

transport vehicle from incompatible cargo.

“Loading incidental to movement” is defined in this final rule to mean loading of packaged or containerized hazardous material by carrier personnel or in the presence of carrier personnel onto a transport vehicle, aircraft, or vessel for the purpose of transporting it, including 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 transport vehicle from incompatible cargo. For a bulk packaging, “loading incidental to movement” means filling of a bulk packaging by carrier personnel or in the presence of carrier personnel for the purpose of transporting it. A shipper who loads hazardous materials into a cargo tank or rail tank car is subject to HMR requirements applicable to such loading in the same way that a carrier performing the same function is subject to applicable HMR requirements. When a shipper performs such loading functions in the absence of the carrier, they are pre-transportation functions. When a carrier performs such loading functions or the shipper performs the functions with the carrier present, the functions meet the definition for “loading incidental to movement.” We also modified the description of pre-transportation functions in § 171.1(b) to indicate that such functions may be performed by shipper or carrier personnel. It is important to note in this context that, even where the HMR specify requirements for loading a packaging or container, OSHA requirements may also apply. As discussed elsewhere in this preamble, OSHA regulations may specify operational procedures for hazardous materials loading operations. Persons who perform loading operations generally will have to comply with both the HMR and OSHA requirements. Similarly, EPA requirements for environmental protection that relate to loading operations—such as requirements for secondary containment or vapor recovery—may also apply.

One commenter suggests that the “discussion of ‘pre-transportation functions’ in [the NPRM], which concludes that such activities are not ‘incidental’ to the movement of hazardous materials, is statutorily nonsensical and unsupported by the words of the statute. * * * The statute contains no authorization for “pre-transportation functions.” It only contains authorization for the agency to regulate the ‘movement’ of goods; or loading, unloading or storage ‘incidental’ to movement; or (in Section

5103(b)(iii)) a few named activities connected with the manufacture and repair of packaging or containers (not at issue here). * * * If DOT insists that the named ‘pre-transportation’ functions do not fall into the statutory category of ‘movement’ (because the carrier has not taken possession of the material * * *), then they must fall into the statutory category of loading, unloading, or storage ‘incidental’ to the movement of such goods.” (National Industrial Transportation League) The commenter appears to have misread Federal hazmat law. Federal hazmat law authorizes the Secretary of Transportation to establish regulations for the safe and secure transportation of hazardous materials in commerce. The regulations apply to persons who: (1) Transport hazardous materials in commerce; (2) *cause hazardous materials to be transported in commerce*; or (3) manufacture, mark, maintain, recondition, repair, or test packagings or containers (or components thereof) that are represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials in commerce. 49 U.S.C. 5103(b)(1)(A); emphasis added. In addition, the Secretary is authorized to regulate any aspect of hazardous materials transportation that the Secretary considers appropriate. 49 U.S.C. 5103(b)(1)(B); emphasis added. Federal hazmat law thus clearly recognizes the critical safety impact of activities performed in advance of transportation by persons who cause the transportation of hazardous materials in commerce. Such activities need not be considered “loading, unloading, or storage incidental to movement” to be subject to regulations promulgated under the authority of Federal hazmat law.

One commenter recommends that the definition of the term “pre-transportation function” should be “explicit, complete, and self-contained. Although the proposed definition includes descriptions of specific functions, the enumerated functions are not exclusive. * * * A definitive list would go a significant way to provide clarity and certainty in this gray area of federal jurisdiction.” (Utility Solid Waste Activities Group) We disagree that a definitive list is necessary. As adopted in this final rule, the term “pre-transportation function” is defined to mean a function that is required to assure the safe transportation of a hazardous material in commerce. The list of examples provided in the definition includes functions currently regulated under the HMR. An all-inclusive listing of pre-transportation

functions would limit our flexibility should we determine that additional pre-transportation functions should be regulated or discover that we inadvertently omitted functions or activities from the definition.

A number of commenters address the specific functions we proposed to include in the definition for “pre-transportation function.” Several commenters state that blocking and bracing of packages in a transport vehicle, segregation of materials in a transport vehicle, and providing and affixing placards to a transport vehicle should not be considered pre-transportation functions because “the carrier, not the shipper, typically performs these functions.” (FedEx Ground Package Systems, Inc.) We do not agree that carrier personnel usually perform these functions. In fact, both shippers and carriers may perform these functions. Shippers frequently use their own personnel to load trailers or freight containers. Further, it is usually the shipper who provides placards to the carrier when placarding is required by the HMR. However, the commenters are correct that carriers may perform some or all of these functions, as well. Commenters are also correct that the definition of “pre-transportation function” should not be dependent on the person performing the function. The definition is intended to delineate functions and activities that are regulated under the HMR because, while they generally occur before transportation in commerce begins, they directly affect transportation safety.

As one commenter points out, “In reality, after taking possession of a hazardous material, carriers also perform activities that RSPA classifies in the Proposed Rule as ‘pre-transportation functions.’ In any final rule, RSPA should clarify that ‘pre-transportation functions’ are not solely performed prior to a carrier’s possession of a hazardous material, and that carriers may perform ‘pre-transportation’ functions *after* taking possession of a hazardous material.” (United Parcel Service, Inc.) We agree. As we stated in the preamble to the NPRM, any person who performs a pre-transportation function must perform that function in accordance with HMR requirements. Such persons may include shippers, carriers, freight forwarders, non-vessel operating common carriers, freight brokers, and other entities. In this final rule, we modified the definition of “pre-transportation function” to clarify that the HMR requirements apply to any person who performs or is responsible