



May 6, 2019

Mr. William Schoonover
Associate Administrator
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Ave, SE
Washington, DC 20590

RE: Comments of the Retail Industry Leaders Association on PHMSA’s Interim Final Rule for Enhanced Safety Provisions for Lithium Batteries Transported by Aircraft; *Docket ID No. PHMSA–2016–0014 (HM–224I), RIN 2137-AF20*

The Retail Industry Leaders Association (“RILA”) is pleased to submit these comments in response to the interim final rule of the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) on enhanced safety provisions for lithium batteries transported by aircraft. *See* 84 Fed. Reg. 8006 (March 6, 2019) (“IFR”).

RILA is the trade association of the world’s largest, most innovative and recognizable retail companies and brands. Our membership includes more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

RILA and its members have a clear and strong interest in this rulemaking. Retailers sell a wide variety of lithium batteries and products containing lithium batteries in our stores every day. Examples include consumer electronics such as computers, power tools, small appliances, and electronic toys, as well as spare and replacement batteries. Retailers provide these useful products to consumers every day through complex global supply chains that include transportation by aircraft, vessel, and highway transportation. RILA continues to support PHMSA’s efforts to enhance safety for transportation of lithium batteries. In particular, RILA supports harmonizing PHMSA’s regulations for air transportation with the International Civil Aviation Organization (“ICAO”) Technical Instructions for the Safe Transport of Dangerous Goods by Air (“TI”), including the enhanced safety measures for lithium ion batteries adopted by the ICAO in 2016. However, PHMSA’s adoption in the IFR of additional labeling or marking requirements for highway shipments of lithium batteries in order to indicate the prohibition on transport aboard passenger aircraft is having significant adverse effects on such shipments, without commensurate benefits to

transportation safety. The transport of products via highway by private carriers and dedicated contract carriers under exclusive use (“highway-only shipments”) is the heart of the retail supply chain within the United States. Therefore, we request that PHMSA undertake the following:

- Exempt lithium batteries transported in highway-only shipments from the requirement to label or mark packages to indicate the prohibition on transport aboard passenger aircraft.
- Issue a notice that PHMSA will not seek to enforce the requirement to label or mark highway-only shipments to indicate the prohibition on transport aboard passenger aircraft while it considers the comments submitted in response to this rulemaking.
- In the event PHMSA does not exempt highway-only shipments, extend the date for compliance with the new labeling or marking requirements for highway-only shipments until September 30, 2019, in order to give shippers time to prepare labels or marks, train employees, and implement new procedures.
- Clarify that when the marking for intermediate sized lithium batteries set forth in 49 CFR 173.185(c)(1)(iv) (“LITHIUM BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD AIRCRAFT AND VESSEL”) is used, no additional label or mark is necessary to indicate lithium batteries are prohibited on passenger aircraft.
- Revise the marking requirement in 49 CFR 173.185(c)(1)(iii) to allow use of “lithium batteries” in the narrative marking rather than separate markings for “lithium ion” and “lithium metal” batteries.

We discuss each of these requests in more detail below:

1. Exemption for Private Carriers Transporting Lithium Batteries by Highway

As mentioned above, RILA supports PHMSA’s efforts to harmonize the requirements for air transportation of lithium batteries in the United States with the ICAO TI. Such harmonization facilitates air transportation of lithium batteries throughout their global supply chain. However, many shipments of lithium batteries by retailers in the United States are transported by highway only. For example, when moving products from retail distribution centers to retail stores, and from retail stores to reverse logistics centers or liquidation or donation outlets, lithium batteries and products containing lithium batteries are typically transported exclusively by highway. To support these movements, many retailers operate their own private fleet of motor vehicles or contract with third parties under exclusive use to transport products via motor vehicle. The IFR imposes requirements on these highway-only shipments.



The IFR would require that packages of lithium ion batteries in highway-only shipments carry a “cargo aircraft only” label or be marked “LITHIUM ION BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD PASSENGER AIRCRAFT.” *See* 84 Fed. Reg. at 8028 (amending Section 173.185(c)(1)(iii)). Because the retail shipments described above are never transported via aircraft, this label or mark would do nothing to enhance air safety.

In fact, requiring a label or mark indicating the prohibition on transport aboard passenger aircraft could have the unintended result of reducing transportation safety. Shipments of small lithium batteries by air must comply with the more stringent requirements for air transport set forth in Section 173.185(c)(4), including limitations on quantity per package and consignment, as well as restrictions on the state of charge in the new Special Provision A100. These requirements do not apply to highway shipments. It would be confusing to the retail employees, private carrier and dedicated carrier personnel, and potentially emergency responders who may handle these shipments to see labels or marks referencing passenger or cargo aircraft when transportation occurs exclusively by highway. For example, someone responding to an incident during highway transportation may assume the packages with a label or mark indicating a passenger aircraft prohibition met the state of charge restrictions or the limitations on quantities per package and not respond appropriately to the incident. These issues may be particularly acute to the extent that the “cargo aircraft only” label is used, since it would be natural to assume that a package bearing such a label is suitable for transport aboard cargo aircraft.

Retailers would be forced to incur substantial costs to prepare highway-only shipments with labels or marks, train employees, and implement new procedures to comply with the new requirements, without any commensurate benefits to transportation safety. The IFR does not even acknowledge costs associated with additional labeling or marking. *See* 84 Fed. Reg. at 8020 (Table 2—Summary of Benefits and Costs for Lithium Battery Provisions—Post ICAO). One retailer with a few thousand stores nationwide estimates the cost of labor and materials to add the new label or mark to be approximately \$5,000,000, with approximately 35,000 associates nationwide requiring training on new procedures for that retailer alone. As mentioned above, RILA members operate more than 100,000 retail outlets. Nearly all of these retail outlets have employees who prepare lithium batteries for shipment. Therefore, the costs to the retail industry as a whole would be substantially higher.

In sum, applying a label or mark mentioning aircraft on highway-only shipments is not only unnecessary and burdensome, but also may be counterproductive to achieving PHMSA’s safety objectives. Accordingly, we request that PHMSA exempt highway-only shipments of lithium batteries from the requirement to label or mark to indicate the prohibition aboard passenger aircraft.



2. Enforcement Discretion Pending Response to Comments on the IFR

Because it will take time and substantial resources for retailers to come into compliance with the labeling or marking requirements for highway-only shipments under the IFR, it is impossible to achieve compliance as of the effective date of the IFR, *i.e.*, the same day the new requirements were published in the Federal Register. Although we are requesting an exemption for highway-only shipments, we understand that it will take time for PHMSA to review and consider the comments submitted in response to the IFR. We request that PHMSA issue a notice that PHMSA will not seek to enforce the new labeling or marking requirements for highway-only shipments while it considers the comments submitted in response to this rulemaking. (Please note we are not requesting an enforcement discretion notice for the labeling/marketing requirements as they apply to air shipments, since those requirements have been in effect at the international level for some time, and air carriers have generally required compliance with such requirements for domestic air shipments.)

3. Extend Compliance Date for Highway Shipments

Given that the IFR was issued with no warning that it would apply to highway-only shipments, it is impossible to comply with the immediate effective date for compliance. Although RILA and its members have been aware of the passenger aircraft prohibition in the ICAO TI for some time, PHMSA had given no indication that it would extend the related label or marking requirements beyond air shipments until publishing the IFR. RILA members operate more than 100,000 retail outlets, and nearly all of these have employees who prepare lithium batteries for shipment. Unlike some other entities affected by the IFR, retail outlets do not commonly have dedicated shipping professionals at each location. It is unrealistic that all involved employees could be effectively trained to implement new label or marking procedures immediately, as required by the regulation. In order to provide time to comply with the new label and marking requirements, including preparing labels or marks, training employees, and implementing new procedures, RILA requests that PHMSA extend the date for compliance with the new labeling or marking requirements until September 30, 2019, to the extent PHMSA does not provide the exemption discussed above for highway-only shipments.

4. Clarify Marking for Intermediate Sized Batteries

Section 173.185(c)(1)(iv) provides that when lithium batteries meeting certain intermediate size limitations are transported by highway or rail, they may be transported in accordance with the reduced requirements for small lithium batteries in Section 173.185(c) as long as packages containing such batteries are marked “LITHIUM BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD AIRCRAFT AND VESSEL.” Given that this marking clearly indicates such packages are not eligible for transport aboard any aircraft, much less passenger aircraft, we request that PHMSA clarify that packages properly marked in accordance



with Section 173.185(c)(1)(iv) need not carry the “cargo aircraft only” label or the alternative marking indicating the prohibition on passenger aircraft.

5. Allowing Flexibility to Mark for “Lithium Batteries” Instead of “Lithium Ion” and “Lithium Metal” Batteries

Under the IFR, a shipper who chooses not to use the “cargo aircraft only” label, must use the narrative marking set forth in Section 173.185(c)(1)(iii), referring to either “lithium ion batteries” or “lithium metal batteries,” as applicable. This will require shippers to maintain two separate sets of markings and thereby increasing the costs of implementation. In some cases, a package may contain both types of batteries. As written, the rule would require that both narrative markings be used. Consequently, a package would carry both “LITHIUM ION BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD PASSENGER AIRCRAFT” and “LITHIUM METAL BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD PASSENGER AIRCRAFT.” It is unnecessarily burdensome and potentially confusing to include two separate markings in these cases.

Because both lithium ion batteries and lithium metal batteries would be prohibited aboard passenger aircraft, it would be sufficient to simply mark the package indicating “lithium batteries” are prohibited aboard passenger aircraft. Giving shippers the flexibility to simply refer to “lithium batteries” will reduce the costs of implementation without affecting safety or hazard communication. The packages will already be marked with the lithium battery mark provided in Section 173.185(c)(3), which indicates whether the batteries are lithium ion or lithium metal. Therefore, it is not necessary to include the battery type on the marking indicating the prohibition aboard passenger aircraft to inform handlers or emergency responders of the battery type. Accordingly, we request that PHMSA allow an alternative marking as follows: “LITHIUM BATTERIES—FORBIDDEN FOR TRANSPORT ABOARD PASSENGER AIRCRAFT.”

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For the reasons discussed above, RILA strongly supports the harmonization of the HMR rules for air transportation with the ICAO TI, but requests that PHMSA exempt lithium batteries transported in highway-only shipments from the requirement to mark or label packages to indicate the prohibition on transport aboard passenger aircraft. We also ask that PHMSA issue a notice that it will not enforce the new labeling or marking requirements for highway-only shipments while it considers the comments submitted in response to the IFR. In the event PHMSA does not exempt highway-only shipments, we request that PHMSA extend the date for compliance with the new labeling or marking requirements for highway-only shipments until September 30, 2019, in order to give shippers time to prepare labels or marks, train employees, and implement new procedures. We ask that PHMSA clarify that when the marking set forth in 49 CFR 173.185(c)(1)(iv) is used, no additional label or mark is necessary to indicate



lithium batteries are prohibited aboard passenger aircraft. Finally, we request that PHMSA allow an alternative to the markings in 49 CFR 173.185(c)(1)(iii) to reference “lithium batteries” instead of “lithium ion” and/or “lithium metal” batteries.

Once again, we appreciate this opportunity to provide our comments on this IFR. We would welcome the opportunity to provide additional input and/or to answer any questions PHMSA may have with respect to our comments and can be reached at (703) 600-2057.

Sincerely,



Jennifer Safavian
Executive Vice President
Retail Industry Leaders Association

