



U.S. Department
of Transportation

**Research and
Special Programs
Administration**

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Mr. James D Thrift
Vice President, Regulatory Affairs & Corporate Relations
Agricultural Retailers Association
1156 15th Street, NW
Suite 302
Washington, DC 20005

Dear Mr. Thrift:

Thank you for your February 20, 2004 email posing additional questions concerning potential liability issues for agricultural retailers that provide hazardous materials to farmer customers who are required to produce security plans under the Hazardous Materials Regulations (HMR; 49 C.F.R. Parts 171-180). Your questions are a follow up to my February 19, 2004 letter to Mr. Richard Gupton, of your association. I have summarized your questions and will respond to them in the order you present them in your email.

1. Under the current HM-232 security plan requirements, what liability could a retailer face if an incident involving hazardous materials under the sole control of a purchaser occurs en route and the purchaser lacks a security plan or fails to adhere to an existing security plan required by federal regulation?

As I explained in my previous letter, the security plan requirements in Subpart I of Part 172 of the HMR apply to persons who offer for transportation or transport certain hazardous materials in commerce. An agricultural retailer who sells agricultural products such as fertilizers or pesticides to a farmer is an offeror for the purposes of the HMR and, thus, must develop and implement a security plan if it sells hazardous materials in the types and amounts listed in § 172.800(b). In accordance with § 172.802, the security plan must address personnel security, unauthorized access, and en route security.

The regulations do not require an agricultural retailer to verify that its customers have a security plan, nor do the regulations require the retailer to collect or review customer security plans. However, the retailer's security plan should indicate the measures it has taken to address en route security. For example, as I mentioned in my previous letter, an agricultural retailer may want to suggest to his customers that they take certain precautions while transporting the hazardous material from the retailer's facility to the customer's facility.

An agricultural retailer's potential liability stemming from a customer's en route incident involving hazardous material, where the customer lacked a security plan or failed to adhere to a security plan, will depend on various circumstances. If the retailer's security plan requires the retailer to sell covered hazardous materials only to customers who have developed and implemented security plans, then offering such hazardous materials to a customer without a security plan would likely be considered a failure to adhere to the retailer's security plan and, consequently, a violation of the HMR. However, the retailer is not responsible for ensuring that its customers adhere to their own security plans. Thus, if the incident occurs because a customer did not adhere to its own security plan, Research and Special Programs Administration (RSPA) would not hold the retailer liable for the customer's failure to adhere to its plan.

2. Does a retailer's en route security plan required by HM-232 only relate to hazardous materials under the control of that retailer?

For this question, I understand your use of the phrase "under the control of" the retailer to mean "offered by" the retailer. As previously discussed, the security plan requirements apply to a person that sells hazardous materials in the types and amounts listed in § 172.800(b). Thus, in accordance with § 172.802, the retailer's security plan must address personnel security, unauthorized access, and en route security for the covered materials that the retailer offers.

3. Under HM-232 or any other DOT regulation, does the retailer have any obligation to address the en route security of materials sold and under the sole control of the purchaser?

As previously explained, if the retailer offers hazardous materials in the amount covered by § 172.800(b), the retailer's security plan must address en route security for that material. The retailer is not specifically responsible for addressing the customer's en route security unless the retailer's security plan requires it to do so.

4. What are the specific liability consequences that could result from a retailer that sells hazardous materials to a farmer customer who fails to develop and adhere to a security plan and an incident occurs while a farmer customer is en route?

Again, the response depends on specific facts. If the retailer's security plan requires the retailer to sell covered hazardous materials only to customers who have developed and implemented security plans, then offering such hazardous materials to a customer without a security plan would likely be considered a failure to adhere to the retailer's security plan and, consequently, a violation of the HMR.

5. What types of measures would demonstrate a good-faith effort by retailers to do all they can to ensure the security of their shipments while in the hands of their customers?

Adhering to the security plan requirements demonstrates a good-faith effort on the retailer's part to ensure the security of its shipments. In addition, the retailer can implement certain procedures,

such as providing a handout to its customers that list security precautions the customer should consider. As I explained in my previous letter, such precautions could include: (1) to the extent practical, minimize transit time by going directly from the retailer to the destination; (2) to the extent practical, prevent unauthorized persons from gaining access to the shipment by monitoring the shipment during stops, locking the shipment inside the transport vehicle, securing the shipment to the transport vehicle, and/or securing closures on the container or package; and (3) report suspicious incidents or events to local or federal law enforcement officials.

From an enforcement perspective, RSPA will be looking to determine whether a retailer has a security plan that is based on a security risk assessment and addresses the three components listed in the HMR. Generally speaking, RSPA will not second guess decisions that a retailer makes on how to address security issues for its specific facility and operations.

I hope this information is helpful. If you have additional questions, please contact me or Donna O'Berry of my staff on (202) 366-4400.

Sincerely

A handwritten signature in black ink, appearing to read "Joseph Solomey", with a long horizontal flourish extending to the right.

Joseph Solomey
Assistant Chief Counsel
Hazardous Materials Safety and Emergency
Transportation Law Division