

for performing a pre-transportation function.

Several commenters address the statement in the preamble to the NPRM, reiterated above, that any person who performs a pre-transportation function must perform that function in accordance with HMR requirements. In this context, the NPRM noted that the HMR apply to persons who offer hazardous materials for transportation in commerce or cause hazardous materials to be transported in commerce. As examples of persons who cause hazardous materials to be transported in commerce, the NPRM listed freight forwarders, non-vessel operating common carriers, freight brokers, and other entities that perform pre-transportation functions. One commenter states, "Since in more than 70% of 'third party shipments' the third party has no physical involvement with the shipments, making them liable on these shipments for compliance with hazmat regulations, makes them a guarantor of compliance, when they have no ability to effectuate compliance." (Gallagher and Howarth, P.C.) This commenter is concerned that this detail in the NPRM creates an uninsurable liability for third parties who "simply arranged the transportation of the shipment."

Another commenter "believes that the proposed regulation of 'pre-transportation functions' as drafted would be unfair, and possibly unenforceable as well. * * * [B]rokers, freight forwarders and [non-vessel operating common carriers] seldom deal with the freight physically at the dock, and they must rely heavily on information received from shippers as to the contents. Intermediaries have the responsibility to select the carrier, and they may issue a house bill of lading or freight receipt to the shipper, but they do not ordinarily take responsibility for preparing the underlying carrier's shipment documentation, or for making the physical arrangements to classify, placard, brace and pack the cargo. As long as either the shipper or the underlying carrier is performing those functions, it would be unfair and unworkable for DOT to hold the intermediary liable for any errors made by parties over which they have no operational control." (Transportation Intermediaries Association)

We agree. We did not mean to suggest that third-party intermediaries would be held responsible for errors made by the shippers and carriers with whom they work unless the third-party knew or should have known about the error. A third-party intermediary who prepares a shipping paper for a hazardous

materials shipment and signs the shipper certification is, in effect, assuming responsibility for compliance with the regulations for all aspects of that shipment about which he knew or should have known. For example, if a freight forwarder or consolidator prepares a new shipping paper for a consolidated load that includes hazardous materials, the shipping paper must conform to all applicable HMR requirements. We realize that the shipping paper will be based on information provided by the original shipper. A third-party intermediary would not be held responsible for errors made by the shipper in its initial shipping documentation, such as incorrect classification of a material. However, using the information available, a third-party intermediary is responsible for completing a shipping paper in accordance with HMR requirements. As another example, a third-party intermediary may handle a package that contains a hazardous material. If the shipping documentation prepared by the original shipper indicates that the material is a flammable liquid, but the package label indicates a CORROSIVE hazard, the third-party intermediary must resolve the discrepancy before the package may be transported. In such a situation, the third-party intermediary knew or should have known that the shipment he was handling did not conform to applicable regulatory requirements. Further, as is currently the case, a third-party intermediary who performs a pre-transportation function must perform that function in conformance with the HMR. For example, if a third-party intermediary consolidates a number of packages into a freight container, he must assure that the packages are loaded into the freight container as required by applicable regulations, including those related to blocking and bracing of cargo or segregation of incompatible materials.

In the NPRM, we proposed to define "offer a hazardous material" to mean the performance of a pre-transportation function under the HMR. In this way, we intended to clarify that, consistent with Federal hazmat law, the HMR apply to functions performed to prepare hazardous materials for transportation in commerce as well as to the actual transportation of hazardous materials in commerce. In addition, we proposed to define "pre-transportation function" to mean tendering a hazardous material to a carrier for transportation in commerce, causing a hazardous material to be transported in commerce, or performing a function in the HMR that is required to assure the safe transportation of a

hazardous material in commerce. Further, in § 171.2, we proposed that no person may offer or accept a hazardous material for transportation unless the hazardous material is properly classed, described, packaged, marked labeled, and in condition for shipment as required under the HMR.

Several commenters note that under our proposed definitions, a shipper would *offer* a hazardous material when performing pre-transportation functions that § 171.2 requires the shipper to perform *prior to offering* a hazardous material for transportation. "RSPA could not have intended such an anomalous and circular result, and accordingly should either revise or withdraw its proposed definition of 'Offer a hazardous material.'" (United Parcel Service, Inc.) Commenters are correct. We did not intend such an anomalous and circular result. In this final rule, we revised the definition of "pre-transportation function" to mean a function specified in the HMR that is required to ensure the safe transportation of a hazardous material in commerce. We agree with commenters that the proposed definition for "offer a hazardous material" is confusing and difficult to apply. Therefore, in this final rule we do not include a definition for "offer a hazardous material."

Several commenters express confusion as to precisely when a person performing pre-transportation functions is responsible for demonstrating compliance with the HMR's pre-transportation requirements. "Most [facilities at which hazardous materials are tendered for shipment] have multilevel check systems designed to ensure that the freight conforms to applicable HMR requirements. The [facility's hazmat employees] can make final changes to documentation, labels, etc., up until the time that the product is loaded and shipping documents are signed." (International Warehouse Logistics Association) We agree with commenters that this point needs clarification. However, the point at which non-compliance with a pre-transportation function becomes enforceable will depend on the facts applicable to a specific instance. As a general rule, we would expect an offeror to be able to demonstrate compliance with all applicable pre-transportation requirements at the time the hazardous material is staged for loading and the consignor or his agent signs the shipping paper. The offeror's signature (or that of his agent as permitted by § 172.205(d)(1)) on the shipping paper is its certification that the hazardous