

is sufficiently cleaned of residue and purged of vapors to remove any potential hazard; (3) the packaging is refilled with a material that is not hazardous to such an extent that any residue remaining in the packaging no longer poses a hazard; or (4) the packaging contains the residue of certain materials listed in this section. Otherwise, an empty packaging containing the residue of a hazardous material must be offered for transportation and transported in the same manner as when it previously contained a greater quantity of the material.

Bayer Corporation (Bayer) petitioned RSPA (P-1416) to add new paragraphs 172.514(b)(3) and 173.29(h) for empty packagings or packagings that contain residues of hazardous substances that meet the definition of a Class 9 (miscellaneous) material, and do not meet any of the other hazard class definitions. Bayer said the proposed additions would address the residue remaining in a container after it had been unloaded to a quantity less than the reportable quantity (RQ). For example, a rail car loaded with 185,000 pounds of MDI (RQ, 5000 lbs.) would be shipped as a Class 9 (miscellaneous) material because the rail car contains more than the RQ. Once the car is unloaded by the consignee and ready for return to the original shipper, the rail car no longer contains the reportable quantity, would not be subject to the HMR, and would not be shipped as a regulated material. This requires the waybill to be changed and all placards and markings removed for the return shipment. Bayer said that this situation has created a compliance nightmare for shippers, its customers, and the various State and Federal enforcement agencies. The railroads are confused because a loaded car is moved into a facility under the HMR, but is offered for the return shipment as a non-regulated car.

On January 31, 1997, the Federal Railroad Administration (FRA) issued a memorandum (Ref. No. HM-97-4) to its Regional Administrators and Railroad Safety Specialists for hazardous materials. In the memorandum, FRA said a rail car that contains any material (or its mixture) listed in Appendix A to the § 172.101 Hazardous Materials Table in a quantity less than its RQ in one package, is not subject to the requirements of the HMR, provided the material does not meet the criteria for any other hazard class and is not a hazardous waste or a marine pollutant. FRA also said that the determination of whether the package contains an RQ of the hazardous substance is the responsibility of the shipper. Generally,

the shipper is not expected to actually measure the amount remaining after unloading, but can, in good faith, estimate it by using its knowledge of the material, the packaging, and the unloading method. Bayer said that an enormous amount of time is spent in trying to explain to the railroads and various enforcement agencies why a MDI rail car must return as non-regulated when it was originally offered under the HMR.

We believe the petition has merit. Since a Class 9 hazardous substance is only subject to the HMR because of the RQ in one package, an empty packaging containing the residue of a Class 9 hazardous substance below its RQ is not subject to the HMR, including shipping paper requirements. In this rulemaking, we are clarifying that a tank car containing less than a reportable quantity of a Class 9 hazardous substance may be offered for transportation as a regulated material if the residue of this material is offered for transportation with all applicable hazard warning marks, placards and shipping papers. We propose to revise § 172.514(b) to allow the markings and placards, if any, to remain on a returning rail car that contains a residue of a hazardous substance that only meets the definition of a Class 9 material, and is not a hazardous waste or a marine pollutant.

C. Clarification of the Emergency Response Information and Training Requirements for Combustible Liquids

A combustible liquid that is in a bulk packaging or a combustible liquid that is a hazardous substance, hazardous waste, or a marine pollutant is not subject to the requirements of the HMR except those prescribed in § 173.150(f)(3) pertaining to: (1) Shipping papers, way bills, switching orders, and hazardous waste manifests; (2) marking of packages; (3) display of identification numbers on bulk packages; (4) placarding requirements of subpart F of part 172; (4) carriage aboard aircraft and vessels; (5) reporting incidents as specified in § 171.15 and § 171.16; (6) packaging requirements of subpart B of part 173 and, in addition, non-bulk packagings must conform with requirements of § 173.203; and (7) the requirements of §§ 173.1, 173.21, 173.24, 173.24a; 173.24b, 174.1, 177.804; 177.817, 177.834(j), and 177.837(d) of the HMR.

However, the emergency response information and training requirements prescribed in subparts G and H of part 172 of the HMR are currently not specified in the requirements in § 173.150(f)(3), although we did not

intend to exempt such shipments from these requirements. To correct this oversight, we are proposing to revise § 173.150(f)(3) to clarify that the emergency response information and training requirements of subparts G and H of part 172, respectively, apply to a shipment of a combustible liquid in a bulk packaging or to a combustible liquid that is a hazardous substance, hazardous waste, or a marine pollutant.

VI. Security Plans

On March 25, 2003, we published a final rule under Docket HM-232 (68 FR 14510) that requires persons who offer for transportation and persons who transport in commerce certain hazardous materials to develop and implement security plans. Among the hazardous materials subject to the security plan requirement are infectious substances that are select agents and toxins regulated by the Centers for Disease Control and Prevention under 42 CFR part 73. Since publication of the HM-232 final rule, several carriers have suggested that carrier employees may not know that a package contains a select agent and, therefore, is subject to security plan requirements, unless that fact is communicated to the carrier. To address this potential problem, in this NPRM, we are proposing to add a new paragraph (p) to § 172.203 that would require each person who offers a select agent for transportation in commerce to include the words "Select Agent" in association with the basic shipping description on the shipping paper that accompanies the shipment. Commenters are invited to suggest alternative methods for addressing this issue; we may modify this proposal in the final rule based on comments received.

VII. Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This NPRM is not a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. A regulatory evaluation prepared for the August 15, 1994 NPRM and subsequently modified for the January 8, 1997 HM-206 final rule is available in the docket. The implementation of certain provisions of this proposal (*i.e.*, allowances for continued use of the previous PIH placards and labels) reduce or eliminate impacts from the proposed changes. Therefore, the costs and benefits associated with this proposed rule are considered to be so minimal as to not warrant changes to the regulatory evaluation.