

March 12, 2010

Magdy El-Sibaie, PhD
Associate Administrator
Pipeline and Hazardous Material Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Docket No. PHMSA-2009-0095 (HM-224F), Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT, Hazardous Materials: Transportation of Lithium Batteries; Notice of Proposed Rulemaking

Dear Associate Administrator El-Sibaie:

The following comments are submitted on behalf of the National Retail Federation in response to Pipeline and Hazardous Materials Safety Administration's (PHMSA) Notice of Proposed Rulemaking (NPRM) on the transportation of lithium batteries. NRF and its members strongly support efforts to harmonize international safety standards when it comes to the transportation of lithium batteries or other hazardous materials. Unfortunately the NPRM as drafted falls short of true harmonization. We also have a number of significant concerns with other aspects of the NPRM as well.

By way of background, the National Retail Federation (NRF) is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees - about one in five American workers - and 2009 sales of \$4.1 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

NRF supports the call by other organizations for PHMSA to change the current NPRM to an Advanced Notice of Proposed Rulemaking (ANPRM). We believe this will allow PHMSA the appropriate time to fully study the issue, perform an accurate cost benefit analysis and determine what actions are necessary to improve the safety of the transportation of lithium batteries. NRF also strongly supports the comments submitted by the Consumer Electronics Retailers Coalition, of which NRF is a member.

NPRM Concerns

As stated above, NRF and its members fully support the efforts of PHMSA to study safety issues related to the transportation of lithium ion batteries as well as the products that contain them. These products include consumer electronics like laptops and cell phones as well as personal health care products like electronic toothbrushes. The number of shipments and covered products range into the millions. PHMSA needs to conduct a full and thorough analysis of all the products and companies that would be affected by this regulation.

Specifically, NRF is concerned with the following aspects of the NPRM:

- Lack of analysis of impact on retail sector
- Flawed economic analysis
- Aggressive 75-day implementation timeline

Lack of Analysis of Impact on Retail Sector

In the NPRM, PHMSA mentions that only two groups will be impacted by the new regulation: distributors and passenger and air cargo carriers. It doesn't appear that PHMSA took into consideration the impact of the NPRM on the retail sector or the ultimate consumer. There was no mention of consultation with the

retail sector contained within the NPRM. This is a glaring omission and needs to be considered as part of the cost benefit analysis.

The retail sector is a critical component within the supply chain for the final sale and distribution of lithium batteries as well as the products that contain them. These include small, medium and large businesses which operate thousands of stores across the country as well as employ millions of workers. The NPRM severely underestimates the number of employees who will now have to be trained for dealing with hazardous materials of a consumer product such as an iPod, which according to the NPRM, would now be classified as since it contains a lithium battery.

Flawed Economic Analysis

As pointed out in the March 5th Public Listening Session on the NPRM and by the numerous industry submissions, the economic analysis conducted by PHMSA is severely flawed. Most industry analysts predict the cost of implementation will far exceed the \$9.3 million for the first year quoted by PHMSA in the NPRM. The standard additional carrier fee for air shipment of Category Nine HAZMAT articles is \$35. This is a significant cost that would be added to the millions of air shipments that occur each year. This would not only apply to goods that are intended for sale, but would be applied to goods that are returned for service as well. This would raise the cost of implementation to hundreds of millions of dollars, not the \$9.3 million noted by PHMSA. In addition, as the number of products that contain lithium batteries increase, the cost of shipping these additional products will increase, not decrease.

In addition, PHMSA completely ignores the costs associated with handling charges imposed by air carriers. PHMSA states that the net cost of the handling fee is zero. This is simply not the case. These handling charges need to be considered as part of the cost benefit analysis. They cannot be summarily

dismissed as “cash transferred from one affected industry to another.” There is no precedent for such a dismissal of such a cost. These costs, as well as those for training additional employees, are critical elements to developing an accurate cost benefit analysis. PHMSA must reconsider this and recalculate the actual impact on the industry by the NPRM. This would include the impact on retailers, manufacturers, the cargo airline industry and the ultimate consumer.

Aggressive 75-day Implementation Deadline

The compliance deadline of 75 days after the publication of the final NPRM is not only aggressive by PHMSA, but unrealistic as to how quickly industry can achieve the mandated changes. As discussed by numerous industry representatives at the March 5th Public Listening Session, industry would need at least a year to implement the changes proposed in the NPRM. Because the NPRM would affect thousands of products and millions of shipments of lithium ion batteries and products that contain them, there is no way for industry to comply in such a short time frame. This is an unrealistic expectation placed upon industry to be able to achieve all of the required changes proposed by the NPRM.

Need for Additional Studies

As stated earlier, NRF and its members fully support efforts by PHMSA to study issues related to the safe transportation of lithium ion batteries and the products that contain them. As PHMSA notes in the NPRM, most of the transportation incidents were problems associated with undeclared or improperly packaged shipments. Specifically, the NPRM states:

“Most of the recent lithium battery incidents have been determined to originate from packages in noncompliant shipments of lithium batteries. As a result, many feel that additional regulations will not help lower the

number of incidents. PHMSA and FAA believe non-compliance most often arises from confusion concerning the regulatory requirements.”

Per this statement, PHMSA should focus on ensuring compliance with current regulations. Resources should be placed towards educating the shipping public, including retailers, about the requirements for proper shipping and packaging of lithium batteries and products that contain them. While additional clarity on the regulations will certainly help, ensuring actual harmonization with the International Civil Aviation Organization standards is critical.

Conclusion

NRF appreciates the opportunity to submit comments on the proposed regulation. On behalf of America's retailers we call upon PHMSA to take this opportunity to change the NPRM into an ANPRM and use the time to fully study the issues impacting the safe transportation of lithium ion batteries. If you have any comments, please contact Jonathan Gold, NRF's Vice President for Supply Chain and Customs Policy.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Pfister". The signature is fluid and cursive, with the first name "Steve" and last name "Pfister" clearly distinguishable.

Steve Pfister
Senior Vice President, Government Relations