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Inv. No.: 332-532
Investigation
Confidential Information has been removed from Exhibits 2 and 3.
NON-CONFIDENTIAL VERSION

BY ELECTRONIC FILING

Ms. Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112
Washington, D.C. 20436

Re: ***The Information Technology Agreement: Advice and Information on the Proposed Expansion Part 1***

Dear Ms. Barton:

On behalf of PRBA – The Rechargeable Battery Association ("PRBA"), we hereby enter our appearance in the U.S. International Trade Commission's (the "Commission") investigation titled *The Information Technology Agreement: Advice and Information on the Proposed Expansion Part 1*, and respond to the Commission's request for written comments.[1] These comments focus on certain rechargeable cells and batteries.

[1] *See The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 1; The Information Technology Agreement: Advice and Information on the Proposed Expansion: Part 2*, 77 Fed. Reg. 48,169 (Aug. 13, 2012).

I. BACKGROUND

Founded in 1991, PRBA is a non-profit industry association whose membership includes manufacturers of the vast majority of portable lithium-ion, nickel-cadmium, and nickel-metal hydride cells and batteries produced in the world today; leading manufacturers of consumer, medical, and other products that incorporate those cells and batteries; companies developing and manufacturing the cells and batteries that will bring to market a new generation of hybrid and plug-in electric vehicles; and companies involved in research, development, distribution, and sales of cells, batteries, and battery-powered products.

PRBA's current focus extends to numerous international regulatory issues. PRBA's international role includes participation as an official Observer with the United Nations Subcommittee of Experts on the Transport of Dangerous Goods, and as an Advisor to the International Civil Aviation Organization Dangerous Goods Panel.

PRBA's members range from some of the largest corporations in the world to manufacturers and distributors who are small businesses. PRBA's members have manufacturing facilities in or ship their products to many if not all of the countries that are signatories to the Information Technology Agreement ("ITA"). Therefore, the proposed changes to the ITA would have a significant impact on PRBA's members.

II. DISCUSSION

Based on PRBA's analysis of the list of proposed additions to the products covered by the ITA, PRBA understands that the proposed list of additional products

to be covered by the ITA has been compiled using the classifications of the 2007 version of the World Customs Organization ("WCO") Harmonized System ("HS") Nomenclature. As an initial matter, PRBA believes it would be prudent to consider instead relying upon the 2012 version of the HS Nomenclature in future ITA negotiations. HS Nomenclature 2012 more accurately reflects the current trade practices within the rechargeable cell and battery industry because it identifies lithium-ion,[2] nickel-metal hydride,[3] and nickel-cadmium rechargeable cells and batteries in individual classifications, separate from other accumulators currently classified in 8507.80.[4]

The propriety of these distinctions is illustrated by production data. In 2011, approximately 4.1 billion lithium-ion cells, 1.1 billion nickel-metal hydride cells and 1 billion nickel cadmium cells were manufactured worldwide.[5] Accordingly, because HS Nomenclature 2012 is significantly more specific to the market for rechargeable cells and batteries, PRBA believes that negotiations concerning rechargeable battery technology should be based on HS Nomenclature 2012.

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[2] Rechargeable lithium-ion cells and batteries have become the power source of choice for portable electronic devices because they offer a higher energy density compared to other rechargeable battery systems. They also are designed for use in the full spectrum of industrial applications, including hybrid-electric and electric vehicles and stationary applications such as electric grid stabilization and IT, datacenter, and telecommunications backup.

[3] Nickel metal hydride cells and batteries also are rechargeable and designed for use in many consumer products and hybrid-electric vehicles.

[4] *See* World Customs Organization, Harmonized Commodity Description and Coding System, 8507.50, 8507.60, 8507.80 (5th ed. 2012), attached as **Exhibit 1**.

[5] *See* Avicenne Energy, *The Rechargeable Battery Market and Main Trends 2011-2020*, attached as **Exhibit 2** (excerpts).

PRBA further believes that the elimination of ordinary duties under HS categories 8507.30 and 8507.80 should proceed. This would promote and facilitate trade between and among the ITA signatories. This, in turn, will benefit PRBA's members in the U.S. and elsewhere by reducing costs associated with trade in these goods. In addition, eliminating import duties in other countries would unquestionably increase the competitiveness of U.S. exports of these goods.

While PRBA supports the proposed expansion of the ITA to cover the rechargeable cells and batteries that have been identified to date, PRBA also believes it is appropriate and important to broaden the scope of the proposed ITA product list to include rechargeable lithium-ion and nickel-metal hydride cells and batteries that currently enter the U.S. under the U.S. Harmonized Tariff Schedule ("HTSUS") classifications 8507.60[6] and 8507.50.[7] In the 2007 version of the HTSUS, products currently classified in 8507.50 and 8507.60 were not separately broken out, but were combined as part of 8507.80. In order to reflect current international trade activity, as well as the current WCO and the U.S. tariff schedules, the proposal to expand the ITA's coverage to include rechargeable cells and batteries that currently are identified by reference to HTS 8507.80 should be revised to include all types of rechargeable cells and batteries classified by reference to HTS sub-classifications 8507.50 and 8507.60.

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[6] All lithium-ion cells and batteries, regardless of end use, enter the U.S. customs territory under HTSUS 8507.60.

[7] All nickel-metal hydride cells and batteries, regardless of end use, enter the U.S. customs territory under HTSUS 8507.50.

In light of the ITA's purpose of removing trade barriers to Information and Communications Technology ("ICT") products, expanding the proposed category of rechargeable cells and batteries to include all rechargeable cells and batteries classified by reference to 8507.30, 8507.50 and 8507.60, as well as 8507.80, would be consistent with and facilitate this purpose by significantly increasing market access for lithium-ion, nickel-metal hydride, and nickel-cadmium cells and batteries to be used in other ICT products.

To the extent that the new ITA product expansion ultimately includes all rechargeable lithium-ion and nickel-metal hydride cells and batteries, it will be important to ensure that all signatories to the ITA consistently recognize and administer these additions. In this regard, as discussed above, the 2012 version of the WCO HS Nomenclature provides individual HTS subcategories for rechargeable lithium-ion and nickel-metal hydride cells and batteries.[8] While many countries, such as Australia, Canada, Indonesia, Japan, Thailand, and the European Union, have adopted separate HTS subcategories for rechargeable lithium-ion and nickel-metal hydride cells and batteries, not all of the ITA signatories have done so. As part of any expansion of the ITA's coverage of rechargeable cells and batteries, the United States Trade Representative ("USTR") should seek to ensure that all signatories to the ITA uniformly adopt the WCO's 2012 HTS subcategories for rechargeable lithium-ion and nickel-metal hydride cells and batteries.

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[8] *See* World Customs Organization, Harmonized Commodity Description and Coding System, 8507.50, 8507.60 (5th ed. 2012), attached as **Exhibit 1**.

As a separate matter, PRBA notes that within any class of chemistry, rechargeable cells are fungible and can be assembled into batteries for multiple types of applications, potentially complicating the administration of end-use based coverage (or non-coverage) by the ITA.[9] Rechargeable lithium-ion cells, for example, are imported in significant volumes, and are ultimately assembled into battery packs that are used for applications as diverse as cell phones, portable computers, power tools, and hybrid and plug-in electric vehicles. Rechargeable cells imported into the United States may be classified without regard to end use, and the WCO HS and the HTSUS do not presently provide individual breakouts, for example, for rechargeable cells intended for use in telephones or for electric vehicles. Given the fungible nature of these goods, and the fact that rechargeable cells and batteries are predominantly used in ICT applications, we believe that expanding the ITA to cover all rechargeable cells and batteries classifiable under 8507.30, 8507.50, 8507.60, and 8507.80, without regard to end use, would be appropriate and consistent with the spirit of the ITA.

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[9] The proposed list of additional products under 8507.80 contain two proposals that seek to identify lithium-ion batteries by end use: "{o}ther storage batteries excluding those used in motor vehicles;" and "{l}ithium-ion accumulators for use in goods classified in 8517." 8517 applies to "{t}elephone sets, including telephones for cellular networks or for other wireless networks; {p}arts of other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of headings 8443, 8525, 8527 or 8528." *See* Letter from Amb. Ron Kirk, United States Trade Representative, to Hon. Irving A. Williamson, Chairman, United States International Trade Commission at Attachment A (July 30, 2012) ("Request Letter").

I. ICT AND NON-ICT PURPOSES

A. Nickel-Cadmium Cells and Batteries

Nickel-cadmium batteries are a type of rechargeable battery that use nickel oxide hydroxide and metallic cadmium as electrodes. There are two types of nickel-cadmium batteries: "wet-cell" and "dry cell." They both offer good cycle life and capacity, good performance at low temperatures, and work well at high discharge rates.

Nickel-cadmium dry cell batteries are used in many consumer applications and provided the preferred rechargeable battery technology in the 1980s and early 1990s for most portable electronic products. Nickel-cadmium wet cell batteries are used in many industrial applications, including, but not limited to, aviation, rail and telecommunications.

B. Lithium-Ion Cells and Batteries

Lithium-ion cells and batteries refer to an entire family of rechargeable battery chemistries. There are numerous lithium-ion chemistries on the market today.[10] These include, but are not limited to, lithium cobalt oxide, lithium iron phosphate, lithium manganese oxide, and mixed metal oxides.[11] Lithium-ion cells and batteries refer to a battery where the negative electrode (anode) and positive electrode (cathode) materials serve as a host for the lithium ion (Li+).[12] Lithium ions move from the anode to the cathode during discharge and are intercalated into

[10] *See* Celina Mikolajczak, *et. al*, The Fire Protection Research Foundation, *Lithium-Ion Batteries Hazard and Use Assessment* at 12 (2011), *available at* http://www.nfpa.org/assets/files/PDF/Research/RFLithiumIonBatteriesHazard.pdf .

[11] *Id.*

[12] *Id.* at 3.

the cathode.[13] The ions reverse direction during charging.[14] Since lithium ions are intercalated into host materials during charge or discharge, there is no free lithium metal within a lithium-ion cell.[15]

Lithium-ion cells and batteries offer a higher energy density compared to other rechargeable battery systems.[16] Lithium-ion cells are often electrically connected together to form a lithium-ion battery pack that also includes protection circuitry to protect against a variety of electrical abuse scenarios (*e.g.*, external short circuit, overcharge, cell imbalance).[17]

The significant majority of lithium-ion cells and batteries are used in ICT products. In particular, over 70 percent of lithium-ion cells and batteries are used in portable computers and cellular phones.[18] With the increased number of portable high power devices that use rechargeable battery technologies, such as tablet computers, personal digital assistants (PDAs), smartphones, mp3 players, and digital cameras, the use of rechargeable lithium-ion cells and batteries has become increasingly widespread. Other ICT uses for rechargeable lithium-ion cells and batteries include medical devices and stationary applications such as electric grid

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13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at 29.

17 *Id.* at 9.

18 *See* Avicenne Energy, The Rechargeable Battery Market and Main Trends 2011-2020, attached as **Exhibit 2** (excerpts). *See also* Hideo Takeshita, *et al.*, *Worldwide Market Update on Secondary Batteries for Portable Devices, Automotive and ESS*, 28th Internaitonal Battery Seminar & Exhibit (Mar. 14, 2011) at 4, attached as **Exhibit 3** (excerpts).

stabilization and IT, datacenter, and telecommunications backup. Thus, the vast majority of lithium-ion cells and batteries are used for ICT purposes.

Rechargeable lithium-ion cells and batteries are used in non-ICT applications as well. Among the most prevalent non-ICT uses are hybrid and plug-in electric vehicles and rechargeable battery-powered power tools. These uses account for a material share of rechargeable cells and batteries but, as discussed above, the majority lithium-ion cells and batteries are primarily used in ICT products such as cellular phones and portable computers.

C. Nickel-Metal Hydride Cells and Batteries

Nickel-metal hydride cells and batteries use positive electrodes of nickel oxyhydroxide and negative electrodes of a hydrogen-absorbing alloy. Nickel-metal hydride cells and batteries can have two to three times the capacity of equivalent sized nickel-cadmium batteries, and their energy density approaches that of lithium-ion cells and batteries. Because nickel-metal hydride cells and batteries are rechargeable and more efficient than nickel-cadmium and alkaline batteries, nickel-metal hydride batteries can cost up to four times more than premium alkaline batteries.

Like lithium-ion cells and batteries, nickel-metal hydride cells and batteries are widely used in ICT applications. The most significant nickel-metal hydride ICT applications include digital cameras, PDAs, hand-held games, portable music players, video devices, and toys. Consumers often purchase nickel-metal hydride batteries as an alternative to primary (*i.e.*, non-rechargeable) alkaline batteries, which must be discarded and replaced when their charge is exhausted. While nickel-

metal hydride batteries could be used in virtually every application that uses primary alkaline batteries, which would include some non-ICT uses, most consumers are only willing to pay the price premium associated with nickel-metal hydride batteries for ICT devices that are used often and require frequent battery replacements.

Nickel-metal hydride cells and batteries, like lithium-ion batteries, also are used in non-ICT applications, the most significant of which is hybrid electric vehicles.

III. IMPORT SENSITIVITIES

At this time, PRBA has not identified any import sensitivities associated with eliminating existing ordinary duties on rechargeable cells and batteries classifiable under HTS 8507.30, 8507.50, 8507.60, and 8507.80. PRBA believes that eliminating tariffs on rechargeable cells and batteries would be wholly consistent with the spirit of the ITA, and supports the expansion of the ITA product list to include all rechargeable cells and batteries classifiable under HTS 8507.30, 8507.50, 8507.60, and 8507.80.

NON-CONFIDENTIAL VERSION

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REQUEST FOR CONFIDENTIAL TREATMENT

We respectfully request confidential treatment for the information contained in brackets in Exhibits 2 and 3 of this submission. This information is comprised of confidential sales, operating, and financial data, and its disclosure would cause substantial commercial and competitive harm to the submitter. We are also filing a public version of this submission from which the confidential information has been redacted.

Please do not hesitate to contact the undersigned to address any questions or concerns that may arise with regard to this submission.

Respectfully submitted,

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Derick G. Holt, Esq.

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Counsel to PRBA – The Rechargeable Battery Association

ATTORNEY CERTIFICATION

The Information Technology Agreement: Advice and Information on the Proposed Expansion, Part 1

Inv. No. 332-532

In accordance with section 201.6(b)(3)(iii) of the Commission's rules (19 C.F.R. § 201.6(b)(3)(iii)), I, Adam H. Gordon of Wiley Rein LLP, counsel to the PRBA – The Rechargeable Battery Association, certify, under penalty of perjury under the laws of the United States of America and pursuant to the Commission's regulations, that information substantially identical to that for which we request confidential treatment is not available to the general public and the public disclosure of such information would cause substantial harm to the persons, firms, and other entities from which the information was obtained.

Adam H. Gordon

Sworn and subscribed to before me
this September 10, 2012.

Notary Public

My commission expires: 1-1-2015

Rosie A. Wilson
Notary Public, District of Columbia
My Commission Expires 1/1/2015

EXHIBIT 1

Harmonized Commodity
Description and Coding System

EXPLANATORY NOTES

Fifth edition (2012)

VOLUME 5

Sections XVI – XXI

Chapters 85 – 97

WORLD CUSTOMS ORGANIZATION
(Established in 1952 as the Customs Co-operation Council)
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85.07 Electric accumulators, including separators therefor, whether or not rectangular (including square).

8507.10 - Lead-acid, of a kind used for starting piston engines

8507.20 - Other lead-acid accumulators

8507.30 - Nickel-cadmium

8507.40 - Nickel-iron

8507.50 - Nickel-metal hydride

8507.60 - Lithium-ion

8507.80 - Other accumulators

8507.90 - Parts

Electric accumulators (storage batteries or secondary batteries) are characterised by the fact that the electrochemical action is reversible so that the accumulator may be recharged. They are used to store electricity and supply it when required. A direct current is passed through the accumulator producing certain chemical changes (charging); when the terminals of the accumulator are subsequently connected to an external circuit these chemical changes reverse and produce a direct current in the external circuit (discharging). This cycle of operations, charging and discharging, can be repeated for the life of the accumulator.

Accumulators consist essentially of a container holding the electrolyte in which are immersed two electrodes fitted with terminals for connection to an external circuit. In many cases the container may be subdivided, each subdivision (cell) being an accumulator in itself; these cells are usually connected together in series to produce a higher voltage. A number of cells so connected is called a battery. A number of accumulators may also be assembled in a larger container. Accumulators may be of the wet or dry cell type.

The main types of accumulators are :

(1) **Lead-acid accumulators,** in which the electrolyte is sulphuric acid and the electrodes lead plates or lead grids supporting active material.

(2) **Alkaline accumulators,** in which the electrolyte is usually potassium, or lithium hydroxide or thionyl chloride and the electrodes are, for example :

(i) Positive electrodes of nickel or nickel compounds and negative electrodes of iron, cadmium or metal hydride;

(ii) Positive electrodes of lithiated cobalt oxide and negative electrodes of a blend of graphite;

(iii) Positive electrodes of carbon and negative electrodes of metallic lithium or lithium alloy;

(iv) Positive electrodes of silver oxide and negative electrodes of zinc.

The electrodes may consist of simple plates, grids, rods, etc., or of grids or tubes covered or filled with a special paste of the active material. The containers for lead-acid accumulators are usually made of glass or, in the case of car batteries, are moulded from plastic, hard rubber or composition material. In big stationary accumulators, glass or lead lined, plastic or wood boxes are used, while containers for alkaline accumulators are usually of steel or plastics. Alkaline accumulators may be of a specific size and shape, so designed to fit the device for which they are the source of electricity. They may be within waterproof containers. Many alkaline accumulators may have the external appearance of primary cells or batteries of heading 85.06.

Accumulators are used for supplying current for a number of purposes, e.g., motor vehicles, golf carts, fork-lift trucks, power hand-tools, cellular telephones, portable automatic data processing machines, portable lamps.

Some lead-acid accumulators are fitted with a hydrometer, which measures the specific gravity of the electrolyte and so indicates roughly the degree of charge of the accumulator.

Electric accumulators remain classified here even if presented without their electrolyte.

Accumulators containing one or more cells and the circuitry to interconnect the cells amongst themselves, often referred to as "battery packs", are covered by this heading, whether or not they include any ancillary components which contribute to the accumulator's function of storing and supplying energy, or protect it from damage, such as electrical connectors, temperature control devices (e.g., thermistors), circuit protection devices, and protective housings. They are classified in this heading even if they are designed for use with a specific device.

PARTS

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), the heading also covers parts of accumulators, e.g., containers and covers; lead plates and grids, whether or not coated with paste; separators of any material (except of unhardened vulcanised rubber or of textile material), including those in the form of flat plates merely cut into rectangles (including squares), meeting very precise technical specifications (porosity, dimensions, etc.) and hence ready for use.

The heading **does not cover** :

(a) Terminals (**heading 85.36**).

(b) Spent electric accumulators and waste and scrap thereof (**heading 85.48**).

EXHIBIT 2

Exhibit Not Capable of Public Summary

EXHIBIT 3

Exhibit Not Capable of Public Summary