



December 23, 2009

OSHA Docket Office
Docket No. H-022K-2006-0062
U.S. Department of Labor
Room N-2625
200 Constitution Ave., NW
Washington, DC 20210

*Re: OSHA Notice of Proposed Rulemaking:
Hazard Communication - Docket No. H-022K-2006-0062*

Dear Sir/Madam:

The American Trucking Associations, Inc., (ATA) appreciates the opportunity to provide comments to the Occupational Safety and Health Administration (OSHA) on its notice of proposed rulemaking to modify its existing Hazard Communication Standard.¹ ATA generally supports OSHA's adoption of the Globally Harmonized System of Classification and Labeling of Chemicals (GHS); however, we have several concerns with the manner in which the GHS will be coordinated with the Department of Transportation's (DOT) hazardous materials transportation regulations (HMRs).

ATA is the national trade association representing the trucking industry² and is vitally interested in matters affecting the transport of hazardous materials. Our member companies that haul hazardous materials are regulated by DOT and must comply with the HMRs. We have reviewed the Proposed Rule and while we believe it to be an improvement over the Advanced Notice of Proposed Rulemaking (ANPRM), ATA still has several concerns. We discuss these concerns below:

DOT & "Constructive Knowledge"

One of the most significant problems that implementation of the Proposed Rule will create for carriers stems from the fact that many chemicals regulated by OSHA and required to display the GHS label/pictogram are not classified as regulated hazardous materials by DOT.

¹ See 74 *Federal Register* 50279 (September 30, 2009) (hereinafter "Proposed Rule" or "NPRM").

² ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its members include more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and indirectly through its affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

DOT regulations prohibit carriers from transporting hazardous materials that are not offered in full compliance with the HMRs. The presence of GHS labels may be deemed to be evidence that a shipper has offered hazardous materials for transportation in a manner that does not fully comply with the HMRs (even though there are a significant number of chemicals that are regulated under GHS and not regulated under the HMRs). This could result in significant liability for the carrier or could delay the transportation of these materials.

In 1998, DOT issued a formal interpretation regarding the issue of “constructive knowledge,” which essentially holds carriers liable for information that they “should have known” (*i.e.*, that a shipment was a hazardous material, even though the shipper did not declare it to be regulated by DOT).³ From a carrier’s perspective, the ability to determine whether or not a shipment is or is not a hazardous material cannot be overemphasized or overlooked in the context of OSHA’s final rule.

Carriers that receive packages with an OSHA GHS label on them will have no way to determine whether the substance is or is not a “hazardous material” for purposes of the HMRs. Carriers cannot be expected to hold shipments and impede commerce for a package that displays a GHS label without any other indication the shipment is not a hazardous material.

Similarly, OSHA’s Material Safety Data Sheets (MSDS) do not require transportation information indicating whether the material is regulated under the HMRs. The absence of this information may result in certain shippers mistakenly classifying the materials for purposes of transportation. OSHA has proposed a re-formatted MSDS, which includes a section for transport information (Section 14) that shippers can use to be consistent with the GHS; however, the Agency has stated that it will not enforce the inclusion of this information as it is outside of the Agency’s regulatory jurisdiction. As such, shippers may not have the information they need to properly classify the materials for transport. Carriers may not have access to an MSDS and should not be expected to read MSDSs to determine whether a package is a hazardous material.

Recommendation

Shipments that are not regulated for transportation as hazardous materials, but that still require an OSHA GHS label must have an indication in conjunction with the GHS label that the shipment is not a hazardous material for purposes of transportation. Carriers do not have the ability to research the thousands of chemical substances they may handle and should not be responsible for making this determination. OSHA should develop a signal to indicate that a material requiring a GHS label either is or is not also regulated as a hazardous material for transportation. We believe that OSHA should work with DOT and affected carriers on the most appropriate means to overcome this problem.

³ Indeed carriers have been held in violation of the HMRs where they accepted a package with a multi-syllabic chemical name stenciled on the box, even though a DOT-approved label or shipping paper was not present. In this case, the shipper failed to include the DOT label and federal enforcement officials found that the presence of a chemical name could be sufficient to trigger the carrier’s knowledge that they may be accepting hazardous materials for transportation even though it is not properly marked and labeled. The GHS pictogram will create a similar problem for those chemicals that are regulated by OSHA but not classified as hazardous materials in transportation.

To help shippers comply with both the HMRs and the GHS labeling requirements, OSHA should require chemical manufacturers and distributors to use the new section 14 on the z as an indicator that the substance(s) is or is not a hazardous material for purposes of transportation. Failure to include information on the GHS label, and on the MSDS, will cause confusion, and mistakes among shippers and transportation workers. This will have a negative impact on the flow of commerce.

Labels

OSHA should clarify that only the DOT's HMR labels may be displayed on the outside of the shipping containers. The substances/chemicals regulated for transportation as a Hazardous Material/Dangerous Goods appear as diamond-shape labels. If OSHA's proposed pictograms, denoted by red diamond-shapes and referred to as "core information", appear on the shipping container, next to or instead of the DOT label, it will not only cause confusion among transportation employees inspecting/accepting and segregating hazardous materials shipments, but will also cause confusion among emergency response personnel.

If OSHA's GHS core information appears on the outside of shipping containers, carriers may not be able to accept packages without first obtaining additional, time-consuming clarification from a shipper as to whether the shipment is or is not regulated as a hazardous material for transportation. Although the DOT's HMRs have been amended since the ANPRM to allow GHS classification labels on the shipping containers containing hazardous materials, ATA believes that, wherever possible, the DOT label should be the only label visible during transportation.

Recommendation

With respect to OSHA's GHS core information, ATA believes that such core information should be on the inner package(s). This would reduce the potential for confusion and compliance concerns with the HMRs. In cases where the container serves as both the shipping container and the workplace container (*e.g.*, drums or intermediate bulk containers), ATA supports OSHA's flexibility to allow employers to select the type of labeling system to be used in their workplaces, consistent with the revised HCS standard.

Training

The haz-com training requirements were written primarily for employees who are or could become exposed to hazardous chemicals in the workplace. Bear in mind that not every industry is going to encounter the same hazardous material training challenges. Little thought was given in the NPRM to transporters of hazardous chemicals. Not only must trucking personnel be trained on the DOT's HMRs, and OSHA's Hazard Communications Standard, they must now be re-trained on modifications to the OSHA HazCom standard for purposes of implementing the proposed GHS classification system. In evaluating the costs of training, it is important to note that unlike a typical stationary workplace that may use a handful of the same chemicals over a given year, carriers cannot predict which chemicals they will handle at any given time. As such, carrier employees will require significantly more training than other industry's employees.

With respect to training on the GHS core information relative to the trucking industry, OSHA's NPRM significantly underestimates the amount of time and costs involved in training trucking industry personnel. The Agency estimated that it would take approximately five minutes to train employees on the revised hazard communications standard, based on OSHA's assumption that employees are already familiar with some aspects of the GHS. This assumption is erroneous. In addition to learning the new components of OSHA's core information, carrier employees must receive additional training to recognize the overlap between the OSHA GHS information and the DOT HMRs labels.

Our member companies estimate, on average, that it will take a minimum of one hour of additional training on OSHA's revised hazard communications standard. Carriers will bear other costs such as the costs to: 1) prepare new training material; 2) train employees on additional issues as they arise during the implementation process; and 3) train employees in the manners in which DOT chooses to interpret OSHA's processes and procedures under the Proposed Rule.

Recommendation

To ease the compliance burden and reduce costs, OSHA should develop a model Hazard Communication Program that could be easily adopted and adapted by transporters and end users of hazardous materials. Such material could be web-based. Further, OSHA should develop model training plans that can be readily accessible and implemented by industry. Implementation of these recommendations could significantly reduce training and compliance costs within the trucking industry, particularly for smaller motor carriers. OSHA could further broaden its efforts in this area through work with other safety organizations such as the National Safety Council, the American Industrial Hygiene Association and OSHA-sponsored seminars conducted on a regional level to "train-the-trainer."

Conclusion

ATA does not oppose OSHA's implementation of the GHS; however, we believe that GHS implementation would be better served by:

- *Requiring that GHS core information be on the inner package(s) to reduce the potential for confusion and compliance concerns with the DOT hazardous materials regulations;*
- *Developing a special mark to be used in conjunction with the GHS label to indicate whether a shipment is or is not a hazardous material for purposes of transportation;*
- *Requiring manufacturers/shippers to include transportation information on the MSDS to ensure that all subsequent entities in the supply chain have adequate information on the requirements necessary to safely transport the materials in compliance with the HMRs. It is unrealistic to expect carrier personnel to evaluate information on an MSDS for transportation purposes;*
- *Developing a web-based, model Hazard Communication Program that could be easily implemented by transporters and end users of hazardous materials;*

- *Developing model training plans that can be readily accessible and adaptable by industry; and*
- *OSHA should initiate a memo of understanding with PHMSA and the various modal regulators that the presence of GHS labels is not valid justification for “Constructive Knowledge” operator violations.*

On behalf of ATA we thank you for consideration of our comments on the Agency’s proposed rule modifying its hazard communication standard.

Respectfully submitted,

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