

March 12, 2010

BY ELECTRONIC MAIL

The Honorable Cynthia L. Quarterman
Administrator, Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590
Electronic Address: <http://www.regulations.gov> (RIN 2137-EA44; Docket No. PHMSA-2009-0095)(HM-224F))

Re: Comments on PHMSA's Proposed Hazardous Materials: Transportation of Lithium Batteries Rule

Dear Administrator Quarterman:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Pipeline and Hazardous Materials Safety Administration's (PHMSA) *Proposed Hazardous Materials: Transportation of Lithium Batteries Rule*.¹ PHMSA's proposed rule, developed in consultation with the Federal Aviation Administration (FAA), would remove exceptions under the Hazardous Materials Regulations (HMR) for transporting small lithium batteries on aircraft, require hazardous materials training for employees that handle lithium batteries or products that contain them, and require that lithium batteries be accompanied by hazardous materials labels and shipping documents during transport.² A more detailed summary of the proposed rule is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider

¹ 75 Fed. Reg. 1302 (January 11, 2010).

² *Id.*

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

less burdensome alternatives. Moreover, Executive Order 13272⁵ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

As discussed in the proposed rule, PHMSA is proposing to change its hazardous materials regulations for the transport of lithium batteries.⁶ Lithium batteries come in two types: lithium metal (primary/non-rechargeable) and lithium ion (secondary/rechargeable) batteries. The two types of batteries have different characteristics, but both are used to power the vast array of consumer, medical, and electronic devices in widespread use throughout society. The proposed rule has been published because lithium batteries have been linked to a heightened risk of fire during transport when not properly packaged.⁷ PHMSA discusses some forty-four such instances in its proposed rule, nearly all involving the improper packaging or handling of these materials.⁸

Lithium batteries are subject to PHMSA's Hazardous Material Regulations (HMR) found at 49 C.F.R. Parts 171 - 180.⁹ In addition, the international community has developed standards that govern the testing and transportation of lithium batteries, most notably through the United Nations (U.N.) Recommendations for the Transport of Dangerous Goods (U.N. Recommendations) and the International Civil Aviation Organization (ICAO) Technical Instructions on the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions).¹⁰ The U.S. Department of Transportation has been and remains an active participant in both of these international efforts.

The proposed rule would revise PHMSA's regulation so that small lithium batteries, such as those found in consumer, medical, and electronic devices, would no longer be excepted from the HMR and would have to be transported as Class 9 hazardous material.¹¹ This would trigger a host of training, labeling, documentation, and notification requirements on anyone who ships or handles a lithium battery or a product containing a lithium battery, including lithium battery manufacturers, manufacturers of products that contain lithium batteries, shippers, retailers, airlines, and others. The proposed rule would also modify some of the testing and re-testing requirement for

⁵ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

⁶ 75 Fed. Reg. 1302.

⁷ 75 Fed. Reg. 1304.

⁸ Id.

⁹ *Cost-Benefit Analysis and Regulatory Flexibility Analysis, Hazardous Materials; Transportation of Lithium Batteries* (December 2009), p. 1.

¹⁰ 75 Fed. Reg. 1302.

¹¹ 75 Fed. Reg. 1310.

lithium batteries that would differ from international standards. PHMSA states that these changes are needed to ensure safety.¹²

Small Entities Have Expressed Serious Concerns With The Proposed Rule

Following publication of the proposed rule, a number of small business representatives contacted Advocacy and expressed serious concerns about the proposed rule. Advocacy met with small business representatives to discuss the proposal and attended PHMSA's public meeting on the proposed rule on Friday, March 5, 2010 where a number of small business representatives testified about the proposal. The following comments are reflective of the issues raised during these conversations and at PHMSA's public meeting.

- 1. Small business representatives support several aspects of the proposed rule, including those that harmonize U.S., U.N., and ICAO requirements.** Small business representatives expressed support for several aspects of the proposed rule, including those that harmonize the definition of lithium metal and lithium ion batteries with current U.N. descriptions, adopt the U.N. watt-hours measure instead of the current equivalent lithium content (ELC) for lithium ion batteries, and incorporate by reference the current U.N. Manual on Tests and Criteria applicable to the design type testing of lithium cells and batteries. Other small business representatives recommended that PHMSA form an Advisory Committee to consider where additional areas of consensus exist and how to ensure harmonization of U.S. and international standards. Advocacy recommends that PHMSA consider further outreach to the regulated community to enhance dialogue, promote safety, and ensure harmonization.
- 2. Small business representatives want PHMSA to retain the exception for small lithium batteries, consistent with ICAO standards.** Small business representatives stated adamantly that they would like PHMSA to retain the current exception for shipping products containing small lithium batteries from the hazardous materials regulations, consistent with ICAO standards. These exceptions apply to batteries that meet U.N. testing criteria and are shipped in conforming packaging. Representatives oppose treating these materials as fully-regulated Class 9 hazardous materials when shipped by air because it will significantly increase the cost and complexity of shipping these products with little demonstrated safety benefit. Representatives also stated that they support the use of the ICAO lithium battery label¹³ for shipping excepted cells and batteries (and products containing them), but not with the proposed Class 9 label which, they believe, will create unnecessary confusion and costs.¹⁴ Representatives also stated that none of the incidents referenced in the proposed rule involving lithium batteries were associated with properly packaged shipments, so PHMSA should concentrate on enforcing existing rules and increasing public

¹² 75 Fed. Reg. 1307.

¹³ See, 75 Fed. Reg. 1311.

¹⁴ A representative from a shipping company stated that they charge \$35.00 extra to ship a hazardous (Class 9) material, which, under the proposal, would include any consumer product containing a lithium battery.

awareness to promote compliance. Representatives also stated that the proposed rule could unintentionally increase risk if people sought to avoid added costs by shipping undeclared materials in nonconforming packaging.¹⁵

- 3. Small business representatives would like PHMSA to retain current international U.N. lithium battery testing standards.** Small business representatives also stated that they oppose the provision that would change the standard of what constitutes a change in the design of a lithium battery requiring retesting. The current U.N. standard requires such retesting when there is a 20 percent change in the design of the battery. (Change may be measured by the difference in mass, voltage, or watt-hours, depending on the chemistry.) While PHMSA states that it appreciates the importance of international harmonization, it proposes to lower the change in design criteria to 5 percent because it feels 20 percent is too high. Representatives stated that PHMSA has not provided any technical or practical justification for changing this to 5 percent. Small business representatives also stated that this change would deviate from international standards and impose undue costs and burdens on U.S. firms and put them at a competitive disadvantage over their foreign competitors (who would not have to test as many designs).¹⁶ Representatives recommended that PHMSA retain the current international retesting standard at 20 percent or, in the alternative, present the 5% recommendation to the U.N. and ICAO for further consideration.
- 4. PHMSA's Regulatory Flexibility Act analysis appears to omit some regulated entities and understate costs.** PHMSA certifies under the RFA that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. However, PHMSA's analysis seems to omit several regulated entities and understate costs. For example, the RFA analysis states that the rule would apply to manufacturers of small lithium batteries and manufacturers of products that contain them. However, small business representatives have pointed out that any retail business, internet shipper, manufacturer of battery packs, shipping company, or airline that handles these materials would also be subject to the new Class 9 hazardous materials provisions. This would require them to train their employees, provide shipping documentation and notices, and incur increased costs that are not included in the analysis.¹⁷ Further, small business representatives expressed concern that the proposed rule would create conflicting international standards and require significant supply chain redesigns because of stowage limits and a reduction in the number of aircraft available to transport products. Finally, small business representatives stated that PHMSA has dramatically understated the number of products containing lithium batteries that are shipped by air each year. For these reasons, the factual basis for the agency's RFA certification may be suspect.

¹⁵ For example, a representative noted that a consumer wishing to return an electronic product to a company might simply place it in the mail rather than pay a hazardous material shipping surcharge. Another noted that consumers might simply discard electronic products rather than return them for service, thereby increasing the waste stream.

¹⁶ A representative stated that the cost of conducting the U.N. test is approximately \$5,000 per design.

¹⁷ Several representatives were concerned that the proposed rule would increase shipping costs by reducing the number of aircraft that would be available to transport products.

Advocacy recommends that the agency consider whether it has included all regulated entities and associated compliance costs in its RFA analysis and whether its RFA certification remains valid.

- 5. PHMSA should evaluate public comments and consider alternatives that still meet the agency's safety objectives.** Advocacy understands that this is a complex technical and safety issue that has involved domestic and international deliberation over many years. Advocacy also appreciates PHMSA's efforts to obtain stakeholder input on this issue through this proposed rule and its recent public meeting on it. However, Advocacy notes that the large turnout at PHMSA's public meeting (most opposing some aspects of the proposed rule) and the number of small business representatives that have contacted Advocacy about this rulemaking is indicative of the significant public interest in this issue. As such, Advocacy recommends that PHMSA carefully consider the public comments it receives on the proposed rule, assess the impact of the proposed rule on small businesses, and consider feasible alternatives that would meet the agency's safety objectives while minimizing the economic impact on small business.

Conclusion

Advocacy appreciates the opportunity to comment on PHMSA's *Proposed Hazardous Materials: Transportation of Lithium Batteries Rule*. Advocacy is mindful of the important safety implications associated with the proposed rule, and hopes these comments are helpful and constructive. Please feel free to contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Susan M. Walthall
Acting Chief Counsel for Advocacy

/s/

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget