

characterize a security plan in terms of addressing and reducing security risks presented by the transportation of certain hazardous materials in commerce.

Related to the liability concern, commenters ask how the proposed security plan requirement would be enforced. "Any measurement of a security plan would be entirely subjective. * * * If our products were somehow involved in a terrorist act, does this mean our security plan failed? And if so, what enforcement action will be taken?" (Airgas, Inc.) Other commenters ask what standard will be used to determine whether security plans comply with regulatory requirements.

Each security plan will differ because each security plan will be based on a company's assessment of the security risks associated with the materials it ships or transports. There is no "one-size-fits-all" security plan that will be appropriate for each company's individual circumstances; similarly, there is no "one-size-fits-all" enforcement standard that can be applied to individual companies. We will examine a company's security plans, including the vulnerability assessment on which the security plan is based, as necessary to ascertain that a company has a plan in place, that it includes the components specified in this final rule, and that its personnel have been trained concerning the plan's specific components.

The fact that a product is used in a terrorist, criminal, or destructive action does not automatically mean that the security plan failed or that Federal security requirements are inadequate. A security plan should represent a company's best, good-faith effort to address identified security risks. However, plans must be updated as new information and technology become available. Compliance with Federal regulatory standards may constitute an effective defense in private litigation. However, failure to comply with those standards can be argued to constitute negligence.

Several commenters suggest that the requirement for security plans should be applied more narrowly than proposed in the NPRM. For example, shipments of bulk packagings that contain residues of certain hazardous materials must be placarded and, thus, would be subject to the proposed security plan requirement. Similarly, shipments of certain corrosive or flammable materials in Packing Groups II or III, such as institutional cleaning products, must be placarded in some circumstances and, thus, would be subject to the proposed

security plan requirement. Commenters suggest that "the requirement for an offeror or transporter to develop and implement a security plan should more appropriately be predicated upon the types (in terms of hazard) and/or quantities of hazardous materials offered or transported by the person, rather than on whether that person is required to register. * * * [S]ecurity plans should only be required for offerors and transporters of hazardous materials that have the potential to pose a significant threat from a security perspective if those hazardous materials were to fall into the wrong hands." (Conference on Safe Transportation of Hazardous Articles, Inc.) We agree that a requirement for security plans should apply only to those materials that present significant security threats. The registration and select agent and toxins lists cover the materials that present the most significant security threats in transportation and provide a relatively straightforward way to distinguish materials that may present a significant security threat from materials that do not. Further, the requirements for security plans proposed in the NPRM and adopted in this final rule permit a shipper or carrier to develop a security plan that assesses the specific security risks of the materials to be transported and put into place measures that are commensurate with the assessed risks. If a shipper or carrier determines that the security risks of the materials it handles are relatively small, then its security plan may well be limited in scope and complexity.

One commenter suggests that materials such as propane do not present a security risk sufficient to require development of shipper and carrier security plans. "Propane has an excellent safety record both at the storage site and in transit. Propane's narrow range of flammability, its tendency to disperse rapidly if released, and the robust, Federally-regulated systems used to contain the product all support the assertion that propane should not be considered a weapon of mass destruction." (National Propane Gas Association) We disagree. Propane is among the liquefied compressed gases most commonly transported throughout the nation. When liquid propane is released into the atmosphere, it quickly vaporizes into the gaseous form that is its normal state at atmospheric pressure. This happens very rapidly, and in the process, the propane combines readily with air to form fuel-air mixtures that are ignitable over a range of 2.2 to 9.5 percent propane by volume. If an ignition source is present in the vicinity

of a highly flammable mixture, the vapor cloud ignites and burns very rapidly (characterized by some experts as "explosively"). Based on these characteristics and the frequency with which propane is transported in this country, we believe that propane presents a sufficient security risk to warrant the imposition of security plan and security training requirements.

Another commenter requests an exception from the proposed security plan requirements for petroleum marketer transporters "given the already heightened level of security practiced by this unique branch of hazardous materials transporters." (Ohio Petroleum Marketers Association) In support of this request, the commenter cites regulations such as State fire codes, workers compensation laws, and Federal transportation safety laws "that reduce the potential for certain hazardous materials to be targets for terrorists, and that maintain a high level of security awareness for hazardous materials employees." Again, we disagree. The regulations cited by the commenter are focused on safety, not security. Products transported by petroleum marketers, such as fuel oil and motor fuel, can potentially be used as weapons of opportunity or can be combined with other materials to construct weapons of mass destruction. Indeed, trucks loaded with petroleum products have been used in terrorist attacks on at least two occasions in recent months overseas. In addition, on June 21, 2002, the Federal Bureau of Investigation disclosed that it had information that terrorists using fuel tanker trucks might try to attack fuel depots or Jewish schools or synagogues. The warning was based on interviews with captured al Qaeda fighters and other sources. Therefore, we reject the requested exceptions.

A number of commenters note that, as drafted, the NPRM suggests that the proposed security plan requirements apply to every shipment offered for transportation or transported in commerce by a person required to register by subpart G of part 107. For example, one commenter says, "A corporation subject to the hazmat registration requirements may easily have more than one facility—some of which might perform operations that would benefit from a security plan, others of which might not. It would be patently unreasonable to require each facility operated by the same corporation subject to hazmat registration requirements * * * develop and implement a security plan regardless of whether the particular facility transports hazardous materials