be met. Determinations of equivalency pose significant problems due to differing requirements. Moreover, there could be many instances where insufficient time would be available in a leasing transaction to compare the HMR with the requirements and prohibitions of another state.

To remedy the situation, the exception in § 175.5 has been revised to stipulate that the HMR do not apply to United States registered aircraft under lease to and operated by foreign nationals outside the United States if (1) hazardous materials are carried in accordance with the pertinent regulations of the state of the foreign operator, and (2) the materials are not forbidden aboard aircraft by § 172.101. The amendment on this subject represents a substantial revision of the proposal contained in Notice 78–13 which would have required full compliance with the HMR by foreign operators. The revision is based on the merits of several comments to the docket which addressed the inability of foreign operators to comply with requirements of the HMR. Commenters contended that, in many instances, compliance with the HMR would place them in conflict with national or international regulations applicable to the operations of foreign operators. Further, they contended that it would be difficult, if not impossible, to obtain compliance with the HMR by foreign shippers offering hazardous materials for shipment totally outside the United States. The MTB believes these comments have merit and the revision which has been adopted alleviates these difficulties while satisfying United States obligations under the Chicago Convention.

While the MTB has no assurance that the regulations of the nation of a foreign operator will always achieve a level of safety equivalent to that provided by the HMR, it believes the amendment to be the best and most practical solution to the problem. Several comments addressed the difficulty of enforcing any requirement which would apply to foreign operators. Enforcement could, admittedly, be difficult in some instances. However, the requirement is considered necessary and there are means available to the FAA for legal recourse against U.S. lessors, foreign operators, and their agents. Since many of the materials prohibited for air transportation by the HMR are also banned by other governments, it is not anticipated that there will be significant problems involving non-compliance with the prohibitions. It is also anticipated that U.S. lessors may desire to stipulate compliance with the new provision as part of their leasing agreements.

It should be noted that the International Civil Aviation Organization is presently drafting a new Annex entitled "Safe Transport of Dangerous Goods by Air" and that this Annex will be considered by the MTB when it is issued. It is anticipated that § 175.5 will require further amendment at that time.

Reports of Discrepancies. This requirement is based on a petition from the Air Line Pilots Association (ALPA), and a similar proposal contained in National Transportation Safety Board (NTSB) Safety Recommendation A–74–26, to require that an aircraft operator report each instance a package offered to the operator for transport by air is discovered not in compliance with the HMR. The proposal contained in Notice 78–13 has been adopted with certain revisions.

The NTSB, in its comments on Docket HM–168, contended "* * * that none of the MTB's actions to date have corrected the deficiency in the existing system which permits a shipper to seek acceptance of a shipment by other carriers once it has been refused by a carrier because of noncompliance with Federal standards." The NTSB further stated "The Safety Board urges the MTB to take action to insure that carriers are required to hold a shipment and its papers until the FAA is notified and the shipment is corrected." Although the MTB agrees with the spirit of this recommendation, the HMTA does not grant the MTB authority to confer upon private individuals (aircraft operators and carriers) the authority to confiscate (in effect) the property of another individual based on presumed, though not proven, noncompliance with the HMR.

In addition to what the MTB considers to be legal impediments to this recommendation, there are practical impediments as well. It would be extremely difficult for FAA enforcement personnel to deal with discrepancy notifications involving potential shipments prior to their acceptance by aircraft operators. A shipment containing a hazardous material must be offered to the carrier in accordance with the regulations. An offering occurs when (1) the package is presented, (2) the shipping paper is presented, (3) the certification is executed, and (4) the transfer of the package and shipping paper is completed with no further exchange (written or verbal) between the shipper and aircraft operator, as usually evidenced by the departure of the shipper. At this point, it is clear that the operator has accepted the shipment and the shipper has removed himself from a final opportunity to take corrective action that would preclude a violation of the HMR relative to transportation of hazardous materials aboard aircraft. Absent a clear showing that the package was offered for transportation as illustrated above, the MTB doubts that an effective enforcement action could be taken against persons who appear at airline cargo terminals seeking to ship packages of hazardous materials.

Based on impediments to implementation of a more comprehensive reporting requirement, the requirement which has been adopted limits required reporting to shipment discrepancies which are discovered subsequent to acceptance of the shipment for transportation and limits "reportable" discrepancies to those discrepancies which are not detectable as a result of proper examination by a person accepting the shipment under the acceptance criteria of § 175.30.

This notification requirement will facilitate the timely investigation by FAA personnel of shipment discrepancies involving situations where inside containers do not meet prescribed packaging or quantity limitation requirements and where packages or baggage are found to contain hazardous materials after having been offered and accepted as other than hazardous materials.

Accessibility. The purpose of this change is to define the term "accessible" as used in § 175.85(b) and to except certain materials from accessibility requirements. The definition is considered necessary because there has been confusion in the past over the meaning of the term "accessible." Certain materials have been excepted from accessibility requirements because they pose no significant risks to the structural integrity of an aircraft and may be safer to carry in inaccessible locations that are not in proximity to crewmembers.

The proposal contained in Notice 78–13 has been adopted with revisions. It should be noted that radioactive materials were excepted from

accessibility requirements prior to this amendment in Docket HM-168, Amendment 175-11 (45 FR 6946) published on January 31, 1980. The reasons for this action are explained in the preamble to Amendment 175-11.

The types of materials which are excepted from accessibility requirements have been expanded to include not only radioactive, poison B and irritating materials but also etiologic agents. The change is based on the merits of comments by ALPA to the effect that infectious, disease producing agents should be carried as far away from the flight crew as possible. The MTB has revised the proposed exception to permit packages suitable for passenger-carrying aircraft to be transported inaccessibly on cargo-only aircraft in quantities exceeding the quantity limitation (50 lb. net weight per inaccessible cargo compartment or freight container) imposed by § 175.75(a)(2). Without this provision packages containing quantities permitted on passenger-carrying aircraft would be subject to more restrictive location requirements on cargo-only aircraft than packages of identical materials containing larger, cargo-only aircraft, quantities.

The exception from accessibility requirements provided for small, single pilot, cargo-only aircraft being used where other means of transportation are impracticable or not available has been retained in this amendment but has been relocated from paragraph (b) to paragraph (c) in § 175.85.

Based on the merits of comments by an aircraft operator in Alaska, an additional exception from the accessibility requirements of § 175.85(b) has been provided. This exception applies to cargo-only aircraft being operated where other means of transportation are impracticable or not available and will permit operators of such aircraft to deviate from accessibility requirements to the extent that they may use alternate cargo stowage procedures where such procedures are reviewed prior to implementation and approved in writing by an appropriate FAA field office. The exception addresses those situations in which large packages are carried in quantities necessitating the stowage of some of the packages in locations on the aircraft where they cannot be readily handled and separated from other cargo during flight, such as when aircraft loads of 55 gallon drums of hazardous materials are carried.

The above-mentioned changes have necessitated a format revision of § 175.85. Paragraph (b) now contains only the requirement that cargo be carried accessibly. Former paragraph (c) has been redesignated paragraph (f) and a new paragraph (c) has been added which contains certain exceptions to the requirements of §§ 175.85(b) and 175.75(a).

Comments to the docket indicated some misunderstanding of the accessibility requirements. First, this final rule is a clarification, rather than a significant revision, of accessibility requirements. The MTB has never considered it acceptable to load materials acceptable only for cargo-only aircraft in inaccessible locations on aircraft such as inaccessible cargo compartments, inaccessible freight containers or, for packages located in accessible cargo compartments, in locations making them inaccessible. Second, this final rule does not preclude the use of either pallets or freight containers. Pallets may be used, within the context of § 175.85(b), if at least one side or end of each palletized package containing hazardous materials is visible and it is possible to handle and separate packages during flight, if necessary.

In order to render palletized packages visible and separable, it may not be feasible to load pallets to full capacity. However, lost pallet capacity may be minimized by leaving open areas in the middle of pallets so that interior packages are rendered visible, or by using packages of other than hazardous materials as interior packages on pallets.

With regard to freight containers, such containers may be used within the context of § 175.85(b), if the containers are loaded in a manner that permits inspection of their contents during flight, and if each package of hazardous materials contained therein is loaded accessibly, that is, it can be seen, handled and separated from other cargo during flight. By the same token, nonstructural containers and insulating or padding materials are not precluded from use as long as covered packages can be readily inspected, handled and separated from other cargo during flight.

One commenter has suggested that a definition of "accessible" proposed in the ICAO Annex 18 entitled "Safe Transport in Dangerous Goods by Air" be made part of the HMR. The MTB will give consideration to Annex 18 in its entirety at a future date. Because of this, and because of differences between the ICAO proposed definition and the definition proposed in Notice 78-13, a verbatim adoption of the ICAO definition would not be appropriate at this time.

In consideration of the foregoing, Parts 171 and 175 of Title 49 are amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

§ 171.8 [Amended]

1. Section 171.8 is amended by deleting the definitions for "Civil aircraft" and "Public aircraft."

PART 175—CARRIAGE BY AIRCRAFT

2. Section 175.1 is revised to read as follows:

§ 175.1 Purpose and scope.

This part prescribes requirements, in addition to those contained in Parts 171, 172 and 173 of this subchapter, applicable to aircraft operators transporting hazardous materials aboard (including attached to or suspended from) aircraft.

3. Section 175.5 is revised to read as follows:

§ 175.5 Applicability.

(a) This part applies to the acceptance for transportation, loading and transportation of hazardous materials in any aircraft in the United States and in aircraft of United States registry anywhere in air commerce. This part does not apply to—

(1) Aircraft owned and operated by a government when not engaged in carrying persons or property for commercial purposes;

(2) Aircraft which are not owned by a government nor engaged in carrying persons or property for commercial purposes but which are under the exclusive direction and control of a government for a period of not less than 90 days as specified in a written contract or lease. An aircraft is under the exclusive direction and control of a government when the government exercises responsibility for—

(i) Approving crew members and determining that they are qualified to operate the aircraft;

(ii) Determining the airworthiness and directing maintenance of the aircraft; and

(iii) Dispatching the aircraft, including the times of departure, airports to be used, and type and amount of cargo to be carried;

(3) Aircraft of United States registry under lease to and operated by foreign nationals outside the United States if—

(i) Hazardous materials forbidden aboard aircraft by § 172.101 of this subchapter are not carried on the aircraft; and

(ii) Other hazardous materials are carried in accordance with the regulations of the State (nation) of the aircraft operator.

4. Section 175.31 is added to read as follows:

§ 175.31 Reports of discrepancies.

(a) Each person who discovers a discrepancy, as defined in paragraph (b) of this section, relative to the shipment of a hazardous material following its acceptance for transportation aboard an aircraft shall, as soon as practicable, notify the nearest FAA Air Transportation Security Field Office by telephone and shall provide the following information:

(1) Name and telephone number of the person reporting the discrepancy.

(2) Name of the aircraft operator.

(3) Specific location of the shipment concerned.

(4) Name of the shipper.

(5) Nature of discrepancy.

(b) Discrepancies which must be reported under paragraph (a) of this section are those involving hazardous materials which are improperly described, certified, labeled, marked, or packaged, in a manner not ascertainable when accepted under the provisions of § 175.30(a) of this subchapter, including—

(1) Package which are found to contain hazardous materials—

(i) Other than as described or certified on shipping papers;

(ii) in quantities exceeding authorized limits;

(iii) In inside containers which are not authorized or have improper closures;

(iv) In inside containers not oriented as shown by package markings;

(v) With insufficient or improper absorption materials, when required; or

(2) Packages or baggage which are found to contain hazardous materials subsequent to their being offered and accepted as other than hazardous materials.

5. In § 175.85, paragraph (b) is revised, paragraph (c) is redesignated as paragraph (f), and a new paragraph (c) is added as follows:

§ 175.85 Cargo locations.

* * * * *

(b) Each person carrying a package containing a hazardous material acceptable only for cargo-only aircraft shall carry the package in a location accessible to a crewmember during flight. To be considered accessible, the package must be loaded in such a manner that it can be seen, handled, and separated from other cargo during flight.

(c) Notwithstanding the provisions of paragraph (b) of this section—

(1) When packages of the following hazardous materials are carried on cargo-only aircraft, they may be carried in a location which is inaccessible to a crewmember during flight and are not subject to the weight limitation specified in paragraph (a)(2) of § 175.75 of this subchapter.

(i) Radioactive materials,

(ii) Poison B, liquids or solids (except those labeled FLAMMABLE),

(iii) Irritating materials, and

(iv) Etiologic agents.

(2) When packages of hazardous materials acceptable for cargo-only or passenger-carrying aircraft are carried on cargo-only aircraft where other means of transportation are impracticable or not available, packages may be carried in accordance with procedures approved in writing by the FAA Air Transportation Security Field Office responsible for the operator's overall aviation security program or the FAA Air Transportation Security Division in the region where the operator is located.

(3) When packages of hazardous materials acceptable for cargo-only or passenger-carrying aircraft are carried on small, single pilot, cargo-only aircraft being used where other means of transportation are impracticable or not available, they may be carried without quantity limitation as specified in § 175.75 in a location that is not accessible to the pilot if—

(i) No person other than the pilot, an FAA inspector, the shipper or consignee of the material or a representative of the shipper or consignee so designated in writing, or a person necessary for handling the material is carried on the aircraft;

(ii) The pilot is provided with written instructions on characteristics and proper handling of the materials; and

(iii) Whenever a change of pilots occurs while the material is on board, the new pilot is briefed under a hand-to-hand signature service provided by the operator of the aircraft.

* * * * *

(49 U.S.C. 1803, 1804, 1808; 49 CFR 1.53 and App. A to Part 1)

Note.—The Materials Transportation Bureau has determined that this document will not result in a major economic impact under the terms of Executive Order 12044 and DOT implementing procedures (44 FR 11034) nor require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321 et seq.). A regulatory evaluation is available for review in the docket.

Issued in Washington, D.C., on May 15, 1980.

L. D. Santman,

Director, Materials Transportation Bureau.

[FR Doc. 80-15690 Filed 5-23-80; 8:45 am]

BILLING CODE 4910-60-M