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November 25, 2013

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

Re: Docket No. PHMSA-2012-0258 (HM-258A)
"Hazardous Materials: Failure to Pay Civil Penalties"

To Whom It May Concern,

The Reusable Industrial Packaging Association (RIPA) is the U.S.-based trade association for businesses involved in the reconditioning, manufacturing, reuse and recycling of industrial containers such as steel drums, plastic drums, and composite IBCs. RIPA's membership accounts for the vast majority of the U.S. container reconditioning industry, as well as a substantial share of packaging manufacturing firms.

These comments are offered in response to PHMSA's Notice of Proposed Rulemaking (NPRM) of September 24, 2013 (78 Fed. Reg. 58501): "Hazardous Materials: Failure to Pay Civil Penalties". The NPRM would codify a process to order cessation of hazardous materials operations in the event a person failed (after 90 days) to meet civil penalty payment obligations incurred under a settled PHMSA Notice of Probable Violation.

While RIPA recognizes that the sanction in question for "failure" to pay civil penalties is mandated by statute (the "Moving Ahead for Progress" act), we wonder if there are not ways to recognize a facility's corrective actions as a means to avoid a Cessation of Operations Order (COO), especially for small businesses. Failure to make a payment should not in isolation trigger a COO. A facility that otherwise has been brought into full compliance with the HMRs, and can demonstrate to the agency's satisfaction certain unforeseen events or extenuating circumstances (e.g., *force majeure*), should be granted an extension of the original 90 days (perhaps an additional 90 days).

PHMSA states that the only information sufficient to prevent a prohibition of operations is proof of payment, proof of bankruptcy, and/or (on appeal) an emergency court stay. Also, any continuation of operations after a COO would invite additional penalties and criminal prosecution.

We can imagine cases where good faith efforts are made to correct operations, training, personnel and/or equipment such that violations have been rectified. Also, some persons not in bankruptcy may nevertheless be unable to make a payment or adhere to a payment schedule.

In its analysis of impacts on small entities, PHMSA notes several industrial categories and their “small business thresholds”. For instance, \$18.5 million in revenue is the threshold for both the category of motor carriers and that for warehousing businesses. Other categories’ thresholds are defined by numbers of employees: 1,500 for air carriers and 500 for rail carriers.

A packaging reconditioner’s small business threshold is \$7 million. Many reconditioners are well below the \$7 million threshold. Additionally, a reconditioner may employ as few as 15-20 employees. As such small entities, a COO could essentially put a company out of business. While the proposed policy does not add any “up front” HMR compliance costs, it nevertheless could adversely impact smaller businesses in a disproportionate way.

Additionally, RIPA believes the 90-day time frame between a missed payment and an order to cease hazmat operations is too brief. The agency should reconsider this provision and promulgate an extended period.

RIPA members adhere to strict Codes of Operating Practice as a condition of membership. As members, they have access to significant resources for aiding in compliance. RIPA believes its members are well prepared and informed as responsible professionals in packaging management. In addition to professional service, reconditioners offer sustainable solutions in packaging decisions. Packaging reuse should be encouraged wherever safety and environmental concerns are adequately addressed.

PHMSA notes that under standards of the Council on Environmental Quality (CEQ), agencies are afforded the option to consider the impacts of “no-action”. While RIPA acknowledges the Congressional mandate to issue this NPRM, RIPA believes some latitude may exist to build in provisions for small entities to avoid a COO when they operate with good faith, under Codes of Practice, and take verified corrective action.

RIPA appreciates the opportunity to comment on these issues related to PHMSA’s enforcement and penalties policies. We look forward to working with the Agency on these matters in the future.

Sincerely,



C.L. Pettit
Director, Regulatory and Technical Affairs

cc: S. Walker
L. Bierlein