**1552.242–70 Indirect costs.**

As prescribed in 1542.705–70, insert the following clause in all cost-reimbursement and non-commercial time and materials type contracts. If ceilings are not being established, enter ''not applicable'' in paragraph (c) of the clause.

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## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

### 49 CFR Part 175

**[Docket No. PHMSA–2015–0165 (HM–262)]**

**RIN 2137–AF12**

## Hazardous Materials: Carriage of Battery-Powered Electronic Smoking Devices in Passenger Baggage

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The Pipeline and Hazardous Materials Safety Administration (PHMSA) is issuing a final rule to prohibit passengers and crewmembers from carrying battery-powered portable electronic smoking devices (*e.g.,* e-cigarettes, e-cigs, e-cigars, e-pipes, e-hookahs, personal vaporizers, electronic nicotine delivery systems) in checked baggage and from charging these devices and their batteries on board the aircraft. However, these devices may continue to be carried in carry-on baggage. This action is consistent with the interim final rule (IFR) published in the **Federal Register** on October 30, 2015, and a similar amendment in the 2015–2016 Edition of the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions). This final rule amends the Hazardous Materials Regulations to maintain alignment with the ICAO Technical Instructions. Furthermore, this final rule does not impact the existing rules on the transport of lithium batteries or other portable electronic devices that are transported for personal use in a passenger's checked or carry-on baggage.

**DATES:** Effective: June 20, 2016.

**FOR FURTHER INFORMATION CONTACT:** Kevin A. Leary, (202) 366–8553, Standards and Rulemaking Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC 20590–0001.

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## I. Background

On October 30, 2015, PHMSA published an IFR in the **Federal Register** [80 FR 66817] that prohibits passengers and crewmembers from carrying battery-powered portable electronic smoking devices (*e.g.,* e-cigarettes, e-cigs, e-cigars, e-pipes, personal vaporizers, electronic nicotine delivery systems) in checked baggage and from charging these devices and their batteries on board the aircraft. The use of battery-powered portable electronic smoking devices has been rising substantially, and they have increasingly become a common item in passenger baggage. Prior to the issuance of this IFR, airline passengers and crewmembers were permitted to carry these devices in either checked or carry-on baggage under the provisions for portable electronic devices contained in § 175.10(a)(18) of the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180). However, the provisions for portable electronic devices do not adequately address the safety risks posed by battery-powered portable electronic smoking devices, which include a heating element as a function of their design. Specifically, a battery-powered portable electronic smoking device contains a liquid, an atomizer or heating element, and a battery. When this device is operated the heating element vaporizes the liquid, so when in checked baggage, the device may lead to the generation of extreme heat with potential ignition of nearby contents.

Recent fire incidents involving battery-powered portable electronic smoking devices in checked baggage and actions taken by the Federal Aviation Administration (FAA) and ICAO all of which are described in the October 30, 2015 IFR, prompted action to address this issue. The requirements in this final rule apply only to battery-powered portable electronic smoking devices (*e.g.,* e-cigarettes, e-cigs, e-cigars, e-pipes, e-hookahs, personal vaporizers, electronic nicotine delivery systems). Notably, this final rule does neither prohibits passengers from transporting other devices containing batteries for personal use (such as laptop computers, cell phones, cameras, etc.) in checked or carry-on baggage, nor does it restrict passengers from transporting batteries for personal use in carry-on baggage.

## II. Comment Discussion

PHMSA received eleven comments to the October 30, 2015 IFR: Four of the commenters supported the provisions of the IFR as written; four of the commenters suggested the prohibition of the carriage of battery-powered portable electronic smoking devices should be extended to carry-on baggage; one commenter suggested that the prohibition should also be extended to prohibit such devices to be transported as mail on passenger aircraft; and two commenters objected to all or part of the IFR.

The four commenters who recommended that PHMSA extend the prohibition of the IFR to prohibit the carriage of battery-powered portable electronic smoking devices in carry-on and checked baggage noted that if these devices pose a fire risk they should not be permitted in the cabin of an aircraft either. PHMSA believes that prohibiting the carriage of these devices only in checked baggage best targets the safety issue that we are addressing. Permitting the carriage of these devices only in carry-on baggage or on the person would be the best alternative because when carried in the passenger cabin, the flight crew can quickly intervene in the case of overheating, short circuit, or fire.

One commenter recommended that PHMSA amend the IFR to prohibit the transport of battery-powered portable electronic smoking devices in the mail because a package containing such devices could be carried as mail aboard a passenger aircraft. The HMR do not apply to any matter subject to the postal laws and regulations of the United States; therefore, this amendment is beyond the scope of PHMSA's regulatory authority (see § 171.1(d)(7)). However, we shared the comment with the United States Postal Service (USPS) for their consideration.

Of the two commenters who objected to all or part of the IFR, one was

opposed to the provisions and suggested that the devices should be made safer rather than restricting their use. PHMSA is taking this action to address a documented safety issue, and we do not believe the restrictions will place an undue burden on device manufacturers, aircraft passengers, crewmembers, or airlines. The other commenter recommended that PHMSA amend the IFR to eliminate the prohibition against the charging of standalone e-cigarette batteries, further providing information on one specific product that incorporates safety circuitry to prevent overcharge and evidence that it is intended to be charged only when removed from the heater cartridge. In the IFR, PHMSA noted that many of the documented device failures occurred while the device was charging, resulting in the ignition of nearby combustible materials. PHMSA restricted charging of the devices and their batteries during flight to address those concerns and to maintain consistency with the ICAO Technical Instructions. While the commenter provided information on one battery-powered portable electronic smoking device, there are many configurations, both with and without removable batteries, to consider. Additionally, users who modify their device may bypass the built-in safety circuitry designed to prevent overheating. PHMSA determined that the limited prohibition against the carriage of battery-powered portable electronic smoking devices in checked baggage and a prohibition against the charging of these devices and their batteries while on board the aircraft address the known risks in the narrowest possible way.

## III. Regulatory Analyses and Notices

### *A. Statutory Authority for This Rulemaking*

This rulemaking is issued under the authority of the Federal Hazardous Materials Transportation Law (49 U.S.C. 5101 *et seq.*), which: (1) Authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce (49 U.S.C. 5103(b)); (2) authorizes the Administrator of the Federal Aviation Administration to promote safe flight of civil aircraft in air commerce by prescribing regulations and minimum standards for practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security (49 U.S.C. 44701); and (3) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities (49 U.S.C. 5120(b)).

In this final rule, PHMSA amends the HMR to maintain alignment with the ICAO Technical Instructions.

### *B. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures*

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') require Federal agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' This final rule is not considered a significant regulatory action under Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation [44 FR 11034].

PHMSA does not anticipate that the actions in this final rule will impose a significant impact on airlines, airline passengers, crewmembers, or the Federal government. In fact, most U.S. airlines proactively notified airline passengers (*e.g.,* Web sites, automated check-in facilities, signage, and verbal notifications from the operator) prior to the issuance of the October 30, 2015 IFR. PHMSA, the FAA, and the Transportation Security Administration (TSA) each updated its guidance to passengers on prohibited items, including battery-powered portable electronic smoking devices, to reflect the provisions of the IFR. Moreover, airline passengers and crewmembers are still permitted to carry battery-powered portable electronic smoking devices in their carry-on baggage or on their person. Spare lithium batteries must be individually protected by placement in original retail packaging or by otherwise insulating terminals (*e.g.,* by taping over exposed terminals or placing each battery in a separate plastic bag or protective pouch). However, as this is consistent with existing requirements for the carriage of spare lithium batteries for portable electronic devices, PHMSA does not anticipate this will have any impact on passengers. Some passengers may incur a non-quantifiable cost in the lost opportunity to charge their device while on board the aircraft, but PHMSA expects this will be a small number of passengers and the per-passenger cost will be small.

### *C. Executive Order 13132*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''), published in the **Federal Register** on August 10, 1999 [64 FR 43255], and the President's memorandum (''Preemption''), published in the **Federal Register** on May 22, 2009 [74 FR 24693]. This final rule does not adopt any regulation that: (1) Has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; or (2) imposes substantial direct compliance costs on State and local governments. PHMSA is not aware of any State, local, or tribal requirements that would be preempted by amending the provisions for the carriage of battery-powered portable electronic smoking devices by airline passengers or crewmembers. In addition, this final rule does not have sufficient federalism impacts to warrant the preparation of a federalism assessment.

### *D. Executive Order 13175*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments''). This final rule does not have tribal implications and does not impose substantial direct compliance costs, therefore the funding and consultation requirements of Executive Order 13175 do not apply.

### *E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to review regulations to assess their impact on small entities, unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. Although this final rule places a limited prohibition on the carriage of battery-powered portable electronic smoking devices by airline passengers and crewmembers in checked baggage, such individuals would still be permitted to carry these devices in carry-on baggage or on their person. The provisions of this final rule do not impose any direct or indirect adverse economic impacts for small units of government, businesses, or other organizations, and PHMSA did not receive any comments specifically relating to the impact of the IFR rule on small entities.

*F. Paperwork Reduction Act*

There are no new information collection requirements in this final rule.

*G. Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

*H. Unfunded Mandates Reform Act*

This rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $155 million or more, adjusted for inflation, to State, local, or tribal governments, in the aggregate, or to the private sector in any one year, and it is the least burdensome alternative that achieves the objective of the rule.

*I. Executive Order 13609 and International Trade Analysis*

Under Executive Order 13609 (''Promoting International Regulatory Cooperation''), Federal agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we have assessed the effects of this final rule to ensure that it does not cause unnecessary obstacles to foreign trade. Therefore, this rulemaking is consistent with Executive Order 13609 and PHMSA's obligations under the Trade Agreement Act, as amended.

*J. Environmental Assessment*

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321–4347), requires that Federal agencies consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. This final rule only impacts how a passenger may carry battery-powered portable electronic smoking devices on aircraft, not whether a passenger may carry such devices. We find that there are no significant environmental impacts associated with this final rule.

*K. Privacy Act*

Anyone may search the electronic form of written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). The DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or by visiting *http://www.regulations.gov/search/footer/privacyanduse.jsp*.

**List of Subjects in 49 CFR Part 175**

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, we amend 49 CFR Chapter I as follows:

## PART 175—CARRIAGE BY AIRCRAFT

■ 1. The authority citation for part 175 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81 and 1.97.

■ 2. In § 175.10, revise paragraph (a)(19) to read as follows:

**§ 175.10 Exceptions for passengers, crewmembers, and air operators.**

(a) * * *

(19) Except as provided in § 173.21 of this subchapter, battery-powered portable electronic smoking devices (*e.g.,* e-cigarettes, e-cigs, e-cigars, e-pipes, e-hookahs, personal vaporizers, electronic nicotine delivery systems) when carried by passengers or crewmembers for personal use must be carried on one's person or in carry-on baggage only. Spare lithium batteries also must be carried on one's person or in carry-on baggage only and must be individually protected so as to prevent short circuits (by placement in original retail packaging or by otherwise insulating terminals, *e.g.,* by taping over exposed terminals or placing each battery in a separate plastic bag or protective pouch). Each lithium battery must be of a type which meets the requirements of each test in the UN Manual of Tests and Criteria, Part III, Subsection 38.3. Recharging of the devices and/or the batteries on board the aircraft is not permitted. Each battery must not exceed the following:

(i) For lithium metal batteries, a lithium content of 2 grams; or

(ii) For lithium ion batteries, a Watt-hour rating of 100 Wh.

* * * * *

Issued in Washington, DC, on May 13, 2016, under authority delegated in 49 CFR 1.97.

**Marie Therese Dominguez,**

*Administrator, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. 2016–11729 Filed 5–18–16; 8:45 am]

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