U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

1200 New Jersey Avenue, SE
Washington, D.C. 20590

SEP 30 2014

Mr. Mark F. Foley
von Briesen & Roper, S.C. Attorneys at Law
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202-4409

Ref. No. 14-0103

Dear Mr. Foley:

This responds to your May 21, 2014 letter requesting clarification of the marking and labeling requirements of a packaging under the hazardous materials regulations (HMR; Parts 171-180). Specifically, you request clarification of the appropriateness of the display of a "UN2794, Batteries, wet, filled with acid" marking and a Class 8 (corrosive) material label on a packaging when shipping under the exception provided in § 173.159(e) of the HMR.

A company you represent manufactures a "kit" designed to provide a safer means to transport by motor vehicle damaged or leaking lead-acid batteries. The "kit" consists of a foldable plastic bag inside a fiberboard box wrapped in a second plastic bag and finally placed in another outer fiberboard box. By providing cushioning and containment, it is your understanding that the "kit" satisfies HMR requirements that leaking batteries may not be transported under the § 173.159(e) exception. These "kits" are shipped empty for use by battery manufacturers, distributors, and retailers.

Furthermore, you indicate that this manner of packing and transport of damaged or leaking acid batteries has been accepted by PHMSA as a practical approach to satisfy the HMR and the conditions for exception under § 173.159(e) based on previous communication between PHMSA and a third party. However, the communication offered instruction that a shipper using the "kit" must cover the "UN designation" (i.e., the marking and label). Your understanding is that this instruction is based on the § 172.303(a) marking prohibition and the § 172.401(a) labeling prohibition which restrict marking and labeling of packages to only those that actually contain the material and hazard described. In order to avoid this problem, your client has modified the design of the "kit" in such a manner as to cover a pre-printed marking and label with an opaque film lightly glued in place. Thus, with the film in place the marking and label are not visible before use. This film also stretches across the opening of the "kit" and prevents a battery from being packed in the "kit" without first removing the film. On behalf of your client, you are asking for confirmation that this system for the "kit" satisfies the conditions set by PHMSA for compliance with the HMR.

The "kit" and the application of the film covering the display of the "UN2794, Batteries, wet, filled with acid" marking and Class 8 (corrosive) material label to prevent display prior to packing of a battery is acceptable. However, conditions for use of the exceptions in

§ 173.159(e) do not include hazard communication requirements including labeling or marking. You do not have to label or mark the packaging when complying with this exception, including instances when there are multiple shippers if you are a holder or party to Special Permit 15161. Although, you may continue to permissively label and mark a package so long as the package contains the material and presents the hazard described by the mark and label. Note also, however, that currently the "kit" is only considered acceptable for use for packing of batteries transported under the conditions of § 173.159(e).

I hope this information is helpful. If you have further questions, please contact this office.

Sincerely,

Charles E. Betts
Director
Standards and Rulemaking Division

von Briesen
von Briesen & Roper, s.c. Attorneys at Law

TAGLaw International Lawyers

Mark F. Foley
Direct Telephone
414-287-1404
mfoley@vonbriesen.com

Der Kinderen
§173.159
Batteries
14-0103

May 21, 2014

Via Email/US Mail

Ryan.posten@dot.gov
Mr. Ryan Posten
Deputy Associate Administrator, Policy and Programs
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE.
Washington, DC 20590

RE: *Request for Letter of Interpretation for DOT Regulations, Label, and Transportation Requirements for Battery Recycle Kits*

Dear Mr. Posten:

Quick Cable, Inc. is the designer and supplier of the QuickContain™ Battery Recycle Kit ("BRK"), formerly known as the Battery Leaker Kit ("BLK"), which has been the subject of various communications between your Department (DOT) and distributors and users of the product. On behalf of Quick Cable, Inc., we seek your approval for a proposed way to eliminate the issue you previously identified with placement of UN 2794 labels on this product.

By way of summary, the BLK/BRK is designed to provide a safer means to transport damaged or leaking lead-acid batteries from repair shops and retail battery stores to authorized recycling and disposal sites via truck auto. The product consists of a foldable polyethylene gusseted bag inside a fiber box, all wrapped in a second re-sealable polyethylene bag which is, in turn, inside a second, outer fiber box. By providing both cushioning and containment, the BLK/BRK satisfies the requirement of 49 CFR 173.159(e) that damaged or leaking lead-acid batteries be transported "in such a manner that leakage is not likely to occur under conditions normally incident to transportation." The BLK/BRKs are ordered and shipped empty and in bulk to battery manufacturers, distributors, and retailers.

Most commonly, BLK/BRKs are used for full truckload pickups from major retailers, applying the exemption in 49 CFR 173.159(e). However, some retailers put BLK/BRKs on pallets loaded onto trucks that contain other items, thereby failing to satisfy the requirement of 173.159(e)(4). DOT Special Permit SP 15161 (**Exhibit A**) authorizes this practice for grantees.

These practices, and PHMSA's approval of them, are summarized in an email exchange dated November 23, 2011 between Mike Carr of Johnson Controls International, Inc. on one hand, and Joe Solomey and yourself on the other. **(Exhibit B)**

The original BLK design, which was the subject of Exhibit B, had a preprinted UN 2794 Corrosives label on the principal display panel. Your November 23, 2011 email set conditions for approval of the BLK's use, including the requirement that the shipper "Cover the UN designation on the package (can be stickered over)."

We assume that this condition was the result of 49 CFR 172.401(a), which prohibits the use of a hazardous material label on a package that does not contain that material or its residue. This prohibition could apply to a BLK/BRK when shipped to customers as a raw material before use. 49 CFR 172.401(d) provides an exception:

> (d) **The provisions of paragraph (a) of this section do not apply to a packaging bearing a label if that packaging is:**
>
> (1) **Unused** or cleaned and purged of all residue;
>
> (2) Transported in a transport vehicle or freight container in such a manner that **the packaging is not visible during transportation**; and
>
> (3) Loaded by the shipper and unloaded by the shipper or consignee.

(Emphasis added.) See also 49 CFR 172.303.

Under these regulations, an unused BLK/BRK (*i.e.*, no battery inside) could be shipped to the retail outlet if the UN 2794 label is not visible during transportation. This is not an ideal solution because a shipper, such as an auto parts store, might prefer to put unused BLK/BRKs inside a truck making the rounds to multiple stores to pick up used batteries. Depending on the truck used and variable circumstances, a pre-printed label might be visible during transportation, in violation of 172.401(d)(2).

To solve this problem, the BLK was modified to have no printed hazard label on the principal display panel. Instead, a stick-on UN 2794 Corrosive label was glued to an inner flap of the BLK where it would not be visible during transport. The design intention was that a user would remove this label from the inside and apply it to a designated location on the principal display panel so it would be visible when the BLK was in use with a battery inside, and not before.

This solution requires the end user to take an affirmative step—removing the glued label from the interior of the box and applying it to the front—before the package displays the appropriate label. This is not ideal because it creates the risk that the label will be inadvertently left inside the box when a battery is put inside, or that the sticker will not be properly affixed to the outside of the box before shipping.

The new BRK differs from the BLK in two principal regards. First, the new BRK has passed the tests necessary for marking as a 4G package. Second, the BRK avoids the potential problems

associated with the BLK's stick-on label by i) pre-printing the label and other appropriate markings on the principal display panel and ii) covering them with an opaque film stretched from the bottom of the principal display panel over the opening at the top of the BRK and lightly glued in place.

With this material covering the front of the BRK, the label and markings are not visible before use. However, because the film stretches across the opening of the BRK, it is not possible to insert a battery without removing the film and thereby revealing the label. The new label and cover system are shown in a mock-up of the outer box that forms the visible exterior of the BRK. See **Exhibit C**.

On behalf of Quick Cable, Inc. and its customers, we are asking for confirmation that this BRK packaging system satisfies the conditions your Department has set for compliance with requirements of 49 CFR 172.303, 172.401, and 173.159(e).

Please let me know if you have any questions. We look forward to your response.

Very truly yours,

von BRIESEN & ROPER, s.c.

Mark F. Foley

MFF:smk
Enclosure

24608733_2 DOCX

EXHIBIT A

SPECIAL PERMIT DOT-SP 15161

December 10, 2013

U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

East Building, PHH-30
1200 New Jersey Avenue S.E.
Washington, D.C. 20590

DOT-SP 15161
(FIRST REVISION)

(FOR RENEWAL, SEE 49 CFR § 107.109)

1. GRANTEE: (See individual authorization letter)

2. PURPOSE AND LIMITATION:

a. This special permit authorizes the transportation in commerce of lead batteries from more than one shipper without voiding the exception in § 173.159(e). This special permit provides no relief from the Hazardous Materials Regulations (HMR) other than as specifically stated herein. The most recent revision supersedes all previous revisions.

b. The safety analyses performed in development of this special permit only considered the hazards and risks associated with transportation in commerce. The safety analyses did not consider the hazards and risks associated with consumer use, use as a component of a transport vehicle or other device, or other uses not associated with transportation in commerce.

c. Unless otherwise stated herein, this special permit consists of the special permit authorization letter issued to the grantee together with this document.

3. REGULATORY SYSTEM AFFECTED: 49 CFR Parts 106, 107 and 171-180.

4. REGULATIONS FROM WHICH EXEMPTED: 49 CFR § 173.159(e)(4) in that the transport vehicle may not carry material offered from multiple shippers, except as provided herein, and § 172.301(c) in that the marking requirements are waived.

5. BASIS: This special permit is based on the application of Exide Technologies dated September 1, 2010 submitted in accordance with § 107.105 and the public proceeding thereon.

6. HAZARDOUS MATERIALS (49 CFR § 172.101):

Hazardous Materials Description			
Proper shipping name	**Hazard Class/ Division**	**Identification Number**	**Packing Group**
Batteries, wet, filled with acid, electric storage	8	UN2794	III
Batteries, wet, non-spillable, electric storage	8	UN2800	III

7. SAFETY CONTROL MEASURES: All provisions of § 173.159(e) must be met, except that batteries may be offered from more than one shipper.

8. SPECIAL PROVISIONS:

a. The driver must inspect each load to ensure the batteries are packaged to protect against short circuits and damage during transportation, damaged batteries are packaged to prevent leaks during transportation, and that no visibly leaking batteries are transported.

b. A current copy of this special permit must be maintained at each facility where the package is offered or reoffered for transportation.

c. MARKING - The marking requirements of § 172.301(c) are waived.

9. MODES OF TRANSPORTATION AUTHORIZED: Motor Vehicle.

10. MODAL REQUIREMENTS: A current copy of this special permit must be carried aboard each motor vehicle used to transport packages covered by this special permit.

11. COMPLIANCE: Failure by a person to comply with any of the following may result in suspension or revocation of this special permit and penalties prescribed by the Federal hazardous materials transportation law, 49 U.S.C. 5101 et seq:

    - All terms and conditions prescribed in this special permit and the Hazardous Materials Regulations, 49 CFR Parts 171-180.
    - Persons operating under the terms of this special permit must comply with the security plan requirement in Subpart I of Part 172 of the HMR, when applicable.
    - Registration required by § 107.601 et seq., when applicable.

    Each "Hazmat employee", as defined in § 171.8, who performs a function subject to this special permit must receive training on the requirements and conditions of this special permit in addition to the training required by §§ 172.700 through 172.704.

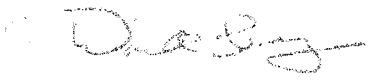
    No person may use or apply this special permit, including display of its number, when this special permit has expired or is otherwise no longer in effect.

    Under Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)—"The Hazardous Materials Safety and Security Reauthorization Act of 2005" (Pub. L. 109-59), 119 Stat. 1144 (August 10, 2005), amended the Federal hazardous materials transportation law by changing the term "exemption" to "special permit" and authorizes a special permit to be granted up to two years for new special permits and up to four years for renewals.

12. REPORTING REQUIREMENTS: Shipments or operations conducted under this special permit are subject to the Hazardous Materials Incident Reporting requirements specified in 49 CFR '' 171.15 Immediate notice of certain hazardous materials incidents, and 171.16 Detailed hazardous materials

incident reports. In addition, the grantee(s) of this special permit must notify the Associate Administrator for Hazardous Materials Safety, in writing, of any incident involving a package, shipment or operation conducted under terms of this special permit.

Issued in Washington, D.C.:



for Dr. Magdy El-Sibaie
Associate Administrator for Hazardous Materials Safety

Address all inquiries to: Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Material Safety Administration, U.S. Department of Transportation, East Building PHH-30, 1200 New Jersey Avenue, Southeast, Washington, D.C. 20590.

Copies of this special permit may be obtained by accessing the Hazardous Materials Safety Homepage at http://hazmat.dot.gov/sp_app/special_permits/spec_perm_index.htm. Photo reproductions and legible reductions of this special permit are permitted. Any alteration of this special permit is prohibited.

PO: LAVALLE/TG

EXHIBIT B

EMAIL STRING DATED NOVEMBER 23, 2011 TO NOVEMBER 30, 2011 BETWEEN MIKE CARR (JCI) AND JOE SOLOMEY AND RYAN POSTEN (DOT)

From: [ryan.posten@dot.gov]
Sent: 11/30/2011 08:54 AM EST
To: Michael Carr
Cc: <charles.betts@dot.gov>; <delmer.billings@dot.gov>; <tyler.patterson@dot.gov>; <Joe.Solomey@dot.gov>; <robert.clatterbuck@dot.gov>; <Kevin.Boehne@dot.gov>; <ted.turner@dot.gov>; <Duane.Pfund@dot.gov>; <benjamin.moore@dot.gov>; <magdy.el-sibaie@dot.gov>; <Kevin.Leary@dot.gov>; <ryan.paquet@dot.gov>; <donald.burger@dot.gov>; <diane.lavalle@dot.gov>; <shawn.wosley@dot.gov>
Subject: RE: JCI Request

Mr. Carr:

The interim measures you describe in your email appear to be a practical approach. If you use the "leaker battery kits" already distributed to your customers, electric storage batteries (including leaking batteries) may utilize the exceptions provided by § 173.159(e), provided the following conditions are met:

1. Cover the UN designation on the package (can be stickered over)
2. Conform to Sec 173.159(e)(4). Examples include AutoZone and Advance Auto where you pickup full loads from just one customer.
3. The box keeps the battery fluid contained while in transit.
4. Conform to one of three methods outlined under Answer 3 in the 2006 interpretation letter to Paul Ackerman from Edward Mazzullo and confirmed in the January 2010 letter to Timothy Lafond from Mr Mazzullo. (I believe item 3 above meets the second method proposed in this interpretation letter)

In addition, please ensure that the driver of a motor vehicle containing electric storage batteries transported in accordance with § 173.159(e), inspect each load to ensure the batteries are packaged to protect against short circuits and damage.

R. Ryan Posten
Senior Director for Hazardous Materials Safety
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
Washington DC 20590
202.366.0656 office
202.255.1527 mobile

From: Michael.L.Carr@jci.com [mailto:Michael.L.Carr@jci.com]
Sent: Wednesday, November 23, 2011 5:43 PM
To: joseph.solomey@dot.gov; Solomey, Joe (PHMSA); Posten, Ryan (PHMSA)
Subject:

Dear Ryan and Joe

Thank you very much for your call.

We remain committed to continued complete compliance with the hazardous materials regulations and appreciate your guidance on appropriate interim procedures for the packaging of visibly leaking batteries while our new proposed advanced leaker bag/box configuration undergoes approved testing.

We would appreciate your confirmation by return email that our understanding of the procedures for use of the leaker box (Version 1) is correct.

We understand that we are permitted to use the leaker box (Version 1) now in the field for visibly leaking batteries as long as the following conditions are met:

1. We (or our shippers) cover the UN designation on the package (can be stickered over)
2. We conform to Sec 173.159(e)(4). Examples for us include AutoZone and Advance Auto where we pickup full loads from just one customer.
3. The box keeps the acid contained in transit.
4. We conform to one of three methods outlined under Answer 3 in the 2006 interpretation letter to Paul Ackerman from Edward Mazzullo and confirmed in the January 2010 letter to Timothy Lafond from Mr Mazzullo.

As soon as we receive confirmation from you that our understanding is correct (or that it needs modification) we will communicate these procedures to our customers (especially AutoZone and Advance). We are prepared to do this immediately. We understand that you will communicate that these procedures are appropriate and comply with the hazardous material regulations to your colleagues in headquarters and in the field so that we, our customers and PHMSA inspectors and headquarters personnel all are operating under the same understanding

In addition:.

1. We will apply as a party to DOT-SP 15161
2. We will continue to work closely with DOT/PHMSA to finish testing on Box version 2 which will eventually replace the box in the field. We have provided our recommended test protocol to Ben Moore.

We have a conference call with you scheduled for next Tuesday at 10 am CST. If you believe that we no longer need that call given our above understanding, please let me know.

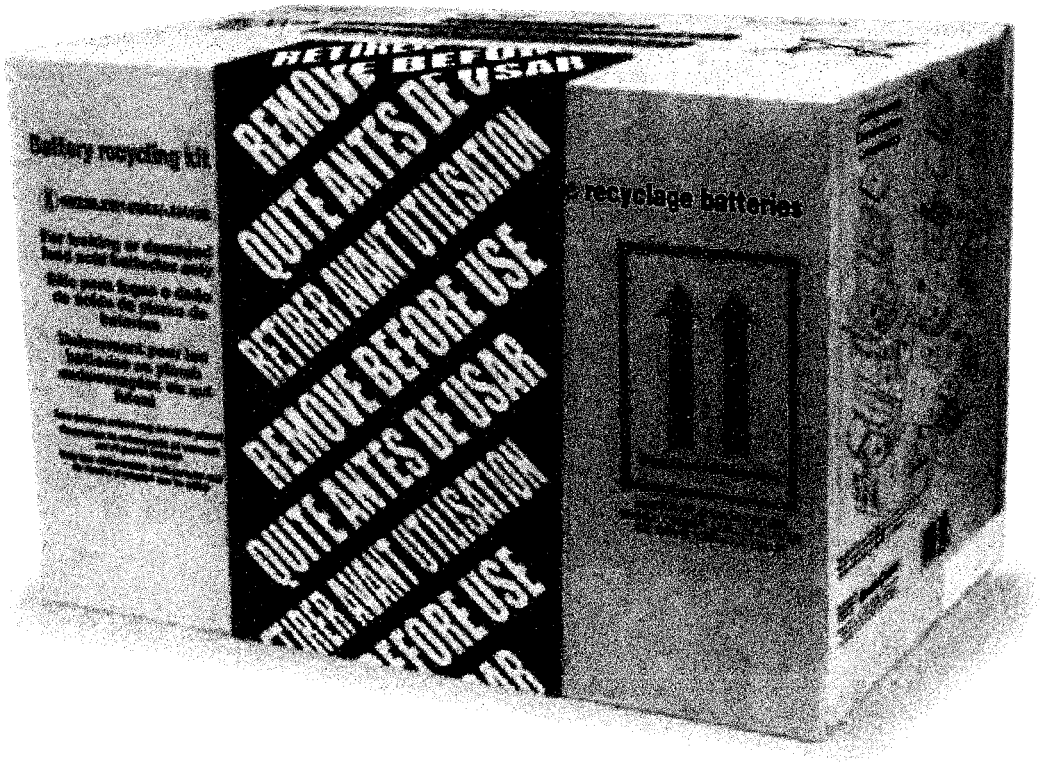
I look forward to your response and appreciate the time you and your colleagues have taken to discuss our proposed new leaker box and appropriate procedures for the use of the box now in the field

mlc

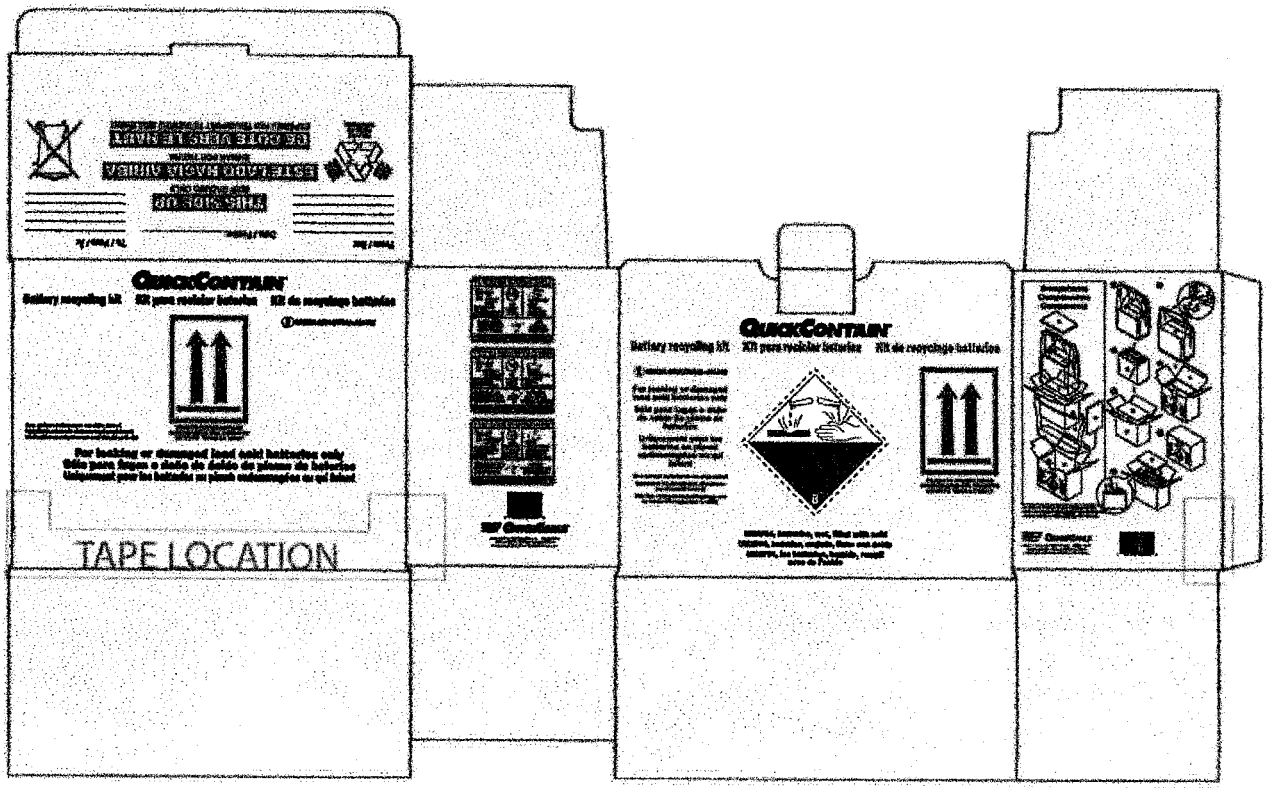
Mike Carr
Office 1 414 524 2046
Mobile 1 414 217 9688

EXHIBIT C

NEW LABEL AND COVER SYSTEM


REMOVE BEFORE USE
QUITE ANTES DE USAR
RETIRER AVANT UTILISATION
recyclage batteries


QUICKCONTAIN
Kit para reciclar baterías
Kit de recyclage batteries
8


QUICKCONTAIN
TAPE LOCATION
QUICKCONTAIN

Drakeford, Carolyn (PHMSA)

From: Betts, Charles (PHMSA)
Sent: Friday, May 23, 2014 12:53 PM
To: Drakeford, Carolyn (PHMSA)
Cc: Goodall, Shante CTR (PHMSA); Dodd, Alice (PHMSA); Posten, Ryan (PHMSA)
Subject: FW: Request for Letter of Interpretation for DOT Regulations, Label, and Transportation Requirements for Battery Recycle Kits
Attachments: 2014-05-21 Quick Cable - Ltr. to RPosten re_ Req. for Ltr. Interpretation.PDF

Importance: High

Carolyn-

Please log and assign the attached request for interpretation to a specialist for response.

Thanks,
Charles

From: Posten, Ryan (PHMSA)
Sent: Friday, May 23, 2014 11:57 AM
To: Betts, Charles (PHMSA)
Cc: Stevenson, Tonya (PHMSA)
Subject: FW: Request for Letter of Interpretation for DOT Regulations, Label, and Transportation Requirements for Battery Recycle Kits

And the attachment

From: Susan M. Koceja [mailto:skoceja@vonbriesen.com]
Sent: Wednesday, May 21, 2014 2:16 PM
To: Posten, Ryan (PHMSA)
Cc: Mark F. Foley
Subject: Request for Letter of Interpretation for DOT Regulations, Label, and Transportation Requirements for Battery Recycle Kits

Attached please find correspondence sent on behalf of Attorney Mark F. Foley

Respectfully,

Susan M. Koceja | Legal Assistant
von Briesen & Roper, s.c.
411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202

Direct: 414-287-1288
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