

August 15, 2003

TO: INDEPENDENT LUBRICANT MANUFACTURERS ASSOCIATION

RE: HAZARDOUS MATERIALS SECURITY REGULATIONS

The Department of Transportation's ("DOT") Research and Special Programs Administration ("RSPA") published new regulations pertaining to hazardous materials ("hazmat") transportation security on March 25, 2003. (68 Fed. Reg. 14510 (March 25, 2003)). ILMA has discussed these new regulations and their effect on Association members in articles in *Compoundings* and *FlashPoint*. RSPA's new regulations require, in part, that: (1) any company involved in the shipping or carriage of hazmats in certain bulk quantities or formats that must be placarded under the Agency's Hazardous Materials Regulations ("HMRs") develop and implement security plans; and (2) all companies involved in the shipping or carriage of hazmats incorporate a security component into their employee training programs for hazmats. The first compliance deadline under these new RSPA regulations is September 25, 2003.

ILMA members who ship or transport hazmats in certain quantities will be subject to both of the above-mentioned elements of the new regulations. Those ILMA members who ship or transport hazmats, but who are not subject to the security plan requirements, will be subject to certain employee training mandates. While there is no "one-size-fits-all" security plan, the Association has prepared a "sample" security plan that can be used by members as a starting point for their compliance activities. It can be downloaded from the SHERA Committee page, under "Industry Letters" by going to www.ilma.org and choosing "Industry Resources" then "SHERA Committee." This memorandum, prepared by ILMA Counsel Jeff Leiter, summarizes RSPA's new hazardous materials security regulations. Please contact Cathy Barmoy (cbarmoy@ilma.org)(703-684-5574) or Jeff Leiter (jleiter@cavtel.net)(703-752-1080), if you have any questions concerning this subject.

Background and Applicability

RSPA's HMRs regulate the shipment and carriage of hazmats in commercial vehicles. Many ILMA members are subject to the HMRs because they ship or transport flammable or combustible liquids that are considered "Class 3" materials under the hazmat rules. In addition, some ILMA members are subject to the HMRs because the hazmats they are shipping or transporting require identification and placarding under the hazmat rules.

As a result, under the new hazmat security regulations, an ILMA member needs to determine whether these new rules apply to its operations. The following hazmat activities likely will trigger the requirement for an ILMA member to develop and implement a security plan:

1) A shipment of a quantity of hazmats in a bulk packaging having a capacity greater than or equal to 3,500 gallons for liquids or gases (or 468 cubic feet for solids);

2) A shipment in other than a bulk packaging of 5,000 pounds gross weight or more of one class of hazmats for which placarding of a vehicle, rail car or freight container is required for that class; or,

3) A quantity of hazmats that require placarding under the HMRs.

See 49 C.F.R. 172.800 for the precise regulatory language. In addition, the above list is only a partial list of hazmat activities that trigger the security plan requirement. As a “rule of thumb,” those ILMA members subject to the annual hazmat registration program likely are subject to the new hazmat security regulations. However, each member company should determine individually whether it must comply with these new regulations.

Development and Implementation of a Security Plan

ILMA members subject to the new hazmat security regulations must develop a security plan by *September 25, 2003*. As noted above, there is no “one-size-fits-all” security plan. RSPA promulgated a performance-oriented standard, relying on a company to assess its security risks. Stated differently, the Agency does not expect security plans to be uniform. However, all security plans must include an assessment of the possible transportation security risks and the appropriate measures to address the assessed risks. RSPA expects that these measures will vary commensurate with the level of threat at a particular time. 49 C.F.R. 172.802(a).

RSPA has developed a security template that can be used as a methodology to identify those points in the transportation process where security measures can be enhanced. The Agency posted the security template on its website at <http://hazmat.dot.gov/rmsef.htm>.

In addition, there are other security risk assessment tools that ILMA members might find useful. The American Petroleum Institute and the National Petrochemical and Refiners Association have published two documents – *Security Vulnerability Assessment Methodology for the Petroleum and Petrochemical Industries* (http://api-ec.api.org/filelibrary/SVA_2003_new.pdf) and *Security Guidance Manual* (http://api-ec.api.org/filelibrary/Security_Guidance2003.pdf) – that contain detailed information. The former document was “field tested” at a lube plant.

It is important for ILMA members, as part of their overall risk assessment, to determine the level of detail in their security plans based on the threats identified for each hazmat. The Agency says that factors that can be taken into account include the type(s) of hazmats transported, the quantity transported, the area to or from which the material is shipped, and the mode of transportation used.

RSPA requires that, at a minimum, the security plan must address three elements: (1) personnel security; (2) unauthorized access; and (3) en route security. 49 C.F.R. 172.802(a).

As to personnel security, the security plan must include measures to confirm the accuracy of information provided by job applicants for positions that involve access to and handling of the hazmats subject to the security plan. However, the measures must be consistent with Federal and State employment and privacy requirements. At a minimum, RSPA expects that employers check information related to an applicant's recent employment history, references and citizenship status. 49 C.F.R. 172.802(a)(1).

The security plan must include measures to address the assessed risk that unauthorized persons may gain access to either the hazmats or transportation vehicles that convey them. 49 C.F.R. 172.802(a)(2). RSPA considers "unauthorized persons" to be members of the general public – that is, persons not employed by the company, unless specifically authorized to have access to either the hazmats or transportation vehicles. It is important, as part of this element of the security plan, to evaluate carefully the nature of and activities at the relevant facilities.

RSPA requires that security plans also include measures to address the assessed security risks associated with en route transportation of hazmats from origin to destination, including shipments stored incidental to movement. 49 C.F.R. 172.802(a)(3). The Agency expects carriers to have more detailed security plans than shippers, although it believes shippers play a critical role because they have more information about the hazmats and because they exercise some control over carrier selection. Accordingly, ILMA members as shippers should ensure that any carriers they hire have security plans by September 25, 2003, that can accommodate the hazmats they offer for shipment. *See* 68 Fed. Reg. at 14517.

As previously noted, although there are required elements, RSPA did not include a prescriptive list of actions that must be included in a security plan. Again, companies are expected by the Agency to customize their security plans based on their own risk assessments. Moreover, if a shipper or carrier determines that its security risks for the hazmats it handles are relatively small, then the security plan can be limited in scope and complexity. 68 Fed. Reg. 14514. ILMA members, thus, should use the security vulnerability assessments documents noted above to ensure that they have made "good faith" and accurate risk assessments.

The security plan must be reduced to writing and must be retained as long as it is in effect. Copies (or portions) of the security plan must be made available to employees

responsible for implementing the plan. The security plan must be revised and updated to reflect changing circumstances. 49 C.F.R. 172.802(b).

Further, to avoid duplication, companies can rely on an alternative security plan that conforms to regulations or guidelines used by other Federal agencies or international or industry organizations. However, the alternate plan must address all of the specific requirements in the RSPA security plan. 49 C.F.R. 172.804.

RSPA said that its enforcement policy will be “flexible,” considering that the Agency expects security plans to vary from company to company. However, the Agency added that it will evaluate a security plan in an enforcement inspection by looking at both the security plan and the risk assessment document the company used in developing the security plan. Accordingly, it is a “good idea” to create a paper trail, documenting the creation of the security plan.

Sample Plan

ILMA has prepared a “sample” security plan for use by ILMA members as one starting point in their compliance activities. As noted several times, above, there is no one “standard” plan. As a result, ILMA members should view the sample plan as a suggested outline for their customized plans. The ILMA sample plan does not contain a security risk assessment. It can be downloaded from the SHERA Committee page, under “Industry Letters” by going to www.irma.org and choosing “Industry Resources” then “SHERA Committee.”

Employee Training

RSPA specifies two types of employee training under its new hazmat security regulations – Security Awareness Training and In-depth Security Training. 49 C.F.R. 172.704(a). Security Awareness Training must be given to each hazmat employee, including those employed by employers *not* subject to the new security plan requirements. Security Awareness Training basically is an addition to existing hazmat employee training for all shippers and carriers. This training must include an awareness of the security risks associated with hazmat transportation and the methods designed to enhance transportation security. The training must be completed no later than the date of the first scheduled recurrent training after March 25, 2003, and in no case later than March 25, 2006. 49 C.F.R. 172.704(a)(4). RSPA is expected to release a training module to assist companies in satisfying the Security Awareness Training requirement.

In-depth Security Training must be provided by each company subject to the security plan requirement by December 22, 2003. This training must address company security objectives, specific security procedures, employee responsibilities, actions to take in the event of a security breach, and organizational security structure. 49 C.F.R. 172.704(a)(5). RSPA said that analogous OSHA or EPA training can be relied on to the extent that such training includes the components specified in the Agency’s regulations. 49 C.F.R. 172.704(b).

Conclusion

ILMA members who meet the applicability requirements must develop a security plan by September 25, 2003. RSPA has given these companies considerable flexibility in assessing security risks and describing the steps it will take to minimize those risks, including personnel risks, unauthorized access, and en route security. Employee training also is required by the new regulations. ILMA has prepared a sample plan to assist its members in meeting their compliance obligations. It can be downloaded from the SHERA Committee page, under “Industry Letters” by going to www.irma.org and choosing “Industry Resources” then “SHERA Committee.”

Please contact Cathy Barmoy or Jeff Leiter at the above-mentioned email addresses or telephone numbers if you have any questions.