

subject to those requirements.” (Utility Solid Waste Activities Group) We agree. Our intention in the NPRM was for those shipments that are listed as triggering the registration requirements in subpart G of part 107 to be subject to security plan requirements, not for every shipment transported by a registered entity or every facility operated by a registered entity. This final rule clarifies that persons who offer for transportation or transport any of the materials listed in subpart G of part 107 or a select agent or toxin regulated by CDC must develop and adhere to security plans applicable to the listed materials.

The NPRM proposed that a security plan address the security of shipments stored incidental to movement in transportation. Several commenters are concerned about the applicability of the security plan requirement to persons that do not offer or transport hazardous materials in commerce, but who may operate facilities at which hazardous materials are stored during transportation. One commenter notes that “[i]n many situations, HAZMAT are delivered to or through facilities operated by entities that are not subject to the security plan requirements because they may not be legally required to register.” (Dangerous Goods Advisory Council) We agree that the final rule should clarify responsibility for security plans applicable to hazardous materials stored incidental to movement in transportation. Generally, these hazardous materials will be stored at a shipper or carrier-owned or -operated facilities, and the shipper or carrier will be responsible for developing a security plan. In this final rule, the requirement for developing and adhering to a security plan applies to persons who offer for transportation or transport hazardous materials in commerce, including loading, unloading, or storage operations incidental to the movement of hazardous materials in commerce.

Another commenter proposes that we adopt a definition for “storage incidental to movement” to distinguish storage that is part of transportation, and therefore subject to security plan requirements, from storage that is not part of transportation. For purposes of this final rule, storage incidental to movement of a hazardous material in commerce is storage that takes place between the time that a hazardous material is offered for transportation to a carrier and the time it reaches its destination. This definition is consistent with long-standing administrative determinations and letters of interpretation concerning the

applicability of the HMR to materials stored incidental to their movement in commerce. We note in this regard that this agency is currently engaged in a rulemaking to clarify the applicability of the HMR to specific functions and activities, including storage of hazardous materials during transportation (HM-223; RSPA-98-4952). The NPRM issued under HM-223 proposed to define “storage incidental to movement” to mean “storage of a transport vehicle, freight container, or package containing a hazardous material between the time that a carrier takes physical possession of the hazardous material for the purpose of transporting it until the package containing the hazardous material is delivered to the destination indicated on a shipping document, package marking, or other medium, or, in the case of a private motor carrier, between the time that a motor vehicle driver takes physical possession of the hazardous material for the purpose of transporting it until the driver relinquishes possession of the package containing the hazardous material at its destination and is no longer responsible for performing functions subject to the HMR.” We are currently in the process of evaluating comments to the HM-223 NPRM. If a final rule issued under docket HM-223 revises the definition of “storage incidental to movement” in a way that affects the applicability to such storage of the security plan requirements in this final rule, we will address such revision, including its implications for security plans and any transition time necessary to implement changes, in the HM-223 final rule.

Most commenters support “the flexibility RSPA provides in [the] proposal to regulated entities in how they go about meeting [the security plan] requirement.” (National Association of Chemical Distributors) These commenters agree that “the regulated community needs the flexibility to select those elements [of a security plan] that are consistent with their methods of operation.” (Independent Fuel Terminal Operators Association) Other commenters, however, are concerned that the elements suggested in the NPRM for possible inclusion in a security plan are “extremely general. In fact, they are so general as to be either unenforceable, or worse, subject to widely varying interpretations by field inspectors and adjudicators. The security plans and codes that have been developed by industry and are being further refined at the current time are far more specific and useful in addressing the security

issues facing the various hazardous materials moving in commerce. If it is RSPA’s purpose simply to require security plans for transporters and offerors without specifying the nature or content of those plans, [we] have no objection. If on the other hand, RSPA intends to somehow oversee the substance of such plans, the proposed requirements are too vague to be enforced.” (The Chlorine Institute) Similarly, other commenters do not agree with the NPRM approach to list non-mandatory items in the regulatory text for security plans, such as the specific elements listed in the NPRM for possible inclusion in a security plan to address en route shipment security issues. These commenters suggest that recommendations should not be made part of regulatory text because of enforcement and liability concerns. Additionally, commenters are concerned that establishing specific requirements for security plans could be counter-productive. One commenter cites as an example the proposal in the NPRM that a security plan must include a process to verify information provided by job applicants. “While a natural temptation would be to specify exactly the kind of checks to be applied, doing so would merely lay out a road map for the potential terrorist seeking employment with a carrier. If a check of X, Y, and Z is required, the terrorist organization will select operatives who can pass a check of X, Y, and Z, but perhaps not A or B. The essence of security is unpredictability—concept in conflict with regulatory precision.” (CSX Transportation)

We carefully considered the comments offered concerning the security plan requirements proposed in the NPRM. We continue to believe that, if it is to be effective, a regulation mandating development and implementation of a security plan must provide sufficient flexibility so that a shipper or carrier can adapt its requirements to individual circumstances. Thus, the requirement for a security plan adopted in this final rule sets forth general requirements for a security plan’s components rather than a prescriptive list of specific items that must be included. In this final rule, the proposed security plan requirements are modified as follows:

*Applicability.* The security plan requirement applies to persons who offer for transportation or transport in commerce one or more of the hazardous materials listed in subpart G of 49 CFR part 107 or a select agent or toxin regulated by CDC. The security plan requirement also applies to persons who operate facilities at which one or more