

June 25, 2012

Dockets Management System  
U.S. Department of Transportation  
Dockets Operations  
M-30, Ground Floor, Room W12-140  
1200 New Jersey Avenue, SE  
Washington, D.C. 20590-0001  
Electronic Address: <http://www.regulations.gov>

**Attn: Hazardous Materials: Miscellaneous Amendments; (RRR) [Docket Number PHMSA-2011-0138 (HM-218G)]**

These comments respond to the notice of proposed rulemaking (NPRM) published in the April 26, 2012 *Federal Register* issue regarding Docket Number PHMSA-2011-0138 (HM-218G), Hazardous Materials: Miscellaneous Amendments (RRR).

The National Association of Chemical Distributors (NACD) is an international association of 400 chemical distributors and their supply-chain partners. NACD represents more than 85% of the chemical distribution capacity in the nation and 90% of the industry's gross revenue. Members of NACD operate in every region of the country through approximately 1500 facilities. As leaders in their communities, NACD members are predominantly small regional businesses. The typical member has 26 employees and \$26 million in annual sales.

Hazardous materials transportation is an integral part of the chemical distribution business. In 2010, NACD members collectively drove more than 156 million miles and delivered 1.22 tons of product every second.

NACD members meet the highest standards in safety and performance through mandatory participation in Responsible Distribution, NACD's third-party verified environmental, health, safety, and security (EHS&S) program. Through Responsible Distribution, NACD members demonstrate their commitment to continuous performance improvement in every phase of chemical storage, handling, transportation, and disposal operations. Through Responsible Distribution, NACD members have achieved a strong safety record. Member companies' safety rating is 80 percent better than non-member companies in the Chemical & Allied Merchant Wholesale Industry and more than twice as good as all manufacturing combined.

NACD has serious concerns about one particular element in HM-218G, the proposed change to Section 178.2 that closure notification requirements apply to packagings containing a residue of a hazardous material.

In the proposed rule, PHMSA fails to make the case for requiring closure instructions for empty containers. The agency states that the measure will result in fewer packages being improperly closed and thereby reduce the potential for leaks in transportation. However, PHMSA does not provide evidence that leaking empty containers have been a safety problem.

Under 49 CFR 173.29(a), any container with residues of a hazardous material must be offered for shipment "in the same manner as when it previously contained a greater quantity of that hazardous material." For many years, this has been interpreted to mean that empty hazardous materials packagings should simply be closed for transportation in a manner that ensures safety. Decades of experience in fact demonstrate that the current system is safe. The potential for residue leaking out of the closure of an empty container is not statistically significant and virtually impossible if the container is shipped with closure in the upward position as required. In other words, residue in an empty container cannot leak from the top of the container.

If adopted, the closure instruction requirement would add substantial complexity and expense to the operations of chemical distributors and their customers while achieving no measureable safety benefit.

The new requirement would impact chemical distributors in different ways. First, many chemical distributors receive empty containers back from their customers. Either the customers return the empty containers to distributors; or distributors, as a service, pick up the containers from customers. Under the proposed rule, in cases where customers return empty containers, distributors would need to educate these customers on the closure instructions, ensure that they have proper torque wrenches and instructions, and develop certification sheets for customers to declare proper closure. Distributors who pick up empty containers would have to properly train drivers, maintain records of the training, purchase proper torque wrenches, and develop new closure records.

Factory pack chemical distributors, those who receive products from manufacturers and ship these products to customers without opening the packages, would be severely impacted by the new rules. In a February 14, 2011 interpretation letter regarding Section 178.2(c), Reference No. 10-0242, PHMSA states, "provided the package is not opened and continues to meet its performance standard, the HMR does not require the person who received the package and is re-offering it for transportation to retain its closure instructions."

The proposed new requirement would subject these distributors to the closure instruction requirements to meet the new obligations for empty containers. These distributors would then be presented the choice of surveying their customers to find out which ones plan to ship the packages once they are emptied and provide the closure instructions to the ones who do, or sending the closure instructions to all of their customers.

In either case, this would add substantial complexity and expense to factory-pack distributor operations. These companies would need to obtain closure instructions for each product, which sometimes number in the hundreds, and are often purchased from more than one manufacturer. To add to the complexity, the manufacturers, i.e., the factory-packers, may purchase containers from more than one container manufacturer. Under the proposed rule, it appears that a closure instruction certificate that is specific to each particular container, and container manufacturer, would have to follow each hazmat container that companies buy and sell. This would require companies to track the various certificates against each particular lot, which would result in an enormous amount of receiving, tracking, and transmitting of a multitude of closure instruction documents.

In addition, given the complexity of modern supply chains, the closure instructions would need to successfully change hands multiple times in some cases. For example, on a truckload of mixed hazardous materials, there could be 20 different closure instruction certificates that need to accompany that load. As each drum or tote or pail from that load gets stripped, and cross-docked, and re-picked, and re-shipped, through multiple supply chain links, the closure instructions for each particular hazardous materials container would have to follow it at every step of the way. This would be a major endeavor, with the potential for immense confusion.

NACD also has concerns about distributors' compliance responsibility. PHMSA has not provided guidance on how the information is to be supplied to customers, and it is unclear where the responsibilities would lie. For example, must shippers communicate closure instructions prior to or with every container, or only when a customer indicates that they will ship the empty container? How much more paperwork must customers receive with each delivery? Who will provide the torque wrenches for proper closure? What is the responsibility of the carrier? In addition, how would a distributor verify that the customer receives and understands the instructions, and would it be the distributor's responsibility to ensure that the customer is properly trained?

The operational requirements outlined above could have substantial economic impacts on chemical distributors and customers. Costs for distributors who pick up empty containers would include the purchase of equipment, driver training, and time at customers' facility spent closing or verifying closure of containers. This would easily result in tens of thousands of dollars of additional costs for a distributor, increasing with the number of shipments.

Costs would be substantial for all distributors and would result primarily from mailing closure instructions to hundreds of customers and answering numerous calls for technical assistance from many of these customers. A major new investment would be required for those who ship factory-pack products and are not currently subject to the closure instruction requirements. These companies would first need to acquire closure instructions from their factory-packed suppliers, numbering in the hundreds in many cases. They would then have to establish systems to keep track of closure version dates; container changes that suppliers make; and which closure instructions are transmitted to which customers for which items, since the last version

date change. They would need to document the transmissions and archive the records. They would also need to integrate all of this into their software systems and office filing systems, and hire or redirect and train people to manage this process.

Costs would also be substantial for customers, who would have their own equipment, training, and recordkeeping costs as well as extra employee time spent complying with the specific closure requirements for the empty containers. In addition, if customers' employees close packagings in accordance with the hazardous materials regulations (HMR) closure instructions, this could make them hazmat employees and subject to **all** DOT training requirements, which would be a major expense for these companies.

Before further considering these new closure instruction requirements, PHMSA must produce statistical data that would support sufficient incidents of residue leaking out of empty containers in transportation, particularly given the substantial costs and complexities that this proposal would add to company operations.

A stated purpose of HM-218G is to reduce complexity and regulatory burdens in concurrence with Presidential Executive Order 13563. The closure instruction proposal is completely contrary to this as it would make certain operations much more complex and expensive while producing no measurable improvement in safety or other benefit.

For all of the reasons outlined above, NACD respectfully urges PHMSA to withdraw this proposed change to Section 178.2.

Thank you for the opportunity to comment on this issue. If you have any questions or need additional information, please feel free to contact me.

Sincerely,



Jennifer C. Gibson  
Vice President, Regulatory Affairs  
NATIONAL ASSOCIATION OF CHEMICAL DISTRIBUTORS  
1555 Wilson Boulevard, Suite 700  
Arlington, VA 22209  
(703)527-6223