National Association of Chemical Distributors

1560 Wilson Boulevard, Suite 1250 ▬ Arlington, VA 22209 ▬ 703-527-NACD (6223) ▬ FAX 703-527-7747

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Docket Operations
U.S. Department of Transportation
West Building, Ground Floor
Room W12-140
Routing Symbol M-30,
1200 New Jersey Avenue, S.E.
Washington, DC 20590-0001

Re: Docket No. PHMSA-2005-22356

These comments respond to the notice of proposed rulemaking published in the October 2, 2008 *Federal Register* issue regarding docket PHMSA-2005-22356, Hazardous Materials: Enhanced Inspection Authority Procedures. The National Association of Chemical Distributors (NACD) agrees that the problem of undeclared hazardous materials is a safety issue that needs to be addressed; however, the Association has concerns about the broad scope of this proposal.

NACD, established in 1971, is an international association of chemical distribution companies that purchase and take title of chemical products from manufacturers. Member companies process, formulate, blend, re-package, warehouse, transport, and market these chemical products exclusively for an industrial customer base of approximately 750,000. NACD's nearly 250 member companies are located in every region of the United States, operate more than 1,550 chemical distribution locations, and employ more than 20,800 individuals. NACD also has member and Affiliate companies in Canada, Mexico, and Singapore. Many members are small businesses, although some companies are national and international in scope. They know their products and processes, and provide value-added services to their customers in a professional, responsible manner.

NACD member companies have established themselves as leaders in health, safety, security, and environmental performance through implementation of the Responsible Distribution Process℠ (RDP), established in 1991 as a condition of membership in NACD. RDP is a third-party verified management practice.

Hazardous materials transportation is an integral part of the chemical distribution business. In 2007, NACD members made 5.3 million chemical distribution shipments, were responsible for 71.7 billion pounds of delivered product, and drove 175 million miles while distributing chemicals.

When the Department of Transportation (DOT) exercises the enhanced authority to inspect and open packages as outlined in the proposed rule, this will inevitably lead to substantial delays in the delivery of hazardous materials shipments; therefore, NACD urges the department to use this authority as sparingly as possible. Unnecessary delays of hazardous materials shipments are more than simple inconveniences in many cases. The proposed rule does not provide affected shippers, carriers, or receivers with any recourse for the business interruptions they will experience under the increased inspection authority.

NACD has concerns about PHMSA's broad interpretation of the term "objectively reasonable and articulate belief." The agency's discussion of this term indicates that in order for an inspector to detain a shipment, he must have "particularized and identifiable facts, i.e. some articulable basis, to believe that a Federal statute or regulation has been violated." Under this broad interpretation, an inspector could detain a properly marked shipment if he has reason to believe it is otherwise out of compliance with the hazardous materials regulations. NACD's concern is that this could result in the detention of shipments that are actually in compliance. In these cases, even though the inspector would not have found a violation, the shipment would have been delayed and disrupted. For the purpose of consistency and to help minimize unnecessary inspections and delays, DOT inspectors should have clear written guidance as to what is meant by "objectively reasonable and articulable belief" and be thoroughly trained on this guidance.

One reason for DOT to use discretion in exercising enhanced authority is that many shipments of chemicals are extremely time-sensitive. For example, delays in the shipments of critical materials to entities such as power plants and water treatment facilities because of unwarranted inspections could actually result in the loss of power and water for nearby communities.

In addition, in many cases, particularly in the areas of pharmaceuticals and other perishable materials, if packages have been breached, customers will not accept them, even if they have DOT seals. Receivers in these cases demand original, manufacturer seals and consider any evidence of tampering, even if by government inspectors, as possible cause for the materials to be contaminated and unusable. In fact, under Food & Drug Administration regulations, even opening an outer package may be deemed as irreparable contamination. To exacerbate this situation, Environmental Protection Agency regulations consider many materials not sold for their original purpose to be waste, leaving the shipper with disposal problems.

The increased inspections by DOT officials under the proposed rule could also result in Federal Motor Carrier Safety Administration (FMCSA) hours-of-service issues for drivers if these inspections take too long.

Regarding procedures for closure, when a DOT inspector opens a package, he or she should follow the agency's own regulations by complying with the packaging manufacturer's closure instructions. DOT inspectors must be thoroughly trained in closing procedures as there will be many different scenarios. For example, it is possible that a truck could contain several drums secured together in shrink wrap and properly labeled. If an inspector opens the shrink wrap and removes the drums for inspection, it will be extremely difficult to reload and re-secure them.

When an inspector decides to detain and open a package, NACD believes that the DOT inspector should assume responsibility for shipment the moment it is detained and diverted, not at the later point at which he opens the package. NACD further recommends that the inspector provide immediate notification that the shipment will be held as well as how long he expects it to be held. This will allow the carrier to more effectively communicate with the shipper and receiver about the delay.

Finally, in this post 9-11 age, when dealing with hazardous materials, both safety and security implications must be considered. Whenever an inspector detains a truck for inspection, the truck, with its contents, becomes a more accessible target for potential attackers. The safety of the personnel associated with the vehicle could also be compromised when the vehicle is stopped and therefore a more attractive target.

Because increased inspections of shipments under the enhanced inspection authority will lead to so many complications, delays, and disruptions, NACD urges DOT to use this authority as sparingly as possible. If packages are not marked, and DOT inspectors have reason to believe that they contain undeclared hazardous materials, it is reasonable for them to conduct inspections. However, if packages are properly marked, inspections to search for non-compliance inside should be limited as much as possible to prevent disruption. Perhaps DOT could exercise the enhanced authority with just one or two agencies, such as the Federal Aviation Administration as many of the undeclared shipments that are of concern are transported by air.

NACD appreciates the opportunity to comment on the proposed rule. If you have any questions, or require any additional information, please do not hesitate to contact me at 703/527-6223.

Sincerely,

Jennifer Gibson
Vice President, Government Affairs
NATIONAL ASSOCIATION OF CHEMICAL DISTRIBUTORS
1560 Wilson Boulevard
Suite 1250
Arlington, VA 22209