

transportation function is performed to prepare a hazardous material and its accompanying shipping documentation for transportation and is required to assure its safe transportation in commerce. Thus, pre-transportation functions include activities such as determining a material's hazard class, selecting a packaging, marking and labeling a package, preparing shipping papers and emergency response information, and selecting and affixing placards. Preparation of a hazardous material for transportation also includes filling and closing the packaging. As defined in the NPRM, pre-transportation functions include: (1) Determining the hazard class of a hazardous material; (2) selecting a hazardous materials packaging; (3) filling a hazardous materials packaging; (4) securing a closure on a filled hazardous materials package or container or on one containing a residue of a hazardous material; (5) marking a package to indicate that it contains a hazardous material; (6) labeling a package to indicate that it contains a hazardous material; (7) preparing a hazardous materials shipping paper; (8) providing and maintaining hazardous materials emergency response information; (9) reviewing a hazardous materials shipping paper to verify compliance with the HMR or international equivalents; (10) for persons importing a hazardous material in to the United States, providing the shipper and the forwarding agent at the place of entry into the United States with information as to the requirements of the HMR that apply to the shipment of the material while in the United States; (11) certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR; (12) blocking and bracing a hazardous materials package in a freight container or transport vehicle; (13) segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo; and (14) selecting, providing, or affixing placards for a transport vehicle to indicate that it is carrying hazardous materials.

These functions usually occur before transportation in commerce begins—that is, before a carrier takes possession of the hazardous material. However, most commenters agree that pre-transportation functions have a direct bearing on the safety of a hazardous materials shipment in commerce and, thus, should be subject to the HMR. Further, commenters agree that regulation of these functions must be uniformly applied and enforced if a

hazardous materials shipment is to move smoothly, efficiently, and safely from its point of origin to its destination. As we explained in the NPRM, Congress recognized the importance of national uniformity in these areas by creating a specific preemption provision in section 5125(b) of Federal hazmat law applicable to state, local, and Indian tribe requirements on: (1) The designation, description, and classification of hazardous material; (2) the packing, repacking, handling, labeling, marking, and placarding of hazardous material; (3) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents; (4) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material; and (5) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

Certain functions may be considered both pre-transportation and transportation functions, particularly those that involve loading of hazardous materials into packagings or onto transport vehicles. In the NPRM, we identified loading functions as pre-transportation functions, including: (1) Filling of a packaging (both bulk and non-bulk); (2) securing closures on a filled hazardous materials package (both bulk and non-bulk) or on one containing a residue of a hazardous material; (3) blocking and bracing hazardous materials in a freight container or transport vehicle; or (4) segregating hazardous materials packages in a freight container or transport vehicle from incompatible cargo. The NPRM also identified loading of packaged or containerized material onto a transport vehicle or loading of hazardous materials into a bulk packaging as loading incidental to movement. Commenters expressed confusion about this aspect of the NPRM.

It was our intention in the NPRM to clarify that loading functions, as listed above, are regulated under the HMR when performed by any person, whether shipper or carrier. If a shipper performs a loading function prior to the carrier's arrival at the shipper facility, that function is a pre-transportation function and is subject to all applicable regulatory requirements. Because carrier possession of a hazardous material is key to our definition of "transportation" for purposes of the HMR, loading

functions that are performed by carrier personnel or by shipper personnel in the presence of the carrier are considered loading incidental to movement and are, thus, transportation functions. Irrespective of the person performing the function or the designation as a pre-transportation or transportation function, loading is regulated under the HMR.

For consistency with our treatment of non-bulk packagings, in the NPRM and this final rule we include filling and closing of a bulk packaging as a pre-transportation function in the same way that filling and closing a non-bulk packaging is a pre-transportation function. Filling and closing a hazardous materials packaging, whether bulk or non-bulk, is part of the process of preparing the hazardous material for transportation. As stated above, any person who performs a pre-transportation function must perform that function in accordance with the HMR. Thus, any person who fills and closes a bulk or non-bulk packaging must assure that the packaging is filled and closures are secured in accordance with all applicable regulatory requirements. Such person may be a shipper or a carrier. If a shipper performs the function, it is a pre-transportation function. If a carrier performs the function or if the function is performed in the presence of the carrier, then it is a transportation function.

Similarly, blocking and bracing and segregation of packages in a transport vehicle are functions frequently performed by carrier personnel. However, shipper personnel may also perform such functions, particularly when loading hazardous materials packages into freight containers. These are regulated functions under the HMR, whether performed by shipper or carrier personnel.

In this final rule, we modified the definitions of "pre-transportation function" and "loading incidental to movement" to reflect commenters' suggestions and concerns. "Pre-transportation function" is defined in this final rule as a function specified in the HMR that is performed prior to the movement of hazardous materials in commerce and is required to assure the safe transportation of a hazardous material in commerce. The list of examples of pre-transportation functions includes filling a hazardous materials packaging, including a bulk packaging; blocking and bracing a hazardous materials package in a freight container or transport vehicle; and segregating a hazardous materials package in a freight container or