

November 10, 2014

Dr. Magdy El-Sibaie  
U.S. Department of Transportation  
Dockets Operations  
M-30, Ground Floor, Room W12-140  
1200 New Jersey Avenue, SE  
Washington, DC 20590

Docket No. PHMSA-2011-0143 (HM-253)

**Re: Pipeline and Hazardous Materials Safety Administration's Notice of Proposed Rulemaking (NPRM) for Reverse Logistics – Docket PHMSA-2011-0143**

Dear Dr. Magdy El-Sibaie:

The Retail Industry Leaders Association (“RILA”), the Food Marketing Institute (“FMI”), the National Association of Chain Drug Stores (“NACDS”), the National Retail Federation (“NRF”), the National Grocers Association (“NGA”), and their members (collectively, the “Retail Associations”) are pleased to submit these comments in response to the above mentioned Notice of Proposed Rulemaking (“NPRM”). 79 Fed. Reg. 46,748 (Aug. 11, 2014). The Retail Associations applaud the Department of Transportation’s (“DOT’s”) continued effort to complete rules to address reverse logistics. Implementing separate rules for reverse logistics will improve the efficiency and scalability of reverse logistics for all parties in the supply chain, support DOT’s goals of continuing to ensure safe and environmentally responsible transportation of unsold and returned consumer goods, and provide better opportunities for both large and small companies to participate in reverse logistics activities.

RILA, FMI, NRF and NACDS, as well as several retailers who are members of the Retail Associations, commented on the Advance Notice of Proposed Rulemaking in 2012. The comments we submit together below build upon those earlier comments submitted individually.

**I. The Retail Associations**

The Retail Associations represent a broad cross section of the retail sector in the United States, including large and small companies, from chains with more than a thousand stores nationwide to regional companies with a handful of stores. The Retail Associations discussed this NPRM with their broad memberships to determine the breadth of compliance needs, current reverse logistics handling methods and challenges, and the associated costs. That information is included throughout these comments where relevant.

RILA is an organization of the world's most successful and innovative retailer and supplier companies – the leaders of the retail industry. RILA members represent more than \$1.5 trillion in annual sales and operate more than 100,000 stores, manufacturing facilities, and distribution centers nationwide. Our member retailers and suppliers have facilities in all 50 states and the District of Columbia, as well as internationally, and employ millions of workers domestically and worldwide.

FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost \$770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores.

NACDS represents traditional drug stores and supermarkets and mass merchants with pharmacies. NACDS members operate more than 40,000 pharmacies, and NACDS' 125 chain member companies include regional chains, with a minimum of four stores, and national companies. Chains employ more than 3.8 million individuals, including 175,000 pharmacists. They fill over 2.7 billion prescriptions yearly, and help patients use medicines correctly and safely, while offering innovative services that improve patient health and healthcare affordability.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's "This is Retail" campaign highlights the industry's opportunities for life-long careers, how retailers strengthen communities, and the critical role that retail plays in driving innovation.

NGA is the national trade association representing the retail and wholesale supermarkets that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating a variety of formats. The independent supermarket sector is accountable for close to one percent of the nation's overall economy and is responsible for generating \$131 billion in sales, 944,000 jobs, \$30 billion in wages, and \$27 billion in taxes. NGA members include retail and wholesale grocers, state grocers associations, as well as manufacturers and service suppliers.

## **II. Background on Retail and Reverse Logistics**

Retail stores are in every community and offer a wide range of products that American consumers use in their daily lives. Retailers and suppliers move these products safely through vast distribution networks around the country before they arrive on store shelves. Nearly all of these products are sold to consumers and are transported from retail stores by consumers, without additional regulations. Only a small percentage remains unsold for reasons such as a supplier launches a new marketing program or changes formulations, the products have exceeded their “best by” date, or the products have been recalled by the supplier. Similarly, a small percentage of products is returned to a store because the consumer is dissatisfied with the product for some reason.

These unsold and returned products are removed from stores through a process known as “reverse logistics.” “Reverse logistics” is essentially the opposite of the process used to move products “forward” in the supply chain from manufacturer, through distribution, and to stores. In “reverse logistics,” unsold or returned products are transported out of the store for disposition elsewhere. The ultimate destination for the product depends on a wide variety of factors, but examples include: consolidation at a distribution center or warehouse where they can be evaluated; donation to a charitable organization; resale, recycling or reuse; return to the manufacturer; or properly discarded. The goal of the supply chain, of course, is to ensure that as much value is captured from the unsold or returned products as possible. Retailers also utilize reverse logistics to promote more responsible and sustainable solutions for inventory that might otherwise be destroyed as well as to reduce the environmental impacts caused by needless waste of products that may be donated, sold in other channels, or recycled.

Despite the fact that the reverse logistics system simply transports the same consumer products that moved “forward” in the distribution process with minimal regulation, some of the unsold or returned consumer products may be considered “hazardous” under existing regulations simply because they are being transported through the “reverse” rather than the “forward” logistics system. This label as “hazardous” applies despite the minimal (if any) actual hazard that these products pose.

## **III. Need for New “Reverse Logistics” Hazardous Material Category**

As a guiding principle, the Retail Associations believe that, if a product is acceptable and safe for any consumer to purchase from a store and take home by car, there is no need to impose additional requirements on retailers that transport the identical product through their reverse logistics systems, even when the product is classified as a hazardous material. Accordingly, the Retail Associations agree with PHMSA that a new regulatory scheme for products in reverse logistics is needed.

Under the current regulatory system, these products may be classified as hazardous materials, but the level of “hazard” is so low in a typically returned quantity as to render any

“hazard” *de minimis*. The consumer packaging of these items supports the safety of these products in ordinary customer activities, such as riding together in a bag for a limited distance without causing harm, and then being properly stored in a home for months without risk of unintentional harm. Transportation from a retail store to a consolidation point, manufacturer, charity, or other reverse distribution location poses a comparably low risk and should therefore be regulated commensurately. Further, it is already quite common for these consumer products, which are sold through e-commerce channels and delivered directly to the consumer, to also be safely returned—through existing “reverse logistics” channels—by an un-trained consumer and without any additional regulation or precautions.

The Retail Associations appreciate PHMSA’s attempt to craft the new regulation but recommend that the final rule incorporate the changes explained below to address the realities of today’s reverse logistics systems.

A. Align “Reverse Logistics” Definition with Industry Practices

As proposed, PHMSA would define “reverse logistics” as “the process of moving goods from their final destination for the purpose of capturing value, recall, replacement, proper disposal or similar reason.” To ensure that the definition is properly understood to describe products that are moved from retail stores, we recommend that the Agency adopt the following changes in the final rule:

“...the process of moving goods from their final destination (***such as a retail store***) for the purpose of capturing value, recall, replacement, proper disposal or similar reason.”

[Proposed language in bold italics.]

B. Include All Relevant Methods of Transportation

Proposed 49 CFR 173.157 states that the reverse logistics rules apply to hazardous materials transported by motor vehicle. Since retailers operate domestic facilities in Alaska, Hawaii, and Puerto Rico, we recommend that the rules also apply to domestic vessels when used in the reverse logistics process.

C. Include Class 7 Hazardous Materials

Proposed 49 CFR 173.157(a) would exclude any Class 7 hazardous materials from coverage under the new reverse logistics rule. However, there are items such as smoke detectors that have been deemed “low risk” because they create minimal hazard in transportation. Accordingly, the Retail Associations recommend including Class 7 products that currently meet the exemptions provided in 49 CFR 173.422 and 49 CFR 173.424 within the scope of the new rules.

#### D. Clarify Packaging Requirements

Proposed 49 CFR 173.157(b)(1) sets forth the packaging requirements for products in reverse logistics. The proposed rule uses the characterizations “leak tight” and “leak proof” but does not define the terms. Unless there is a distinction intended, the final rule should consistently define requirements for liquids and gases using the single term “leak proof;” this aligns well with the requirement that packaging for solids be “silt proof.” (“Leak tight” more appropriately describes the outcome of a “leak proof” package.) Additionally, the final rules should include a definition of “leak proof,” such as a sealed plastic bag, box, or other container that prevents or contains leaks, and is capable of containing free liquids under conditions normally incident to transportation, without regard for the orientation of outer packaging.

Further, proposed 49 CFR 173.157(b)(3) eliminates outer packaging requirements for uncompromised receptacles (e.g., cans and bottles); however, it is not clear if that rule overrides the specific requirements for liquids proposed in (b)(1), i.e., leak proof inner packaging and sufficient absorbent material contained in outer packaging. Therefore, the Retail Associations suggest PHMSA expressly state that the requirements for liquids in (b)(1) apply to *compromised* liquids only. Further, if the inner packaging is leak proof for compromised liquids and there is sufficient absorbent material between the inner and outer packaging, PHMSA should not require that the outer packaging to be leak proof.

Moreover, the proposed outer packaging rules require products in reverse logistics to be “secured against shifting.” This proposal conflicts with the current standard in 49 CFR 173.24a(a)(3), the general securing and cushioning regulation, which requires packaging to *control* shifting “under conditions normally incident to transportation”. The Retail Associations urge PHMSA to adopt the current standard for reverse logistics rather than adopting a new standard.

Lastly with respect to packaging, proposed 49 CFR 173.157(b)(9) addresses the packaging rules for materials transported in reverse logistics according to special permits. However, the proposed language appears to address only outer packaging, not inner packaging, training, or the other regulatory requirements. Given the low risk presented by these products, the final rules should be amended to state expressly that all aspects of the final rules for reverse logistics apply to goods subject to special permits.

#### E. Caps/Closures for Equipment and Aerosols

PHMSA also lays out specific requirements for equipment powered by internal combustion engines and aerosols in proposed 49 CFR 173.157(b)(4) and 49 CFR 173.157(b)(7), respectively. The proposals would require the transporter to secure the “caps or closures” and “cap”, respectively. As some returned or damaged products may not have their original caps or closures, PHMSA should amend the final rule to allow for the use of the caps or closures

manufactured by the original equipment manufacturer or any other means to prevent the release of any remaining contents.

**F. Marking and Separation Requirements for Limited Quantities**

With regard to markings, PHMSA proposes in 49 CFR 173.157(c)(1) that outer packaging must be marked with the common name or proper shipping name to identify the hazardous material it contains. Under current regulations, multiple items in limited quantities may be shipped in a single outer package. Marking the common name of each item on the outer packaging would be unduly burdensome.

Accordingly, the Retail Associations recommend that PHMSA amend the final rule to maintain the marking exceptions for limited quantity and ORM-D provided in 49 CFR 173.156. Alternatively, PHMSA should require outer container markings of “Hazardous Materials” or add other generic shipping names to the table of labels found in 49 CFR 172.101; furthermore, PHMSA should allow multiple shipping names on a single package. Along these lines, the final rules should be amended to state that the separation requirements of proposed 49 CFR 173.157(e)(3) do not apply to limited quantities of compatible items, such as Class 3 perfumes and Class 2.1 or 2.2 room sprays.

**G. Align Training Requirements and Notifications**

Finally, proposed 49 CFR 173.157(d)(4) requires that the operator of a motor vehicle must be informed of the presence of hazardous material and of the requirements in the new rules for reverse logistics but it is unclear how this notification must be made. The Retail Associations suggest that the training recommended in 49 CFR 173.157(d)(2) is adequate to inform motor vehicle operators of the rules for reverse logistics thereby obviating the need for any additional notification.

Notification regarding the presence of hazardous materials in reverse logistics should be explicitly aligned with the requirements for all other shipments prepared, offered for transportation, or transported according to other rules in Subchapter C (Hazardous Materials Regulations); otherwise, proposed 49 CFR 173.157(e)(5) may preclude retailers from invoking the same rules. Likewise, the separation requirements in proposed 49 CFR 173.157(e)(3) and training requirements in proposed 49 CFR 173(d) should not override current separation and training requirements for the disposal of edible foods.

**V. Aligning with EPA and Its Reform of Hazardous Waste Management Regulations for Retail**

The U.S. Environmental Protection Agency (EPA) is currently reviewing its Resource Conservation and Recovery Act (RCRA) regulations as they pertain to the management of unsold or returned consumer goods at retail. The most recent step in this process has been the

publication of, and subsequent request for comments on, its Notice of Data Availability earlier this year. 79 Fed. Reg. 8926 (Feb. 14, 2014). Numerous organizations submitted comments, including the Retail Associations and several individual retailers.

In our comments regarding EPA's Notice of Data Availability and request for comment, the Retail Associations urged EPA to consider a comprehensive regulatory solution in the form of a conditional exclusion from the RCRA definition of solid waste for unsold or returned consumer goods generated or collected by retail stores and managed in a reverse distribution system. The Retail Associations envision that a conditional exclusion would provide a streamlined set of regulations for retailers that will enhance compliance, encourage reuse/recycling and better management of unsold/returned products in reverse distribution, ensure environmental protection, and create opportunities for increased sustainability. Such an approach should align with PHMSA's current effort.

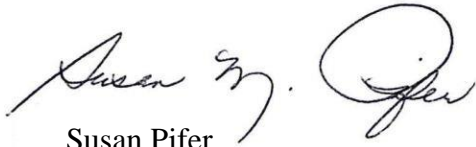
Therefore, the Retail Associations recommend that DOT work with EPA to align rules regarding the transportation of items that are not identified as a waste at the point of origin (e.g. the store), and therefore regulated by DOT, but may later be deemed a waste at a consolidation point, manufacturer, charity, etc. when jurisdiction would transfer to EPA. If DOT determines that products are safe to ship back through reverse logistics, EPA should likewise consider this determination when it defines the point after which a product becomes a regulated waste.

## **VI. Impact of Modifying the Existing Regulatory Requirements**

The proposed modifications to PHMSA's existing hazardous materials regulations will allow for more efficient and streamlined retail compliance, specifically with regard to customer returns, the processing of those returns, and in-store cosmetically damaged items. Many of these changes will enable more merchandise to be returned to manufacturers for reuse, reduce waste (including hazardous waste), and enable more charitable donations. Further, alignment with EPA's regulations will allow for a consistent and integrated approach. The Retail Associations see the development of PHMSA's reverse logistics regulations as both an opportunity to embrace the potential benefits that will allow retailers to move toward a more sustainable supply chain and an opportunity to discuss the roles and relationships between the retail industry and its logistics and shipping partners to identify the most efficient means to move forward.

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The continued growth and development of a well-structured, safe, and efficient reverse logistics system is important to the entire consumer goods industry, including the retail industry, whose position in the process is key to facilitating the success of the reverse logistics industry. The Retail Associations appreciate the opportunity to provide our comments on this important matter and look forward to working with PHMSA to obtain a clear final rule. Please do not hesitate to contact us for further information.



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