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Re: Transportation of Lithium Batteries Notice of Proposed Rulemaking (NPRM) Docket No. PHMSA-2009-0095 (HM-224F)

The National Association of Manufacturers (NAM) is pleased to submit these comments on the proposed Transportation of Lithium Batteries Notice of Proposed Rulemaking (NPRM). The manufacturing community is very concerned with the current direction of this NPRM published on January 11, 2010, that is being carried out by the Pipeline and Hazardous Materials Safety Administration (PHMSA) in consultation with the Federal Aviation Administration (FAA). As the NAM stated in two previous submissions to Docket No. PHMSA-2009-0095 (HM-224F), the 60-day comment period is inadequate to appropriately assess the supply chain implications for manufacturers, distributors, transportation providers, retailers and customers that this rule will have on day-to-day business operations. This comment seeks to articulate the many concerns manufacturers have expressed about the proposed rule.

The NAM is the nation's largest industrial trade association, representing manufacturers in every industrial sector and in all 50 states. Manufacturing has a presence in every single congressional district providing good, high-paying jobs. For more information about the NAM, visit www.nam.org.

The mission of the NAM is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

America's manufacturers rely on the nation's air transportation system to help support business competitiveness, efficiency, and growth across all sectors of our membership. The commercial air cargo market provided by passenger carriers and all cargo carriers provides critical access to domestic and overseas markets for manufacturers. In addition, air cargo offers premium services to shippers who rely on the skies for high value and/or time sensitive shipments. Oftentimes, air cargo is the only shipping option due to the very nature of the product being shipped and it is the stated preference of the shipper to move cargo by air. While the NAM is a strong supporter of aviation safety and recognizes the need to enhance aviation safety and security through a risk-based approach, our opposition to the rule as currently proposed is based on the high cost to implement, strong support for international harmonization,

and insufficient data and research concerning the flammability of properly packaged materials that the NPRM seeks to further regulate. In addition, there is a need to improve enforcement of current rules and manufacturers resoundingly believe PHMSA did not provide an entirely complete justification or an accurate cost-benefit analysis to support the NPRM. Members of the NAM have reported to us the following issues and concerns with the transportation of lithium batteries NPRM:

A High Cost to Implement During a Time of Economic Recovery

- Due to the impacts of designating lithium ion and lithium metal cells and batteries and the products containing these batteries as Class 9 hazardous materials when shipped by air, shippers will face increased costs from transportation providers because most air carriers charge additional fees for carriage of fully regulated hazardous materials shipments. In addition, the restriction to only cargo aircraft for these shipments as well as the proposed rule's Class C compartment requirement for stowage aboard the aircraft will squeeze the available air cargo market as competition for cargo space will increase as all manufacturers affected by this NPRM will be limited to cargo aircraft. One manufacturer believes that an effect of the rule will be a loss of 80 to 90% of the existing airfreight capacity that will force shippers to redesign entire supply chains in less than a six-month timeframe. As a result, shipping costs will skyrocket and shipping delays will be an inevitable byproduct of a restricted air cargo market. Manufacturers believe that the PHMSA cost-benefit analysis is inadequate and does not consider these transportation market impacts to shippers as a result of very short implementation of the NPRM. Further, the PHMSA cost benefit analysis does not even consider the supply chain relationships impacted by this NPRM or the global nature of modern supply chains.
- In addition, the PHMSA cost-benefit analysis does not appropriately reflect the cost of the shipment initiating from the Originating Equipment Manufacturer (OEM) nor the impacts of product returns or take back programs initiated or supported by manufacturers. We believe PHMSA must revisit and reanalyze the projected compliance costs of the NPRM. Respectfully, we disagree with the PHMSA analysis and believe that compliance costs are much higher than the cost-benefit analysis indicates.
- Along with the new Class 9 designation for the shipments by air affected by the NPRM, the proposed rule requires hazardous materials training for all personnel handling shipments of lithium ion and lithium metal batteries and cells and equipment containing them. The NAM opposes this provision because it will add undue costs to manufacturers and it will be challenging to implement in most workplace settings due to the flexible nature of employee functions. Manufacturers have assessed that the cost of the employee training requirement is woefully underestimated in the PHMSA cost benefit analysis.

Inefficiencies and Additional Burdens to American Manufacturing That Are Contrary to International Civil Aviation Rules and Standards

- The NAM supports the full harmonization of its lithium battery proposed rule with the United Nations' International Civil Aviation Organization (ICAO). The PHMSA rule as currently proposed is inconsistent with the 2009/2010 ICAO Technical Instructions

Manual and will create regulatory confusion and inefficiencies in the logistics supply chain that will adversely impact international commerce, especially as it relates to labeling and packaging requirements and exceptions. The NAM believes the PHMSA must substantially revise its proposal to harmonize with international standards and requirements to maintain competitiveness with our international trading partners and reflect the international nature of air cargo transportation.

- ICAO rules currently permit certain exceptions for the air transportation of lithium ion and lithium metal batteries and products and equipment containing these batteries. The PHMSA NPRM not only revises and eliminates current exceptions that are relevant to many manufacturers, but the newly proposed exceptions are based on lithium content of not more than 0.3 grams or a Watt-hour rating of not more than 3.7 Watt-hours. These proposed exceptions are extremely limited and cover only a small universe of manufactured products, such as low-cost cellular phones and other small, portable devices. We applaud PHMSA for recognizing the need for some continued exceptions but believe PHMSA should expand its exceptions and revise its proposed exceptions policy to one that is risk-based and consistent with ICAO rules.
- The waterproof packaging requirements for equipment containing lithium ion or lithium metal batteries regardless of method of transportation (air, rail, highway, and water) is onerous and inconsistent with international regulations concerning the movement of dangerous goods. We support the requirements from the ICAO Technical Instructions and believe the United States should harmonize its packaging requirements with the international dangerous goods regulations. A waterproof packaging requirement for all modes of transport in addition to the hazardous materials marking will add unnecessarily to shipping costs.

Research and Data Is Insufficient

- Manufacturers do not believe that the NPRM is appropriately focused on timely research. Supporting data outlined in the NPRM does not indicate that lithium ion or lithium metal batteries contained in finished products or equipment or packed alongside finished products or equipment poses a safety risk. Further, some manufacturers have assessed that FAA testing of lithium metal batteries is inadequate and the FAA has not applied all chemistries occurring in current production of these batteries. Manufacturers support the development of a variety of tests for lithium ion cells and large format lithium ion batteries and believe that PHMSA and FAA should consult with the existing ad hoc UN working group on these issues. The PHMSA and FAA must work to improve its data collection on battery incidents and battery flammability in different conditions.

Other Concerns Expressed by Manufacturers

- Manufacturers have expressed strong opposition to mandatory compliance 75 days from the final passage of the rule and believe that full implementation could take as long as eighteen months based on manufacturing schedules, contract obligations to customers, new training mandates, the development, testing and certification of new packaging, and other logistical challenges that cannot be fully altered in a short period of time. Further, manufacturers believe that PHMSA has not adequately justified an accelerated compliance timeframe.

- Manufacturers have expressed serious concerns that many low quantity or one-time shippers will violate the rule because they are unaware of the requirements set out in the proposal. Manufacturers believe that PHMSA has crafted a rule that will be nearly impossible to enforce in light of an extremely weak enforcement record of the current regulations.
- As the federal government encourages greater energy independence, the development of a lithium ion battery industry in the United States is more critical than ever. The PHMSA NPRM is totally inconsistent with national policy goals because the rule will make it more difficult and more expensive to ship large advanced batteries that are used for electric and hybrid vehicles and domestic energy exploration. Achieving a level playing field in the United States that keeps transportation services efficient and costs competitive is critical to the success of these larger policies intended to promote energy independence.
- Manufacturers are extremely concerned that PHMSA has not fully analyzed the trade implications of the NPRM and believe that the agency must consider potential violations of existing trade agreements, specifically the implications of noncompliance with the WTO Technical Barriers to Trade (TBT) Agreement potentially created by the NPRM.
- The NPRM does not distinguish differences between lithium metal and lithium ion batteries. Both types of batteries have different compositions and reactions to external factors vary based on those individual compositions. The NPRM fails to scientifically recognize those variances. Further, some manufacturers believe it to be entirely inappropriate to classify certain products, such as life-supporting and life-sustaining medical devices as hazardous materials.

NAM members encourage the U.S. Department of Transportation and its Pipeline and Hazardous Materials Safety Administration to further engage industry to better understand the global nature of supply chains and how just-in-time principles support manufacturing competitiveness in a global marketplace. A joint NAM and U.S. Chamber of Commerce letter dated March 3, 2010 notes the ubiquitous nature of lithium ion and lithium metal batteries and the multiple products containing them. These are products that power our consumer and industrial markets and support economic growth, safety, health, and national security. We believe the proposed rule goes too far in regulating the air shipments of lithium ion and lithium metal batteries and the Department of Transportation must better analyze current available data concerning battery incidents, seek additional data and information regarding battery behaviors aboard aircraft, and carefully consider new research in the pipeline. Manufacturers underscore the key fact well-articulated by PRBA – The Rechargeable Battery Association, “there has never been a fire on an aircraft attributable to lithium ion cells, batteries, or the products into which they are incorporated where existing U.S. regulations were complied with.” The most appropriate path forward is to bring current U.S. regulations in line with international standards and practices.

Manufacturers are major air cargo customers of U.S. owned and operated passenger airlines as well as all cargo carriers based here in the United States. Cargo services provided by the air carrier industry help maintain competitiveness and help grow the American economy. We believe that preserving this critical shipping option to manufacturers of lithium ion and lithium metal batteries and products containing these batteries can be appropriately maintained with a keen eye on safety. We continue to support the conversion of the rule from a NPRM to

an Advanced Notice of Proposed Rulemaking (ANPRM) so that PHMSA can draw upon the real world experiences of manufacturers as well as the air carriers who provide critical services to our sector. It is our hope that the PHMSA will move in a direction that is consistent with ICAO standards and regulations. However, if DOT is compelled to move forward to issue a final rule, we underscore the importance of lengthening the compliance timeframe to 18 months and request modifications based on our comments.

Comments Submitted by:

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