

organization to submit written comments to the docket in advance of publication of this NPRM. The NCAI chose not to do so.

In addition, following publication of the NPRM, we wrote to the NCAI to provide a copy of the NPRM. We encouraged NCAI to submit comments on the NPRM and invited its representatives to meet with us to discuss the specifics of the proposals in the NPRM. NCAI did not request a meeting or submit comments.

*D. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. We have determined that the requirements in this final rule will not have a significant impact on a substantial number of small entities.

*Need for the proposed rule.* Federal hazardous materials transportation law (Federal hazmat law), codified at 49 U.S.C. 5101 *et seq.*, authorizes the Secretary of Transportation to establish regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign 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. The regulations may govern any safety aspect of hazardous materials transportation the Secretary considers appropriate. The law defines "transportation" to mean "the movement of property and loading, unloading, or storage incidental to the movement," but does not define with specificity the particular activities that fall within the term "loading, unloading, or storage incidental to movement."

We have issued a number of interpretations, inconsistency rulings, and preemption determinations in response to requests from the public for clarification regarding the meaning of "transportation in commerce" and whether particular activities are covered by that term and, therefore, are subject to regulation under the HMR. Loading, unloading, and storage of hazardous

materials are areas of particular confusion and concern. In addition, there is uncertainty concerning the extent to which other Federal, state, and local agencies may regulate hazardous materials safety, especially at fixed facilities. Although the interpretations and administrative determinations we have issued are publicly available, the regulated industry, Federal agencies, state and local governments, and Indian tribes have not been consistently aware of their existence and availability. Further, some of the interpretations and decisions we have issued need to be revised in light of changes in the Secretary of Transportation's and other Federal agencies' statutory authority. Thus, we have initiated a rulemaking to consolidate, clarify, and revise, as necessary, these interpretations and administrative decisions and make them part of the HMR.

*Description of Proposed Actions.* The final rule clarifies the applicability of the HMR by focusing on a carrier's possession of hazardous materials for the purpose of transporting them in commerce. Thus, the HMR would apply to the following functions:

1. *Packaging functions.* All functions related to the design, manufacture, maintenance, and use of packagings authorized for the transportation of hazardous materials in commerce. These functions include testing, retesting, and reconditioning functions designed to assure the integrity of authorized packagings.

2. *Pre-transportation functions.* All functions performed in advance of transportation in commerce to prepare a shipment of hazardous materials for transportation. These functions affect the safety of hazardous materials shipments during transportation and include:

- Determining the hazard class of a hazardous material;
- Selecting a hazardous materials packaging;
- Placing warning signs, blocking wheels, and setting brakes on tank cars placed for loading or unloading with closures open;
- Filling a hazardous materials packaging;
- Securing a closure on a filled hazardous materials package or container;
- Marking a package to indicate that it contains a hazardous material;
- Labeling a package to indicate that it contains a hazardous material;
- Preparing a hazardous materials shipping paper;
- Providing and maintaining hazardous materials emergency response information;

- Reviewing a hazardous materials shipping paper to verify compliance with the HMR or international equivalents;
- For persons importing a hazardous material into the United States, providing the shipper with information as to the requirements of the HMR that apply to the shipment of the material while in the United States;
- Certifying that a hazardous material is in proper condition for transportation in conformance with the requirements of the HMR;
- Blocking and bracing a hazardous materials package in a freight container or transport vehicle;
- Segregating a hazardous materials package in a freight container or transport vehicle from incompatible cargo; and
- Selecting, providing, or affixing placards for a freight container or transport vehicle to indicate that it is carrying hazardous materials.

3. *Transportation functions.*

Functions performed as part of the movement of hazardous materials in commerce. These functions include:

- Loading incidental to movement (*i.e.*, loading of non-bulk packages, portable tanks, or IBCs into freight containers or transport vehicles by carrier personnel; loading of cargo tank motor vehicles by carrier personnel; loading of rail tank cars by carrier personnel);
- Unloading incidental to movement (*i.e.*, unloading of non-bulk packages, portable tanks, or IBCs from freight containers or transport vehicles by carrier personnel; unloading of cargo tank motor vehicles by carrier personnel; unloading of rail tank cars by carrier personnel); and
- Storage incidental to movement (*i.e.*, storage of a hazardous materials package between the time the package leaves the shipper's premises and the time it arrives at the consignee's facility; storage of rail tank cars on track leased from carrier by consignee).

Generally, the clarifications outlined above are consistent with current regulatory requirements and previously issued administrative decisions and interpretations concerning the applicability of the HMR and maintain the current status quo. However, for rail transportation, the clarifications included in the final rule represent a change from current practice and interpretation. Because tank car unloading by consignees is generally part of a manufacturing or distribution process and, as such, is inappropriate