



SBLC WEEKLY

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LITHIUM BATTERIES

The Pipeline and Hazardous Materials Safety Administration (PHMSA) has proposed a rule for the transportation of lithium batteries as hazardous materials. PHMSA's proposed rule, developed in consultation with the Federal Aviation Administration (FAA), would remove exceptions under the Hazardous Materials Regulations (HMR) for transporting small lithium batteries on aircraft, require hazardous materials training for employees that handle lithium batteries or products that contain them, and require that lithium batteries be accompanied by hazardous materials labels and shipping documents during transport.

At a minimum, the rule, if finalized, would surely result in additional shipping costs for lithium batteries and products that contain them, and could potentially add responsibilities for manufacturers, distributors, and retailers of products that contain them. A copy of the proposed rule can be found at <http://edocket.access.gpo.gov/2010/pdf/2010-281.pdf>.

PHMSA has determined lithium batteries have a heightened risk of

fire during transport when not properly packaged. PHMSA has noted some forty-four such instances in its proposed rule, nearly all involving the improper packaging or handling of these materials.

The proposed rule would revise PHMSA's regulation so that small lithium batteries, such as those found in consumer, medical, and electronic devices, would no longer be excepted from the HMR and would have to be transported as what they call a "Class 9 hazardous material." This would trigger training, labeling, documentation, and notification requirements for anyone who ships or handles a lithium battery or a product containing a lithium battery, including lithium battery manufacturers, manufacturers of products that contain lithium batteries, shippers, retailers, airlines, and others.

The Office of Advocacy for Small Business has submitted comments on the rule. The Office of Advocacy observed that the "PHMSA certified under the Regulatory Flexibility Act (RFA) that the proposed rule, if adopted, would not have a significant economic impact on a substantial

number of small entities. However, PHMSA's analysis seems to omit several regulated entities and understate costs. For example, the RFA analysis states that the rule would apply to manufacturers of small lithium batteries and manufacturers of products that contain them. However, small business representatives have pointed out that any retail business, internet shipper, manufacturer of battery packs, shipping company, or airline that handles these materials would also be subject to the new Class 9 hazardous materials provisions. This would require them to train their employees, provide shipping documentation and notices, and incur increased costs that are not included in the analysis. Further, small business representatives expressed concern that the proposed rule would create conflicting international standards and require significant supply chain redesigns because of stowage limits and a reduction in the number of aircraft available to transport products. Finally, small business representatives stated that PHMSA has dramatically understated the number of products containing lithium batteries that are shipped by air each year. For these reasons, the factual basis for the agency's RFA certification may be suspect."

THE LAW OF UNINTENDED CONSEQUENCES – CHAPTER SIX THOUSAND AND TWELVE

Our good friends at the American Nursery and Landscape Association (ANLA) have brought a matter to our attention that will affect you if you deal with “wood” products.

The Biomass Crop Assistance Program (BCAP) was created by the last Farm Bill (Title IX of the Food, Conservation, and Energy of 2008 Act) and provides significant government subsidies for all manner of material that creates clean fuels. Wood, for example, is one of these materials, and is often referred to as “woody biomass.” This includes wood fibers, bark, etc. On May 5, 2009, President Obama issued a Presidential directive “to aggressively accelerate the investment in and production of biofuels. The directive included a directive that Secretary Vilsack take steps to the extent permitted by law to expedite and increase production of and investment in biofuel development efforts which includes issuance of guidance and support for collection, harvest, storage, and transportation (CHST) assistance of eligible materials for use in biomass conversion facilities.”

The BCAP program is currently frozen while the Department of Agriculture works to issue a final rule

(http://www.fsa.usda.gov/Internet/FSA_Federal_Notices/bcap_prm_2_8_2010.pdf comment deadline April 9) that would undo some of the “unintended consequences” regarding interpretation of eligible products for BCAP subsidies.

Without some fixes, if the program gets off the ground, the cost of bark and other wood materials has the potential of jumping dramatically. The program has the unintended consequence of creating an inflated market for these types of materials that are otherwise used in manufacturing particleboard, fiberboard, pressboard, etc.

MINI JOBS BILL

The Senate did not complete work on H.R. 2847, the bill that creates a jobs tax credit, increases temporarily the direct expensing allowance, extends some infrastructure spending programs and expands the Build America Bond program. A cloture petition has been filed for action this week. The Senate is expected to pass it and the next stop would be the President’s desk.

EXTENDERS

The Senate has passed its version of H.R. 4213, the massive bill that extends various expired or expiring tax credits and deductions as well as some other government programs. The House had previously passed a different version of H.R. 4213. There are various schools of thought on how quickly the two Chambers can reconcile their versions. Some say it could take the rest of the year. I am going with the glass half full outlook and think it will not take quite that long.

Both versions include many of the same provisions; the problem is that the bills include different tax increase provisions to offset the tax revenues “lost” from the extension of the expired and expiring tax relief. The health care debate, which may come to an important crossroad this week, has some influence on the timing as some of the revenue offsets under consideration are the same as included in health care proposals.