

is one that, inter alia, meets the pertinent small business size standard established by the SBA, and is not dominant in its field of operation. Section 121.201 of the SBA regulations defines a small wireline telecommunications business as one with 1,500 or fewer employees. In addition, the SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope. Because our proposals concerning the part 36 separations process will affect all incumbent LECs providing interstate services, some entities employing 1500 or fewer employees may be affected by the proposals made in this NPRM. We therefore have included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under the SBA definition, a carrier is small if it has 1,500 or fewer employees. According to the FCC's Telephone Trends Report data, 1,311 incumbent LECs reported that they were engaged in the provision of local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most incumbent LECs are small entities that may be affected by the rules and policies adopted herein.

#### **Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

None.

#### **Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design,

standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.

As described above, seven years have elapsed since the imposition of the freeze, thus, we ask commenters, in their comments on the present NPRM, address the impact of a further extension of the freeze. We seek comment on the effects our proposals would have on small entities, and whether any rules that we adopt should apply differently to small entities. We direct commenters to consider the costs and burdens of an extension on small incumbent LECs and whether the extension would disproportionately affect specific types of carriers or ratepayers.

Implementation of the proposed freeze extension would ease the administrative burden of regulatory compliance for LECs, including small incumbent LECs. The freeze has eliminated the need for all incumbent LECs, including incumbent LECs with 1500 employees or fewer, to complete certain annual studies formerly required by the Commission's rules. If an extension of the freeze can be said to have any affect under the RFA, it is to reduce a regulatory compliance burden for small incumbent LECs, by abating the aforementioned separations studies and providing these carriers with greater regulatory certainty.

#### **Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules**

None.

#### **Paperwork Reduction Act**

The NPRM does not propose any new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new, modified, or proposed "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, 44 U.S.C. 3506(c)(4).

#### **List of Subjects in 47 CFR Part 36**

Communications common carriers, Reporting and recordkeeping requirements, Telephone, and Uniform System of Accounts.

**Marlene H. Dortch,**

*Secretary, Federal Communications Commission.*

#### **Rules**

For the reasons discussed in the preamble, the Federal Communications

Commission proposes to amend 47 CFR part 36 as follows:

#### **PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES**

1. The authority citation for part 36 continues to read:

**Authority:** 47 U.S.C. 151, 154 (i) and (j), 205, 221(c), 254, 403, and 410.

2. In 47 CFR part 36 remove the words "June 30, 2010" and add, in their place, the words "June 30, 2011" in the following places:

- a. Section 36.3(a), (b), (c), (d), and (e);
- b. Section 36.123(a)(5) and (a)(6);
- c. Section 36.124(c) and (d);
- d. Section 36.125(h), (i), and (j);
- e. Section 36.126(b)(5), (c)(4), (e)(4), and (f)(2);
- f. Section 36.141(c);
- g. Section 36.142(c);
- h. Section 36.152(d);
- i. Section 36.154(g);
- j. Section 36.155(b);
- k. Section 36.156(c);
- l. Section 36.157(b);
- m. Section 36.191(d);
- n. Section 36.212(c);
- o. Section 36.214(a);
- p. Section 36.372;
- q. Section 36.374(b) and (d);
- r. Section 36.375(b)(4) and (b)(5);
- s. Section 36.377(a), (a)(1)(ix), (a)(2)(vii), (a)(3)(vii), (a)(4)(vii), (a)(5)(vii), and (a)(6)(vii);
- t. Section 36.378(b)(1);
- u. Section 36.379(b)(1) and (b)(2);
- v. Section 36.380(d) and (e);
- w. Section 36.381(c) and (d); and
- x. Section 36.382(a).

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**BILLING CODE 6712-01-P**

#### **DEPARTMENT OF TRANSPORTATION**

#### **Pipeline and Hazardous Materials Safety Administration**

#### **49 CFR Parts 172, 173, and 176**

[Docket No. PHMSA-2009-0241 (HM-242)]

**RIN 2137-AE52**

#### **Hazardous Materials Regulations: Combustible Liquids**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Advance notice of proposed rulemaking (ANPRM).

**SUMMARY:** PHMSA is considering amendments to the Hazardous Materials Regulations (HMR) as they apply to the transportation of combustible liquids. Specifically, we are considering whether to harmonize the domestic regulations applicable to the transportation of combustible liquids with international transportation standards. In addition, we are examining ways to revise, clarify, or relax certain regulatory requirements to facilitate the transportation of these materials while maintaining an adequate level of safety. The intent of this ANPRM is to invite public comments on how to accomplish these goals, provide an opportunity for comment on amendments PHMSA is considering, and present a forum for the public to offer additional recommendations for the safe transportation of combustible liquids.

**DATES:** Comments must be received by July 6, 2010. To the extent possible, we will consider late-filed comments as we consider the next action. You may submit comments by any of the following methods:

- *Web Site:* <http://dms.dot.gov>.

Follow the instructions for submitting comments on the DOT electronic docket site.

- *Fax:* 1–202–493–2251.

• *Mail:* Docket Management System; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

• *Hand Delivery:* To the Docket Management System; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

**Instructions:** You must include the agency name and docket number PHMSA–2009–0241 (HM–242) or the Regulatory Identification Number (RIN) 2137–AE52 for this notice at the beginning of your comment. Note that all comments received will be posted without change to <http://dms.dot.gov> including any personal information provided. Persons wishing to receive confirmation of receipt of their comments must include a self-addressed stamped postcard or access our Web site at <http://dms.dot.gov>.

**Docket:** For access to the docket to read background documents and comments received, go to <http://dms.dot.gov> at any time or to U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Helen L. Engrum, Office of Hazardous

Materials Standards, telephone (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, 2nd Floor, PHH–10, Washington, DC 20590–0001.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Overview of the Hazardous Materials Regulations**

The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) govern the safe transportation of hazardous materials. The HMR are designed to achieve three goals:

1. To ensure that hazardous materials are packaged and handled safely and securely during transportation;
2. To provide effective communication to transportation workers and emergency responders of the hazards of the materials being transported; and
3. To minimize the consequences of an incident should one occur.

The hazardous material regulatory system is a risk management system that is prevention-oriented and focused on identifying a safety or security hazard and reducing the probability and quantity of a hazardous material release. Under the HMR, hazardous materials are categorized by analysis and experience into hazard classes and packing groups based upon the risks they present during transportation. The HMR specify appropriate packaging and handling requirements for hazardous materials, and require a shipper to communicate the material's hazards through use of shipping papers, package marking and labeling, and vehicle placarding. The HMR require shippers to provide emergency response information applicable to the specific hazard or hazards of the material being transported. The HMR mandate training requirements for persons who prepare hazardous materials for shipment or who transport hazardous materials in commerce. Finally, the HMR include operational requirements applicable to each mode of transportation.

PHMSA reviews the HMR on a continuing basis to determine whether revisions or amendments are necessary to ensure a high level of safety for the safe transportation of hazardous materials in commerce. During our regulatory review process, we look for opportunities that may exist to enhance safety, such as by minimizing misunderstanding of regulatory requirements for the transportation of hazardous materials and, where opportunities exist, to reduce the regulatory burden on industry while maintaining a high level of safety. We

believe opportunities exist to clarify and simplify current requirements in the HMR applicable to the transportation of combustible liquids, thereby reducing compliance burdens on shippers and carriers while facilitating movement of these materials in domestic and international commerce. This initiative is based on our ongoing review process, input from the regulated community, review of requests for letters of interpretation and clarification concerning combustible liquids, and written and oral questions pertaining to combustible liquids that have been presented to PHMSA's Hazardous Materials Information Center.

##### **II. Background of Class 3 Flammable Liquids and Combustible Liquids**

On February 27, 1968, the Hazardous Materials Regulation Board—the predecessor agency to the Research and Special Programs Administration (RSPA) and, subsequently, the Pipeline and Hazardous Materials Safety Administration (PHMSA)—published a notice of proposed rulemaking (NPRM) under Docket No. HM–3 (33 FR 3382) proposing to re-define the term “flammable liquid,” in order to harmonize the definition with international standards and better address the risks such materials present in transportation. On February 21, 1970, the Board published an NPRM under Docket No. HM–42 (35 FR 3298) proposing to create and define a new class of materials identified as “combustible liquids” to address a lack of hazard warning communication concerning these materials, and the hazards posed by transportation of these materials at temperatures equal to or exceeding their flash points. Liquids in this higher flash point range (80 °F to 200 °F) include kerosene, fuel oil, turpentine and certain alcohols, all of which present fire hazards during transportation, and are referred to generically as “combustible liquids.” The 200 °F upper limit is commonly used by industry, government, and the National Fire Protection Association (NFPA) as the regulatory limit for defining flammable/combustible liquids.

On December 5, 1970, the Board published an NPRM under Docket No. HM–67 (35 FR 18534) proposing to change the method of determining the flash point of materials from the Tagliabue open-cup test method to the Tagliabue closed-cup test method in an effort to establish a more accurate flash point of materials.

The issues addressed in these three notices were consolidated under Docket HM–102 and published as an NPRM on

June 15, 1972 (37 FR 11898). The NPRM included proposals for a new definition for the class of materials identified as “flammable liquid” and created and defined a new class of materials identified as “combustible liquid,” in addition to modifying the definition for pyrophoric liquids within the flammable liquid hazard class.

On January 24, 1974, the Hazardous Materials Regulation Board published a final rule under Docket HM-102 (39 FR 2768) that, among other issues, (1) Specified a new definition for the class of materials identified as “flammable liquid;” (2) created and defined a new class of materials identified as “combustible liquids;” (3) modified the definition for “pyrophoric liquid” within the flammable liquid class; and (4) set forth the requirements for the materials that were covered by these new definitions.

The final rule defined these hazard classes as follows:

1. A “flammable liquid” is any liquid having a flash point below 100 °F (37.8 °C) that does not meet one of the definitions specified under then § 173.300 (i.e., materials defined as compressed gases).

2. A “combustible liquid” is any liquid having a flash point at or above 100 °F (37.8 °C), and below 200 °F (93.3 °C).

3. A “pyrophoric liquid” is “any liquid that ignites spontaneously in dry or moist air at or below 130 °F (54.5 °C).

In following years, the agency published additional notices proposing revisions to the provisions for flammable and combustible materials, culminating in the publication of a final rule on December 21, 1990 under Docket HM-181 (55 FR 52402). Generally, this rule comprehensively revised the HMR with respect to hazard communication, classification, and packaging requirements to enhance safety through better classification and performance-oriented, risk based packaging, and to promote flexibility and technological innovation in packaging, reduce the need for special permits (formerly “exemptions”), and facilitate international commerce. The final rule adopted international standards (United Nations Recommendations on the Transport of Dangerous Goods or “UN Recommendations”) for defining flammable liquids and retained a domestic exception for flammable liquids reclassified as combustible liquids. The upper flash point range for flammable liquids was subsequently extended to meet the UN standard of 60 °C (140 °F) for flammable liquids. The definition for combustible liquids

under the HMR was retained both as a domestic classification option for liquids with flash points between 38 °C (100 °F) and 60 °C (140 °F) and as a requirement for liquids with flash points between 60 °C (140 °F) and below 93 °C (200 °F). The classification system in the UN Recommendations has no combustible liquid category or hazard class.

Commenters to the HM-181 rulemaking asserted that the exceptions provided in the HMR for the transportation of combustible liquids create an unnecessary variance between domestic and international transportation and increase the potential for non-compliance. For instance, commenters stated the domestic exception would lead to identical materials being classified differently, and would result in confusion among transportation, enforcement, and emergency response personnel. At the time, we disagreed with these commenters and stated that although different classifications for the same materials could occur under this exception, we anticipated little or no confusion on the part of shippers already dealing with a dual packaging and marking system, i.e., differing requirements for domestic and international transportation. We also stated that the exception for combustible liquids would not hamper enforcement or emergency response personnel who are trained in the use of the HMR, UN identification numbers, the identification of materials using DOT’s placarding system, and DOT’s Emergency Response Guidebook.

This issue was raised again in a subsequent HM-181 final rule published on December 20, 1991 (56 FR 66124) that responded to petitions for reconsideration of certain aspects of the rule. Several petitioners urged the agency to remove the combustible liquid class definition and the reclassification option. The petitioners stated that the domestic combustible liquid classification introduced unneeded regulatory complexity and violated the stated aims of HM-181 to simplify the HMR. This being both a safety and economic issue, we disagreed with the petitioners who would eliminate the combustible liquid class altogether, believing that the significant number of domestically regulated materials with flash points between 38 °C (100 °F) and 93 °C (200 °F) pose risks in transportation that cannot be ignored.

Under HM-181, we revised the HMR to clarify that only flammable liquids that do not meet the definition of any other hazard class may be reclassified as combustible liquids. This revision was

intended to prevent reclassification of materials that meet the definition of a hazardous substance or hazardous waste and, thus, meet the definition for a Class 9 (Miscellaneous) material. We also narrowed the provisions to generally prohibit reclassification for materials offered for air or vessel transportation, with certain exceptions. The phrase “except Class 9” was subsequently removed from §§ 173.120(b)(1) and (b)(2), and 173.150 under the Docket HM-181 Correction/Response final rule published on October 1, 1992 (57 FR 45446), in which the Class 9 definition was clarified to state that a material which meets the definition of another hazard class, but also falls within one of the Class 9 criteria (e.g., hazardous substance) does not meet the definition of Class 9.

Section 173.120 of the HMR currently defines a “flammable liquid” as a liquid having a flash point of not more than 60 °C (140 °F), or any material in a liquid phase with a flash point at or above 38 °C (100 °F) that is intentionally heated and offered for transportation or transported at or above its flash point in a bulk packaging, with some exceptions for liquids that also meet the definition for Division 2.1 (Flammable gas), 2.2 (Non-flammable gas), or 2.3 (Poisonous gas) materials, as defined in § 173.115; mixtures that are not offered for transportation at or above their flash points; liquids with a flash point greater than 35 °C (95 °F) that do not sustain combustion; liquids with a flash point greater than 35 °C (95 °F) and with a fire point (the temperature at which the liquid will continue to burn after ignition) greater than 100 °C (212 °F); and liquids with a flash point greater than 35 °C (95 °F) which is in a water-miscible solution with a water content of more than 90 percent by mass.

In addition, § 173.120 of the HMR defines a “combustible liquid” as any liquid that does not meet the definition of any other hazard class specified in this subchapter and has a flash point above 60 °C (140 °F) and below 93 °C (200 °F). Further, in domestic transportation, a flammable liquid with a flash point at or above 38 °C (100 °F) that does not meet the definition of any other hazard class may be reclassified as a combustible liquid. This provision does not apply to transportation by vessel or aircraft, except where other means of transportation is impracticable. An elevated temperature material that meets the definition of a Class 3 (Flammable liquid) material because it is intentionally heated and offered for transportation or transported at or above its flash point may not be reclassified as a combustible liquid.

A flash point is the minimum temperature at which a liquid gives off vapor within a test vessel in sufficient concentration to form an ignitable mixture with air near the surface of the liquid. Materials with higher flashpoints are thus less likely to ignite than materials with lower flash points. Because of their higher flash points, combustible liquids do not pose as great a risk in transportation as flammable liquids. Therefore, the regulatory requirements applicable to their transportation are less stringent than those for flammable liquids. For example, combustible liquids transported in non-bulk packagings are excepted from all HMR requirements, unless the combustible liquid also meets the definition for a hazardous substance, hazardous waste, or marine pollutant. In addition, combustible liquids may be transported in non-specification bulk packagings. A combustible liquid that is not a hazardous substance, a hazardous waste, or a marine pollutant is not subject to HMR requirements if it is a mixture of one or more components that has a flash point at or above 93 °C (200 °F), comprises at least 99 percent of the volume of the mixture, and is not transported as a liquid at a temperature at or above its flash point. Also, a combustible liquid that does not sustain combustion is not subject to the requirements of the HMR as a combustible liquid. Either the test method specified in ASTM D 4206 or the procedure in appendix H of part 173 may be used to determine if a material sustains combustion when heated under test conditions and exposed to an external source of flame.

The HMR provide additional exceptions for flammable (Class 3) and combustible liquids under § 173.150. Limited quantities of flammable and combustible liquids are excepted from labeling requirements, unless the material also meets the definition of Division 6.1 (Poison) or is offered for transportation or transported by aircraft, and the specification packaging requirements of the HMR when packaged in combination packagings, each not exceeding 30 kg (66 pounds) gross weight, in accordance with this section. In addition, shipments of limited quantities are not subject to placarding. A limited quantity of a flammable or combustible liquid may be reclassified and renamed as a "consumer commodity" as defined in § 171.8 of the HMR. An aqueous solution containing 24 percent or less alcohol by volume and no other hazardous material may be reclassified as a combustible liquid, and is not subject to the HMR requirements if

it contains no less than 50 percent water.

### III. Petitions for Rulemaking

In this ANPRM, PHMSA is soliciting comments on issues related to the transportation of combustible liquids in both domestic and international commerce. We have received two petitions for rulemaking suggesting that domestic requirements for the transportation of combustible liquids should be harmonized with international standards. In addition, we have received a petition for rulemaking suggesting that the HMR should include more expansive domestic exceptions for shipments of combustible liquids. The petitions are described below.

#### A. VOHMA Petition for Rulemaking

The International Vessel Operators Hazardous Materials Association (VOHMA) submitted a petition for rulemaking [P-1498; PHMSA-2007-28238] concerning differing domestic and international requirements for the transportation of combustible liquids. As indicated above, the UN Recommendations do not include a definition or classification for combustible liquids. The UN Recommendations are not regulations, but rather are recommended standards issued by the UN Sub-Committee of Experts on the Transport of Dangerous Goods. These recommendations are amended and updated biennially and serve as the basis for many national, regional and international modal regulations, including the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions) and the International Maritime Dangerous Goods (IMDG) Code.

In the UN Recommendations on the Transport of Dangerous Goods (Model Regulations), 15th Revised Edition, Chapter 2.3; Section 2.3.1.2, "*Flammable liquids*" are defined as liquids, or mixtures of liquids, or liquids containing solids in solution or suspension (for example, paints, varnishes, lacquers, etc., but not including substances otherwise classified on account of their dangerous characteristics) which give off a flammable vapor at temperatures of not more than 60 °C (140 °F), closed-cup test, or not more than 65.6 °C (150.08 °F), open-cup test, normally referred to as the flash point. This class also includes:

a. Liquids offered for transport at temperatures at or above their flash point; and

b. Substances that are transported or offered for transport at elevated temperatures in a liquid state and which give off a flammable vapor at a temperature at or below the maximum transport temperature.

**Note:** Since the results of open-cup tests and of closed-cup tests are not strictly comparable and even individual results by the same test are often variable, regulations varying from the above figures to make allowance for such differences would be within the spirit of this definition.

Liquid desensitized explosives (*see* 2.3.1.4) are also included in the Class 3 hazard class. Liquid desensitized explosives are explosive substances which are dissolved or suspended in water or other liquid substances, to form a homogeneous liquid mixture to suppress their explosive properties (2.1.3.6.3). Entries in the Dangerous Goods List for liquid desensitized explosives are: UN1204, UN 2059 UN 3064, UN 3343, UN 3357 and UN 3379.

Liquids meeting the definition in Chapter 2.3; Section 2.3.1.3 with a flash point of more than 35 °C (95 °F) which do not sustain combustion are not considered hazardous materials for purposes of the UN Recommendations, the ICAO Technical Instructions, or the IMDG Code. Liquids are considered to be unable to sustain combustion for the purposes of these Regulations (i.e., they do not sustain combustion under defined test conditions) if:

a. They have passed a suitable combustibility test (*see* SUSTAINED COMBUSTIBILITY TEST prescribed in the *Manual of Tests and Criteria*, Part III, sub-section 32.5.2;

b. Their fire point according to ISO 2592:2000 is greater than 100 °C (212 °F); or

c. They are water miscible solutions with a water content of more than 90% by mass.

In its petition, VOHMA notes that the differing domestic and international requirements for combustible liquids has resulted in conflicting and confusing hazard communication requirements with the result that international shipments may be frustrated as foreign authorities attempt to reconcile HMR hazard communication schemes with international regulations. For example, VOHMA notes that many paints, inks, adhesives, solvents, and petroleum products have flash points between 60 °C (140 °F) and 93 °C (200 °F) and are offered for transportation as combustible liquids within the United States. However, the HMR permit such shipments to be described on a shipping paper and to display markings, labels, and placards in the same manner as

shipments of flammable liquids with flash points of less than 60 °C (140 °F). When these shipments are destined for export to a jurisdiction outside the United States, foreign inspectors, stowage planners, interlining carriers, and intermodal feeder companies may become confused by the display of a UN identification number of a material that is not regulated in international commerce and thus may delay forwarding the shipments until the confusion is resolved. We agree with VOHMA that these frustrated shipments impede commerce and may also result in additional risks in the ports and terminals where they are held.

In its petition, VOHMA also expresses concern that HMR provisions that permit reclassification of flammable liquids with a flash point at or above 38 °C (100 °F) as combustible liquids could result in the movement of undeclared shipments in international commerce. Reclassed combustible liquids are excepted from the HMR when transported in non-bulk packagings such as one-gallon cans, five-gallon jerricans, or 55-gallon drums. However, materials with flash points between 38 °C (100 °F) and 60 °C (140 °F) are fully regulated as Class 3 materials in international commerce. We agree with VOHMA that unmarked and unlabeled packages of reclassified combustible liquids may find their way into international distribution with the result that the shipments are not declared as dangerous goods and will not be appropriately handled and stowed in international transportation.

To address these problems, VOHMA asks PHMSA to use the "Combustible liquid, n.o.s." proper shipping name entry in the Hazardous Materials Table (HMT), with an associated technical name in parentheses, when the material is reclassified in accordance with § 173.150(f) and is intended for rail or highway transportation only, or has a flash point above 60 °C (140 °F) but below 93 °C (200 °F). This would serve to distinguish shipments regulated only in the United States from shipments regulated in international commerce.

#### *B. DGAC Petition for Rulemaking*

The Dangerous Goods Advisory Council (DGAC) also submitted a petition for rulemaking [P-1531; PHMSA-2008-0303] for amendment of the requirements for combustible liquids in bulk packagings in order to reduce port congestion and improve transportation efficiency in port areas. A bulk packaging is defined in § 171.8 as a packaging, other than a vessel or barge, including a transport vehicle or

freight container, in which hazardous materials are loaded with no intermediate form of containment *and* that has: (1) A maximum capacity greater than 450 L (119 gallons) as a receptacle for a liquid; (2) a maximum net mass greater than 400 kg (882 pounds) and a maximum capacity greater than 450 L (119 gallons) as a receptacle for a solid; or (3) a water capacity greater than 454 kg (1000 pounds) as a receptacle for a gas as defined in § 173.115 of the HMR. The DGAC petition highlights many of the issues identified by VOHMA in its petition, with a particular focus on problems encountered in international transportation for shipments of materials DGAC terms "high flash point combustible liquids"—that is, combustible liquids with flashpoints between 60 °C (140 °F) and 93 °C (200 °F). DGAC suggests that the regulatory differences between the HMR and international regulatory requirements for these combustible liquids are disruptive to the flow of goods in port areas and contribute to port congestion. According to DGAC, imported bulk shipments of high flash point combustible liquids arriving in U.S. ports must be marked and placarded in accordance with HMR requirements. Similarly, the marks and placards that are applied to bulk shipments of such combustible liquids for U.S. transportation must be removed in the port prior to export. DGAC estimates that export shipments are delayed for an average of three days awaiting removal of HMR-required marks and placards and import shipments are delayed an average of five days awaiting application of HMR-required marks and placards. To alleviate this problem, DGAC requests that PHMSA except high flash point combustible liquids from all HMR requirements when transported in specification packages of less than 3000 liters capacity, (the upper capacity limit for intermediate bulk containers (IBCs), or when in an ISO (UN) portable tank in international commerce.

#### *C. U.S. Custom Harvesters Petition for Rulemaking*

U. S. Custom Harvesters, Inc. (Custom Harvesters) also submitted a petition for rulemaking [P-1536; PHMSA-2009-0099] requesting modification of current requirements applicable to combustible liquids. According to the petition, a custom harvester has invested in the equipment (which includes grain harvesting combines, silage harvesters, grain trucks, tractors and grain carts) necessary to harvest wheat, corn, corn silage and cotton. The custom harvester

industry replaces the farmer in the field during harvest.

Custom Harvesters is concerned that current requirements applicable to bulk shipments of combustible liquids inhibit the industry's ability to hire seasonal workers to transport the diesel fuel necessary to re-fuel harvesting equipment in the fields. Because the diesel fuel is typically transported from a local service station or farm cooperative in tanks with capacities greater than 450 L (119 gallons) (i.e., in bulk quantities), the commercial motor vehicles transporting the diesel fuel must be operated by a driver with a commercial driver license with a hazmat endorsement. (In accordance with 49 CFR part 383, a hazmat endorsement is required for drivers of commercial motor vehicles that transport placarded amounts of hazardous materials. Bulk shipments of combustible liquids must be placarded.) Custom Harvesters asks us to consider an exception from placarding for combustible liquids transported in quantities that do not exceed 3785 L (1,000 gallons) in a single packaging.

Approximately 100 persons submitted comments in support of the U.S. Custom Harvesters' petition. The commenters stress the difficulty of hiring seasonal, foreign workers who may not be able to obtain a CDL with a hazmat endorsement in a timely fashion.

#### **IV. Comments Requested**

Based on the petitions for rulemaking described in the previous section of this preamble and our own review of domestic and international regulations applicable to the transportation of combustible liquids, we have identified a number of issues that we may wish to address through rulemaking, including: (1) Harmonizing the HMR definitions and requirements for combustible liquids with international standards; (2) modifying HMR requirements for marking and placarding shipments of combustible liquids to eliminate confusion that occurs when shipments marked and placarded for domestic transportation are transported in international commerce; and (3) expanding current HMR exceptions for combustible liquids to accommodate unique operational requirements. These issues are discussed in more detail below.

##### *A. International Harmonization*

Because there is no provision in the UN Recommendations, the International Civil Aviation Organization's (ICAO) Technical Instructions for the Safe Transport of Dangerous Goods by Aircraft, or the International Maritime

Dangerous Goods (IMDG) Code for flammable liquids to be reclassified as combustible liquids and, indeed, no international regulation of liquids with a flash point over 60 °C (140 °F), we recognize that the HMR provisions for the transportation of combustible liquids may potentially be confusing to both domestic and international shippers and carriers of flammable and combustible liquid shipments. We also recognize this lack of clarity may present a tangible safety concern, such as the mishandling or misidentification of these shipments in transportation, or the transportation of undeclared shipments. Further, in addition to our primary focus on the safe transportation of hazardous materials, one of our associated goals is to facilitate international commerce through harmonization with international standards, to the extent that harmonization does not compromise our safety objectives. Therefore, we are considering a proposal to eliminate the current domestic exception that allows the reclassification of high flash point flammable liquids (i.e., those with a flash point at or above 38 °C (100 °F)) as combustible liquids. This potential revision would establish a uniform definition for a flammable liquid as a liquid having a flash point of not more than 60 °C (140 °F), for both domestic and international transportation. Non-bulk shipments of these materials could then be consistently transported as flammable liquids in the United States and abroad, thereby reducing the possibility for the frustration or unsafe handling of shipments whether transported within or outside the United States and the problem of differing marking, labeling and placarding requirements for domestic and international shipments.

However, to the extent there is justification for providing relief from some, if not all, provisions of the HMR applicable to high flash point flammable liquids, we may want to consider a revision to the HMR that would include the current domestic exceptions for high-flash point flammable liquids in non-bulk packagings in a revised set of requirements for Class 3 materials, thereby eliminating the necessity to reclass these materials as combustible liquids to utilize the exceptions. We believe this alternative could be less cumbersome and could facilitate a clearer understanding of the regulations.

#### *B. Unique Identifiers for Combustible Liquid Shipments*

In addition to considering harmonizing the HMR definitions and requirements for flammable liquids with

international standards, we are considering whether utilization of unique identifiers for combustible liquid shipments could help to eliminate the confusion that currently results when shipments of reclassified combustible liquids or combustible liquid shipments regulated under the HMR but not regulated under international standards are transported to or from the United States.

As VOHMA notes in its petition, the HMR currently permit reclassified combustible liquids in bulk packagings to be described on a shipping paper (except the hazard class must be modified to read "Combustible liquid") and marked and placarded in the same manner as materials with flash points under 60 °C (140 °F). Thus, a shipment of paint reclassified as a combustible liquid would be described on a shipping paper as "UN1263, Paint, Combustible Liquid, III" and placarded with a Class 3 placard (without text) displaying the UN identification number "1263". Even though these shipments are not regulated for international transportation, the shipping paper entries and placards suggest that this is a fully regulated shipment. As VOHMA suggests, we could require shippers who reclass flammable liquids as combustible liquids to utilize the domestic identification number NA1993, the proper shipping name "Combustible liquid, n.o.s.," followed by the technical name for the material, as listed in the § 172.101 HMT, in parentheses (for example, "NA1993, Combustible liquid, n.o.s. (paint), III). Bulk packagings containing reclassified combustible liquids would be marked COMBUSTIBLE LIQUID and placarded with the COMBUSTIBLE placard and the domestic identification number NA1993.

For international shipments of materials regulated as combustible liquids under the HMR but not regulated as hazardous materials under international regulations, we could develop a hazard communication scheme that would clearly identify these shipments when transported in the United States, but that would not be confusing to foreign officials and transport personnel when transported in international commerce. For example, we could except such shipments from placarding requirements and instead require bulk packages containing combustible liquids to be marked COMBUSTIBLE LIQUID and NA1993 (the domestic identification number). These identifiers are not recognized internationally and so may be less likely to cause confusion or shipment delays overseas. Alternatively, we could adopt

DGAC's suggestion and provide an exception from marking and placarding requirements for high flash point combustible liquids.

#### *C. Expanded Exceptions for Domestic Transportation*

As the petition from the U. S. Custom Harvesters suggests, there are situations where current HMR requirements for the transportation of combustible liquids create an operational burden for those who use combustible liquids in agricultural and similar operations. Moreover, the HMR exception from regulation for combustible liquids in non-bulk packagings may lead shippers and users of combustible liquids to use less efficient transportation methods—such as utilizing several non-bulk packagings rather than a single bulk packaging or making multiple trips using non-bulk packagings—to avoid the regulatory costs associated with fully regulated bulk shipments. Less efficient transport methods may also be less safe transport methods if they increase the number of trips necessary to deliver the materials and the number of times the material must be handled before it is delivered to its destination.

We are considering expanding current exceptions applicable to the transportation of combustible liquids to accommodate unique operational requirements or needs. For example, as the U. S. Custom Harvesters petition suggests, we are considering whether to expand current exceptions applicable to non-bulk shipments of combustible liquids to shipments of less than a threshold amount, such as 3,785 L (1,000 gallons). Alternatively, we may wish to consider expanding current exceptions for hazardous materials that are transported in support of agricultural operations as specified in § 173.5, to include activities such as the harvesting operations described in the U. S. Custom Harvesters petition. For liquids, the maximum quantity authorized in § 173.5(b) is currently 1,900 L (502 gallons). Or we may wish to consider expanding the current materials of trade (MOTs) exceptions in § 173.6 to incorporate an exception for combustible liquids transported in bulk up to a maximum quantity, such as 1,500 L (400 gallons) as currently authorized for certain Class 9 mixtures or 3,785 L (1,000 gallons) as requested by the U.S. Custom Harvesters, in support of refueling operations or as a general exception for all combustible liquids.

#### *D. Combustible Liquids in Non-Bulk Packaging*

Currently, § 173.150(f)(2) specifies that the requirements of the HMR do not

apply to a material classed as a combustible liquid in a non-bulk packaging unless the combustible liquid is a hazardous substance, a hazardous waste, or a marine pollutant. Simply put, under these specific conditions, a combustible liquid in a non-bulk packaging is not subject to the HMR. Section 173.140 of the HMR defines a Class 9 miscellaneous hazardous material as a material which presents a hazard during transportation but which does not meet the definition of any other hazard class. Class 9 materials include any material which has an anesthetic, noxious or other similar property which could cause extreme annoyance or discomfort to a flight crew member so as to prevent the correct performance of assigned duties. It also includes any material that meets the definition in § 171.8 of the HMR for an elevated temperature material, a hazardous substance, a hazardous waste, or a marine pollutant.

Applied together, these two sections of the HMR indicate that a flammable liquid in a non-bulk packaging and reclassified as a combustible liquid, is not subject to the HMR, but could, nonetheless, be regulated under the HMR when it meets the criteria for Class 9 material, i.e., a marine pollutant. To illustrate, a material that is a marine pollutant, does not meet any other hazard class definition, and has a flashpoint between 140 °F and 200 °F, is classed as a Class 9 material under the IMDG Code and may be transported under the provision of §§ 171.22 and 171.23 (formerly § 171.12) as a Class 9 material. However, this same material could be classed as a combustible liquid under the HMR. Likewise, a material that is an excepted package for limited quantities for Class 7 (radioactive materials) could be transported as a combustible liquid because of similar language under the exception criteria for Class 7 (radioactive materials) found in §§ 173.421 and 173.422.

We believe there are instances when a shipment transported both domestically and internationally under these scenarios could cause confusion or undue hardship, may frustrate shipments, or could create an unnecessary risk along the transportation cycle. As previously noted, one of our objectives in reviewing the HMR is to increase international harmonization without sacrificing our safety goals. We believe an alternative may exist to maintain an acceptable level of safety in the transportation of hazardous substances and hazardous wastes as Class 9 materials, without their inclusion under the current combustible liquids

definition or Class 7 (radioactive materials) exceptions. Therefore, we are considering a proposal to remove the phrase “which does not meet the definition of any other hazard class” from the definitions of combustible liquids and Class 9 materials. In addition, we are considering listing “stand-alone” restrictions for each of these materials, and would rely on the Precedence of Hazard Table under § 173.2a for the proper classification of materials having more than one hazard. Because the section in the HMR regarding excepted packages for limited quantities of Class 7 (radioactive materials) also contains similar wording to the two classes noted above, we are also considering a revision to remove the phrase “meet the definition of a hazardous substance or hazardous waste” from § 173.422 and § 173.424.

These revisions may more clearly indicate that if a shipment of a material is a Class 9 or Class 7 material in a non-bulk packaging, it would be transported as a Class 9 or Class 7 material, respectively, and not a combustible liquid. We believe such revisions could reduce undue burden on the regulated community, mitigate the potential for the inaccurate or contradictory classification of Class 7 (radioactive materials), Class 9, and combustible liquid materials, and increase the level of safety during the transportation of these materials.

## V. Questions

PHMSA invites commenters to submit comments based on the above discussion and the following questions:

1. Should the HMR continue to apply to materials with a flashpoint above 60° C (140° F) and below 93° C (200° F)? What benefits would result from de-regulation of combustible liquids? What are the safety implications of such de-regulation? How would such de-regulation affect emergency response?

2. Should the HMR continue to permit Class 3 materials with flashpoints between 38° C (100° F) and 60° C (140° F) to be reclassified and transported as combustible liquids? What are the benefits of eliminating this reclassification exception? Would there be costs associated with eliminating this reclassification exception? What are the safety implications of eliminating the reclassification exception? How would elimination of the reclassification exception affect emergency response?

3. Should the HMR provide expanded exceptions for the transportation of combustible liquids? For example, should the HMR except combustible liquids below a certain threshold (e.g., not more than 1,893 L (500 gallons),

3000 L (793 gallons), 3,785 L (1,000 gallons), or 13,249 L (3,500 gallons) from packaging, hazard communication, or other requirements? What are the potential impacts on hazard communication and emergency response notification of such changes?

4. Should the HMR include expanded exceptions for farm operations or agribusinesses? Should the HMR include expanded materials of trade exceptions for persons who transport combustible liquids? What are the potential impacts on hazard communication and emergency response notification of such changes? Are there additional exceptions that should be considered?

5. Should the HMR continue to permit combustible liquids to be described using shipping names and identification numbers applicable to Class 3 materials? Should PHMSA adopt a requirement for all combustible liquids to be described as “Combustible liquid, n.o.s.”? For example, for hazardous material shipping names currently in the § 172.101 HMT, such as Paint, Diesel fuel, Fuel oil, Kerosene, Turpentine, Methallyl alcohol, etc. What safety benefits would result from the use of shipping descriptions unique to combustible liquid materials? How would such a change affect emergency response?

6. Should the HMR provide for use of a unique combustible liquid marking (e.g., the words “COMBUSTIBLE” or “COMBUSTIBLE LIQUID” in red letters on a white background) in place of COMBUSTIBLE placards and other hazard communication for bulk shipments of combustible liquids? Should the HMR provide for use of the domestic identification number, NA1993, on bulk packages utilizing a combustible liquid marking? What are the potential impacts on hazard communication and emergency response notification of such a change? Are there other practical alternatives to use of COMBUSTIBLE placards for bulk shipments?

## VI. Additional Issues

PHMSA will base any future proposal for changes on the suggestions and comments provided by interested parties and our own initiatives. Additionally, any proposals would include the analyses required under the following statutes and executive orders in the event we determine that rulemaking is appropriate:

### A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order (E.O.) 12866 requires agencies to regulate in the “most cost-



effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” We therefore request comments, including specific data if possible, concerning the costs and benefits that may be associated with revisions to the HMR based on the issues presented in this notice. A rule that is considered significant under E.O. 12866 must be reviewed and cleared by the Office of Management and Budget before it can be issued.

#### *B. Executive Order 13132*

E.O. 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. We invite state and local governments with an interest in this rulemaking to comment on any effect that revisions to the HMR relative to the transportation of combustible liquids may cause.

#### *C. Executive Order 13175*

E.O. 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that “significantly or uniquely affect” Indian communities and that impose “substantial and direct compliance costs” on such communities. We invite Indian tribal governments to provide comments if they believe there will be an impact.

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

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), we must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. “Small entities” include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. If you believe that revisions to the HMR relative to the transportation of combustible liquids would have a significant economic impact on small entities, please provide information on such impacts.

Any future proposed rule would be developed in accordance with Executive Order 13272 (“Proper Consideration of

Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts on small entities of a regulatory action are properly considered.

#### *E. Paperwork Reduction Act*

Section 1320.8(d), Title 5, Code of Federal Regulations requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. It is possible that new or revised information collection requirements could occur as a result of any future rulemaking action.

#### *F. Environmental Assessment*

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires Federal agencies to analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Counsel on Environmental Quality (CEQ) regulations order federal agencies to conduct an environmental review considering (1) The need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b). PHMSA welcomes any data or information related to environmental impacts that may result from a future rulemaking addressing the transportation of combustible liquids.

#### *G. Privacy Act*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://www.dot.gov/privacy.html>.

#### *H. International Trade Analysis*

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the

establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we would assess the effects of any rule to ensure that it does not exclude imports that meet this objective. Accordingly, any proposals would be consistent with PHMSA’s obligations under the Trade Agreement Act, as amended.

#### *I. Statutory/Legal Authority for this Rulemaking*

1. 49 U.S.C. 5103(b) authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.

2. 49 U.S.C. 5120(b) authorizes the Secretary of Transportation to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with standards adopted by international authorities. This notice considers potential amendments to the HMR that would maintain alignment with international standards by incorporating various amendments. The continually increasing amount of hazardous materials transported in international commerce warrants the harmonization of domestic and international requirements to the greatest extent \* \* \*. The majority of amendments in any harmonization rule should result in cost savings and ease the regulatory compliance burden for shippers engaged in domestic and international commerce, including trans-border shipments within North America.

#### *J. Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.



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**Magdy El-Sibaie,**

*Associate Administrator for Hazardous  
Materials Safety.*

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