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VOHMA commends RSPA for this rulemaking activity which is intended to improve the reporting procedures and the data compiled through these reports to enable further enhancements of the safe containerization and transportation of dangerous goods. The current reporting requirements have been in existence for more than a decade and the report submission technology and critical database have undergone significant evolution during that period. We support the proposal to authorize "one call reporting" and electronic submission of the written report since it will provide mutual benefits to both the reporting party and those who compile such data.

In the past, we have expressed concern that the current system requiring carriers to report incidents may not adequately capture critical data to be used in studies regarding packaging failures as a result of normal handling or through conditions not normally incident to transportation. VOHMA members and Administrators actively participated in the industry/government work group that studied improvements to the reporting criteria and the form to be used. We agree that the reporting requirements should apply not only to carriers but to anyone having charge, care, or control of the package at the time of the packaging failure. But, based on other recent proposals from RSPA regarding defining the term "transportation" we are unsure of who will actually be required to report an incident that occurs during the course of activities that might not be considered to be "in transportation" and in fact, wonder if the responsibility might then fall back on the last carrier.

VOHMA is equally concerned that expanding the application of the reporting system and the quantity of data that will be required to be reported may severely tax the resources of a transportation industry that is already experiencing an overburden on their professional technical staff during these economically challenging times. VOHMA asks that RSPA carefully consider the reporting requirements and the data entry that will be mandated by the Final Rule in this docket to ensure that the resources required for completion will be minimized to the greatest extent possible by requiring only such information that is critical to the stated purpose of the system.

While the reporting of "success stories" might be of value in compiling interesting statistics to support the benefits of using specific packagings, VOHMA feels this requirement infringes on effective utilization of the already limited resources within the industry. The performance oriented packaging testing criteria currently in the HMR and the international codes, are based on replicating conditions known to be experienced during all modes of transportation. They take into account that packages will be handled roughly, dropped, subjected to collision, exposed to extremes in temperature, pressure, or other environmental factors, and further subjected to repeated exposure to physical forces normally incident to transportation by all modes. The fact that they withstand such normal or even abnormally abuse "successfully" is evident in that a reportable release did not occur. VOHMA suggests that, in the absence of a required report for a release as a result of a packaging failure, RSPA or any other agency utilizing the data captured through the reporting system can make a reasonable assumption that the packaging performed satisfactorily and all such shipments safely reached their destination intact. Even in the case of a DOT Exemption, the only time a report is required to be filed is if a packaging failure occurs during transportation using such packaging. We ask that the proposed requirement for reporting incidents with no release of a hazardous material not be included in the final rule.

VOHMA has historically stated that undeclared dangerous goods cargoes are one of our most significant problems. Not only do these cargoes expose our vessels and their crews to unknown dangers at sea, but they also result in great expense when they are discovered at some point after the voyage begins and in some instances, the entire ship must be restowed at the next port of call. It

matters not whether the original shipper or an interlining forwarding agent is at fault, the results are the same. Our carriers have initiated internal cargo booking and acceptance systems and procedures designed to minimize these occasions by identifying potential instances of non-declared dangerous cargoes before they are offered for transportation to the port. Through their diligent dedication of human resources and electronic systems, numerous potential incidences are averted, however, these systems are not foolproof and it is difficult to determine the number of such cargoes that go undetected. The majority of freight containers that are offered for transportation on cellular container ships are equipped with high security seals to protect against entry. Carriers not only lack the resources to remove such seals, unpack the container to inspect the cargo within, repack the container, and replace the blocking and bracing in the container, but are also not required to do so as stated at Part 176, §176.39 - Inspection of cargo. And in cases where the shipper is in compliance with the regulations for declaring those cargoes, the certification on the Shipper's Declaration for Dangerous Goods and the Container Packing Certificate provides verification that the contents of the freight container are in an acceptable condition for transportation by sea.

VOHMA agrees that those shippers who intentionally ship non-declared dangerous cargo, or even inadvertently ship these consignments due to lack of knowledge of their product or lack of regulatory training need to be identified and enforcement action initiated as an incentive to comply. But we caution RSPA to provide a means for the carrier or others in the transportation system to report such deviations when discovered without prejudice. The reporting of non-declared cargo should not result in punitive action against the person who initiates the report, unless it can be proven beyond a reasonable doubt that the person had direct knowledge of the fact prior to acceptance of the cargo. The reporting system for these incidences should also not require that person to utilize a format that is unnecessarily time consuming.

VOHMA suggests that a more finite definition of when the consignment becomes undeclared may be necessary. For example, in the maritime industry a shipper, forwarder or Ocean Transportation Intermediary (OTI formerly called an NVOCC) may book several "slots" or cells on a cellular containership based on their previous experience on service offered to any given port-of-call. At the time of the booking, the space may be reserved for commodities described as "Freight All Kinds" or "FAK" since the exact description of the intended cargoes are not yet known. In such cases, when hazardous materials are subsequently identified by the booking party, the booking is revised to include such description. In some cases these descriptions are not available from the shipper until the stuffing of the container has been completed and sometimes, not until the container is stowed and the ship has sailed. In order to prevent such occurrences, carriers have instituted procedures that compare the dock receipt or any other documents accompanying the inbound cargo with the original booking information. Discrepancies result in "putting a hold" on the container until an accurate description can be obtained. However, even the most sophisticated of these systems must rely on the veracity of information provided by the customer.

At what point is the carrier required to report an instance of "undeclared hazardous materials"? Does it become reportable upon discovery prior to acceptance? Does it become undeclared cargo only after is accepted and loaded on-board? Additional clarification could be provided at §171.8 in the definition: "*Undeclared hazardous material* means a hazardous material: (1) that is required to be described on a shipping paper in the manner required by Subpart C of Part 172 of this subchapter, but is offered for transportation with no indication on the shipping paper or other documentation at the time that the shipment is offered and/or received by the carrier that it is a hazardous material;"

And what rules will apply to discovery of cargoes such as exports of cargoes not subject to Title 49 CFR domestically by ground transport that are unknowingly offered and accepted as non-regulated by sea, such as liquids in non-bulk packaging with a flash point of 60.5° C or less that have been reclassified as combustible liquids under §173.150(f) and have no markings or labels to indicate that they are flammable liquids by sea?

Often products that are authorized for domestic transportation as a "consumer commodity" are offered for transportation by a distributor other than the original manufacturer and since no hazardous material shipping paper was received by such distributor, they are not aware that a shipping paper is required for ocean transport as a limited quantity consignment. The carrier would have no indication that such hazardous material cargo was being offered for transport absent an inspection of the contents of every package in the freight container. We would further point out that the provisions of the proposed §171.8 definition of *Undeclared hazardous material* at paragraph (2) fails to take into account that limited quantities intended for personal care of household use are excepted from the marking requirements at Chapter 3.4 of the IMDG Code and are authorized for transportation in the US in §171.12 (b).

Further, if the importer has failed to notify the shipper or forwarding agent at the place of entry that a material with flash point of greater than 60.5° C and less than 93° C, transported in a bulk packaging is regulated in the US, the carrier may unknowingly be in possession of an undeclared hazardous material shipment upon arrival in the US port. The same may be true of CERCLA hazardous substances that are not regulated by the IMDG Code. How will the reporting requirements be applied to such instances involving foreign shippers or vessels of foreign registry calling US ports? The carrier should not be placed in a role of policing compliance on the part of shippers, forwarders, OTIs, or other intermediary agents, beyond that already conducted in the cargo acceptance controls. Further defining the application of this proposal to vessels of US registry accepting cargo in foreign ports for transport to international destinations may also be beneficial.

While we support the concept of reporting instances of flagrant violations regarding undeclared hazardous materials, VOHMA feels that RSPA must provide more detailed guidelines in the proposed regulation to ensure that the zeal of the various local, state, and federal enforcement authorities will not hamper the effectiveness of the program or result in inequitable prosecution of carriers who did not "knowingly" accept the undeclared shipment. In all cases of intermodal transfer of containerized cargoes, the initial shipper should be held responsible by the regulations for declaring dangerous cargoes and not the interlining carriers providing the transportation services. Information on the report for undeclared shipments, and the instances when a report will be required, should be limited to include only such instances where the US DOT has regulatory jurisdiction to investigate and prosecute the party offering the undeclared cargo for transportation.

VOHMA suggests that there appears to be a need for coordination between this proposed rulemaking and the Docket No. OST-01-10380 published from the Office of the Secretary. This proposed rulemaking states in the preamble that if a person filing a report for an undeclared hazardous material shipment had no reason to believe that they were accepting a hazardous material, DOT would not hold them responsible for acceptance of such a shipment. But at the same time, OST-01-10380, invites comments on the terms "constructive knowledge" of the presence of hazardous materials and introduces the term "suspicious packages" as possible sufficient grounds to initiate civil penalty enforcement proceedings against a carrier. It further states the Hazardous Materials Uniform Transportation Uniform Safety Act (HMTUSA) defines the term "knowingly"

and that the definition is intended to "negate any inference that the term only encompasses actions based on the actual knowledge or reckless actions." Uniformity in defining the culpability of a person "knowingly" accepting such cargo is a prerequisite to formulating comments on this portion of the proposed rulemaking.

We would further call to RSPA's attention that, while it may be advantageous to notify the original packager of a hazardous material shipment that the packaging has failed in transportation, it might in fact be problematic if not impossible to do so. The proposed §171.16(d)(3), will require forwarding a copy of the report to the person whom offered the hazardous material for transportation. Often, the carrier accepts the freight container from an OTI or forwarder listing that party as the shipper of record or consignor. The identity of the actual shipper is guarded as proprietary information for commercial reasons. In many instances where one or more third parties are involved in the brokerage of container packing and transportation services, there may be multiple levels of identity protection. It should not be the regulatory responsibility of the reporting party to ensure that the copy of the report is, in fact, actually received by the original offeror.

The same problem may be experienced in the request for the reporter to provide the shipper/offeror Hazmat Registration Number on the report form. When the registration program was originally implemented by RSPA, it was specifically stated that parties would not be expected to police the registration compliance of others when offering or transporting hazardous materials. The information regarding the shippers Hazmat Registration Number at Section 11. of the form should therefore not be a required entry when submitted by anyone other than the original shipper.

The exceptions to the reporting requirements do not appear to be consistent in application. Paragraph (2) provides an exception to the reporting requirements when "all of the following apply" and states at subparagraph (v) Each packaging has a capacity of less than 20 liters (5 gallons) for liquids or less than 30 kg (66 pounds) for solids;" and subparagraph (vi) states "The total aggregate release is less than 20 liters (5 gallons) for liquids or less than 30 kg (66 pounds) for solids;" The proposed regulatory language indicates that a release of the total contents of a 5 gallon jerrican containing a Class 3, 4, 5, 6.1, 8, or 9, in Packing Group III would not require a report to be filled, however a drip or weep from a 55 gallon drum, or an IBC, or a portable tank other than during the loading or unloading process, would require the completion of a report. A shipment of a truckload or containerload of packaging having a capacity of less than 5 gallons each, found to be leaking from the closures on every packaging in the consignment, would not require the submission of a report if it was determined that the total quantity from all of these packagings did not exceed 5 gallons. While we realize that exceptions to the reporting requirements must be provided to prevent overburdening the system, we suggest that the exceptions should address all packagings, keeping in mind the intent of the reporting system to identify incidents based on instances of multiple packaging failures of any given design type.

In Part 3 - Consequences, in section 26. Damages, the report requires an entry of the value of the material loss. This information is often not available to the carrier and in certain instances involving high value cargo, the value is confidential to the shipper. In other cases there may be salvage value to materials that have been involved in an incident, rendering the accurate entry of such information highly impractical. We question the need for information on values of the cargo on a report form intended to examine the root cause of the packaging failure. In cases where the carrier submits an initial incident report, and the shipper is liable for the remediation or clean-up costs, the accurate entry of such information is highly unlikely. The directions for completion of the proposed FORM

DOT 5800.1B should include guidelines on those entries which are not mandatory for completing the report in order that reporting parties do not devote unnecessary time to the task.

Once again, we are grateful for the opportunity to provide our comments on these important issues and we hope you will find them helpful. VOHMA members welcome the opportunity to participate with the regulatory community in formulating reasonable and effective controls over the transportation of hazardous materials by all modes. Please do not hesitate to contact us for clarification or additional information on these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John V. Currie". The signature is fluid and cursive, with a large initial "J" and "C".

John V. Currie  
VOHMA Administrator