

January 28, 2019



Submitted electronically via <https://www.regulations.gov>

Mr. William Schoonover
Acting Associate Administrator, Hazardous Materials Safety
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
East Building, 2nd Floor
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Docket No. PHMSA–2017–0108 (HM–215O): Hazardous Materials: Harmonization
with International Standards

Dear Mr. Schoonover:

PRBA – The Rechargeable Battery Association appreciates the opportunity to submit these comments on PHMSA’s HM-215O Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on November 27, 2019. 83 Fed. Reg. 60,970. PRBA supports PHMSA’s efforts to harmonize the U.S. hazardous materials regulations (HMR) with the international dangerous goods regulations. However, we have identified two issues of concern in the NPRM that are explained in detail below.

INTRODUCTION

PRBA members manufacture approximately 65% of the lithium ion battery cells produced in the world today. They also include leading manufacturers of consumer, medical, and defense products that are powered by those battery cells, battery assemblers, battery recyclers, retailers, and large distributors of lithium batteries and equipment powered by them. Our members also are developing and manufacturing vehicles and lithium batteries that will bring to market a new generation of hybrid and electric vehicles. Another area of tremendous growth for our members is the manufacturing, installation, and commissioning of lithium battery grid energy storage projects in the U.S. and internationally. PRBA and our members participate in many of the international dangerous goods transportation forums, including the UN Sub-Committee of Experts on the Transport of Dangerous Goods, ICAO Dangerous Goods Panel, and IMO’s Carriage of Cargoes and Containers Sub-Committee.

LITHIUM BATTERY TEST SUMMARY

PRBA has participated in meetings of the UN Informal Working Group on Lithium Batteries for the past five years. The Test Summary was originally drafted by the Working Group and

presented to the UN Sub-Committee of Experts for consideration over a period of several years, and PRBA was involved throughout that process.

The UN38.3 lithium battery (and cell) tests are conducted by the original cell and battery manufacturers or a third-party test lab. The purpose of the UN38.3 tests is to “present the procedures to be followed for the classification of lithium metal and lithium ion cells and batteries...” (See provision 38.3.1 in the Manual of Tests and Criteria.) That is, if a cell and battery pass all of the applicable tests, they may be classified and shipped as Class 9 dangerous goods in accordance with the applicable regulations.

Shippers and offerors of these products are ultimately responsible to ensure the hazardous materials they offer for transport are in full compliance with the relevant provisions of the regulations. This would include ensuring the lithium batteries they offer for transport are compliant with the UN38.3 lithium battery tests. We also understand that dangerous goods inspectors and enforcement agencies have expressed frustration at the apparent lack of valid information available from certain lithium battery and equipment manufacturers regarding the UN38.3 lithium battery tests conducted on the cells and batteries they manufacture and/or ship. To address these concerns, PRBA supported efforts by members of the UN Sub-Committee of Experts to develop a Test Summary document that could be easily implemented and produced by the relevant parties (*e.g.*, cell, battery, and equipment manufacturers).

One of the reasons we supported the development of a Test Summary was to address the unnecessary requests our members receive on a regular basis for Safety Data Sheets (SDS) from companies working in the supply chain (*e.g.*, freight forwarders). An SDS is not required by the HMR or dangerous goods regulations and we have always discouraged the use of these as a hazardous materials compliance tool. A lithium battery SDS often has outdated, misleading, and inaccurate information on the cells and batteries and UN38.3 lithium battery tests. That is why we felt the Test Summary would provide the transparency requested by the dangerous goods agency officials who participated in meetings of the UN Sub-Committee of Experts and ICAO Dangerous Goods Panel and eliminate the frequent requests for SDS.

For the reasons expressed above, except for a few provisions in the Test Summary, PRBA was generally supportive of the UN Sub-Committee of Experts adoption in December 2015 of this new requirement in the UN Model Regulations.

With regard to the U.S. harmonization effort, in order to provide a smooth transition for companies who will need to comply with the new Test Summary requirement, we respectfully request that PHMSA make the following amendments to the proposed changes to 49 CFR § 173.185 and PHMSA’s guidance document on the Test Summary.

1. PHMSA should provide additional time to comply with the lithium battery Test Summary requirement. PHMSA should allow manufacturers and subsequent distributors until January 1, 2022 to comply with the Test Summary requirements. The currently proposed compliance deadline of January 1, 2020 would not allow sufficient time for U.S. manufacturers and subsequent distributors of these products to establish procedures for preparing and securing Test Summaries. We feel additional time is particularly

appropriate and necessary in light of the problems and regulatory uncertainty that has been caused by the lengthy federal agency shutdown and the challenges this new and substantive regulatory requirement will cause.

2. Clarify in PHMSA's guidance document and Final Rule preamble what is meant by "available upon request at reasonable times and locations" as proposed in 49 CFR § 173.185(a)(3). PHMSA's guidance on the Test Summary and the NPRM preamble fail to clarify that a "reasonable time" is distinct from "immediately." Consistent with IATA's lithium battery guidance¹ and the industry's Test Summary Q&A,² PHMSA should clarify that Test Summaries need not be available "immediately" at any location at which a request might be received. We feel this is a critical point for manufacturers and subsequent distributors who may be subject to this requirement. We therefore request that PHMSA amend the Q6/A6 in its guidance on the Test Summary as noted below and reflect this point in Final Rule preamble.

Q6: When must the TS be made available?

A6: Due to the large volume of lithium batteries and lithium battery powered products that are shipped daily, manufacturers and subsequent distributors should not be expected to immediately provide a Test Summary for every product they ship. The Test Summary should be made available upon request at reasonable times and locations to an individual or entity in the supply chain.

3. It is not practicable to require the post-hoc generation of a Test Summary for batteries that were manufactured as far back as 2003. PHMSA should adopt a more reasonable approach and require the Test Summary for lithium batteries and products powered by them manufactured after the mandatory compliance date of the new Test Summary (*i.e.*, January 1, 2022) . The proposed language in 49 CFR § 173.185(a)(3) requires "Each manufacturer and subsequent distributor of lithium cells or batteries manufactured after June 30, 2003, must make available upon request at reasonable times and locations, a test summary." There may be times when distributors are shipping older battery designs that were manufactured by a company that is no longer in business. Securing all the necessary information for the Test Summary may be impossible in these cases. This issue was discussed at the UN Sub-Committee and PRBA opposed requiring the Test Summary for these older battery designs as far back as 2003.

We therefore request that PHMSA amend the proposed language in 49 CFR § 173.185(a)(3) as follows: "Each manufacturer and subsequent distributor of lithium cells or batteries manufactured after ~~June 30, 2003~~ January 1, 2022, must make available upon request at reasonable times and locations, a test summary.

¹ <http://www.prba.org/wp-content/uploads/lithium-battery-guidance-document-2019.pdf>

² <http://www.prba.org/wp-content/uploads/Q-A-on-Lithium-Battery-Test-Summary-September-2018-Version-A.pdf>

LARGE PACKAGING LITHIUM BATTERIES SHIPPED FOR DISPOSAL OR RECYCLING

The development of requirements for large packaging for lithium batteries has caused some confusion for manufacturers of large batteries that have an impact resistant outer casing and often do not require UN performance packaging. PHMSA's proposal to add large UN performance packaging (*i.e.*, "Metal (50A, 50B, 50N); (ii) Rigid plastic (50H); (iii) Plywood (50D)) for lithium batteries shipped for disposal or recycling will only add to that confusion. *See* proposed 49 CFR 173.185(d)(3).

The existing text for shipping lithium batteries for disposal or recycling currently authorizes "strong outer packaging conforming to the requirements of §§ 173.24 and 173.24a." The industry has always understood this to apply to all packaging, including packaging that may exceed 400 kg net mass or 450 liters. (See definition for "Large packaging" in 49 CFR § 171.8.) The addition of a new 49 CFR 173.185(d)(3) authorizing the use of large UN performance packaging implies that only this new type of packaging may be used for these larger batteries. We do not believe that was PHMSA's intent, especially when shippers already have the option of using large UN performance packaging pursuant to 49 CFR § 173.185(b)(6).

To eliminate any further confusion on this issue, we therefore respectfully request that PHMSA not adopt the text proposed in 49 CFR 173.185(d)(3).

LITHIUM BATTERIES INSTALLED IN CARGO TRANSPORT UNIT

PRBA strongly supports PHMSA's proposal to adopt the following new identification number and proper shipping name for the hazardous materials table (HMT): "UN3536 Lithium batteries installed in cargo transport unit." This new entry in the HMT and accompanying Special Provision 389 is based on a PRBA proposal that was adopted by the UN Sub-Committee of Experts. It is intended to cover containerized systems of lithium ion and lithium metal batteries that are generally shipped under approvals or special permits issued by PHMSA and other competent authorities. By adopting this new entry and special provision, it will eliminate the need to secure approvals and special permits, greatly simplify the transport of these containerized systems, and achieve full harmonization with the corresponding international requirements.

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We appreciate PHMSA's consideration of our comments. Please contact me at 202.719.4109 or gkerchner@wileyrein.com with any questions regarding these issues.

Sincerely,

George A. Kerchner

George A. Kerchner
Executive Director