



U.S. Department  
of Transportation

**Research and  
Special Programs  
Administration**

Office of the  
Chief Counsel

400 Seventh Street, S.W.  
Room 8407  
Washington, D.C. 20590

Phone: (202) 366-4400  
Fax: (202) 366-7041

FEB 19 2004

Mr. Richard D. Gupton  
Director of Legislative Policy & Counsel  
Agricultural Retailers Association  
1156 15th Street, NW  
Suite 302  
Washington, DC 20005

Dear Mr. Gupton:

Thank you for your December 9, 2003 letter to Mr. Robert McGuire, Associate Administrator for Hazardous Materials Safety, 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). Since your questions pertain to legal issues, I am responding to your letter instead of Mr. McGuire. I have summarized your questions and will respond to them in the order you present them in your letter.

1. Do the new Department of Transportation (DOT) hazardous materials security regulations preempt all related state transportation and tort laws and regulations?

The criteria for preemption of non-Federal requirements concerning the transportation of hazardous materials are set forth in 49 U.S.C. § 5125. In summary, a non-Federal requirement is preempted, unless it is otherwise authorized by Federal law, when:

- (1) it is not possible to comply with both the non-Federal requirement and the Federal hazardous materials transportation law requirements or requirements in the HMR;
- (2) the non-Federal requirement is an obstacle to accomplishing and carrying out Federal hazardous materials transportation law or the HMR;
- (3) the non-Federal requirement pertains to any of five "covered subjects" and is not "substantively the same as" requirements in the Federal hazardous materials transportation law or the HMR;
- (4) a non-Federal routing requirement does not comply with regulations of the Federal Motor Carrier Safety Administration; or

(5) a fee related to the transportation of hazardous material is not fair or is used for a purpose that is not related to transporting hazardous material.

If the non-Federal requirement meets any of the above criteria, then Federal preemption law would conceivably apply. However, there is no automatic finding of preemption solely because one of the above criterion may apply. Instead, the Research and Special Programs Administration (RSPA) must evaluate a non-Federal requirement to determine whether, as applied and enforced, the regulation is covered by a particular preemption standard. We will consider questions as to whether specific non-federal security regulations are pre-empted on a case-by-case basis, applying the principles outlined above.

2. What measures are required and/or recommended by DOT for a retailer to address en route security?

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, 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. 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.

3. Is a retailer exempt from liability if a farmer customer covered under new hazardous materials security regulations fails to implement a security plan, e.g. fails to lock the shipment during stops or allows unauthorized persons access to the shipment, and an incident occurs as a result while that customer is en route on a public street or highway with the hazardous material?

For this question, I understand your use of the phrase "implement a security plan" to mean "adhere to a security plan." As discussed above, the agricultural retailer is required to have a security plan that addresses en route security. The retailer is not responsible for ensuring that its customers adhere to their own security plans. Thus, in the situation you describe, RSPA would not hold the retailer liable for the customer's failure to adhere to its plan.

4. What, if any, consequences or liability issues could result from a retailer that provides hazardous materials to a farmer customer covered under the new DOT hazardous materials security regulations if the retailer fails to implement a security plan and an incident occurs as a result while the customer is en route?

For this question, I understand your use of the phrase “implement a security plan” to mean “develop and adhere to a security plan.” As explained above, the retailer’s security plan must address personnel security, unauthorized access, and en route security. While the retailer is not required to verify that its customers have a security plan, its own security plan must address en route security for the materials covered by the plan. For example, 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. Does DOT accept all liability when a retailer does not verify whether a farmer customer covered by the hazardous materials security regulations has implemented a security plan and other requirements and an incident occurs while a farmer customer that has no security plan is in route on a public street or highway with hazardous materials that fall under the new regulations?

No, DOT does not accept any liability for the failure of an offeror or transporter to comply with the security plan requirements. Furthermore, a retailer is not shielded from liability merely because it has developed and implemented a security plan. However, by adhering to the security plan requirements, the retailer will demonstrate a good-faith effort to do all it can to ensure the security of its shipments.

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



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