



U.S. Department
of Transportation

Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave., SE
Washington, DC 20590

AUG 7 2009

Mr. George Kerchner
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006

Ref. No.: 09-0143

Dear Mr. Kerchner:

This is in response to your June 18, 2009 letter concerning the applicability of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) to shipments of small lithium metal batteries (< 2.0 grams lithium content) and small lithium ion batteries (< 8 grams equivalent lithium content) sold over the counter at retail locations. Your questions are paraphrased and answered below:

Q1. Are small lithium batteries assembled at retail locations and sold over the counter to customers for personal use subject to the testing requirements outlined in Section 38.3 of the UN Manual of Tests and Criteria?

A1. As specified in § 171.1, the HMR govern the transportation of hazardous materials in intrastate, interstate and foreign commerce. The term "in commerce" means in furtherance of a commercial enterprise. Therefore, hazardous materials that are sold to customers for personal, non-commercial use and transported by such persons in their personal vehicles are not subject to the HMR. However, if the transportation is in commerce the lithium batteries are subject to the HMR. In that case, each battery must be of a type proven to meet each of the tests in 38.3 of the UN Manual of Tests and Criteria prior to transportation.

Q2. Can small lithium batteries transported to customers in personal or company vehicles qualify for the materials of trade exceptions?

A2. Yes. The materials of trade definition in § 171.8 includes a private motor carrier transporting hazardous materials in direct support of a principal business that is other than transportation by motor vehicle. The materials of trade exceptions in § 173.6 permit Class 9 materials including lithium batteries.

Q3. Do the testing requirements of the UN Manual of Tests and Criteria apply to lithium batteries transported as materials of trade?

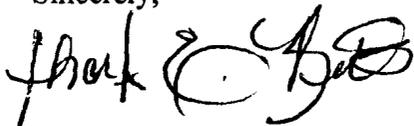
A3. In order to meet the provisions of the materials of trade exception, lithium batteries must be of a type proven to meet the criteria of Class 9 by testing in accordance with the UN Manual of Tests and Criteria. Alternatively, production runs of less than 100 cells or batteries may be transported by motor vehicle without testing provided you meet all of the conditions outlined in § 172.102(c), special provision 29.

Q4. Can a passenger transport a lithium battery that has not been tested in accordance with the UN Manual of Tests and Criteria in accordance with the passenger and crewmember exceptions specified in § 175.10.

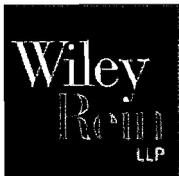
A4. The exceptions for passengers and crewmembers in § 175.10(a)(17) do not require lithium batteries to be tested in accordance with the UN Manual of Tests and Criteria. However, all batteries must be packaged in a manner that precludes the generation of sparks or a dangerous quantity of heat. Each spare battery must be individually protected so as to prevent short circuits and carried in carry-on baggage only.

I trust this satisfies your inquiry. If we can be of further assistance, please contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles E. Betts". The signature is stylized and cursive, with a large loop at the end.

Charles E. Betts
Chief, Standards Development
Office of Hazardous Materials Standards



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Leary
§175.10(a)
§173.185
Lithium Batteries
09-0143

George Kerchner
202.719.4109
gkerchner@wileyrein.com

June 18, 2009

DELIVERED VIA EMAIL

Mr. Edward Mazzullo
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey, Avenue, SE
Washington, D.C. 20590

Re: Request for Interpretation on Lithium Batteries

Dear Mr. Mazzullo:

October 1, 2009 is specified as the effective date for mandatory testing of "small" lithium ion and lithium metal cells and batteries pursuant to Special Provision 188 in the U.S. hazardous materials regulations. I have several questions regarding how the UN lithium battery testing requirements apply to "small" batteries assembled and sold at retail locations and carried onboard aircraft.

Some retailers may assemble a limited number of small lithium ion and lithium metal batteries for their customers. The retailers never offer these small batteries for transportation to carriers such as UPS or FedEx. Instead, they are sold over the counter or delivered in company or personal vehicles to customers. It is our understanding that these small batteries are not subject to the UN testing requirements because they are never offered for transportation and/or qualify as Materials of Trade pursuant to 49 C.F.R. 173.6. My questions related to these issues are listed below.

- (a) Are small lithium batteries assembled at retail locations and sold over the counter subject to the UN testing requirements?
- (b) Do small lithium batteries transported to customers in personal or company vehicles qualify for the Materials of Trade exception in 49 C.F.R. 173.6?
- (c) If the answer to question (b) is yes, which if any of the UN testing requirements are applicable to these batteries?

The exceptions for passengers in 49 C.F.R. § 175.10(a) states "This subchapter does not apply to the following hazardous materials when carried by aircraft passengers



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or crewmembers". For lithium batteries, § 175.10(a)(17) places limits on the size and number of batteries that can be carried onboard aircraft and requires that batteries be protected so as to prevent short circuits and placed in carry-on baggage only.

Section 175.10(a) states "*This subchapter does not apply* to the following hazardous materials when carried by aircraft passengers. . . ." This would appear to except lithium batteries from the UN testing requirements. My question related to this issue is provided below.

- (d) If all the requirements in 49 CFR § 175.10(a)(17) are met, can a passenger carry a small lithium battery onboard an aircraft that has not been tested pursuant to the UN Manual of Tests and Criteria?

* * * *

Thank you for your assistance. I can be reached at 202.719.4109 or gkerchner@wileyrein.com if you have any questions regarding this matter.

Sincerely,

George A. Kerchner

George A. Kerchner