

DHS Publishes Interim Final Rule Implementing Chemical Facility Anti-Terrorism Standards

On April 9, 2007, the Department of Homeland Security ("DHS") published in the Federal Register interim final rules ("Final Rule") implementing the legislative mandate set forth in Section 550 of the Homeland Security Appropriations Act of 2007. Under the Chemical Facility Anti-Terrorism Standards ("CFATS"), DHS will now require certain facilities ("Covered Facilities") to submit for approval Site Vulnerability Assessments ("SVAs") and Site Security Plans ("SSPs").

With the exception of one element that remains unresolved and subject to further comment, the Final Rule is effective June 8, 2007. The exception is Appendix A, which DHS has added to the Final Rule. Appendix A contains a list of substances, each with a Screening Threshold Quantity ("STQ"), which will be used as an integral part of the process to determine which facilities present a high level of security risk and, therefore, are Covered Facilities. DHS is seeking comments on Appendix A, with respect to both the identities of these "DHS Chemicals of Interest" and their respective STQs. Comments may be submitted to DHS on or before May 9, 2007. (See further discussion under the Summary of Key Provisions, below.)

Appendix A notwithstanding, the Final Rule is substantially similar to the proposed rules published by DHS on December 28, 2006. (We previously summarized the draft rules issued by DHS in December 2006; see SAFETY Act Update, January 10, 2007.) This Alert summarizes the most critical provisions of the Final Rule and provides a comment on its interplay with and impact on the SAFETY Act.

Final Rule; Summary of Key Provisions

Appendix A: This list of "DHS Chemicals of Interest" was not in the draft rule. DHS has decided to use the list, with Screening Threshold Quantities, as a tool in determining whether a facility poses a high risk. DHS states that Appendix A was derived from EPA's RMP list, the Chemicals Weapon Convention and the list of hazardous materials regulated by DOT. If a facility has an Appendix A substance at levels exceeding the STQ it must complete the "CSAT Top-Screen" (see discussion below regarding Top-Screen).

The use of Appendix A as a screening tool raises numerous issues and concerns. The list and its application do not, for example, distinguish between manufacturing facilities and warehouses. Accordingly, the storage of an Appendix A substance above an STQ will

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SAFETY Act Implications of the Proposed New Rules

The SAFETY Act, enacted on November 25, 2002, is ground-breaking legislation that can eliminate or dramatically reduce the tort liability of companies whose anti-terror products or services fail to prevent, interdict or mitigate a terrorist act. Claims stemming from a certified act of terrorism relating to a DHS-qualified anti-terror technology ("ATT") product or service designed to prevent, detect, deter or limit the harmful effects of terrorist attacks: (1) may only be brought against "Sellers" of the ATT; (2) may only be brought in federal court; (3) may not result in the imposition of punitive damages; and (4) can, at most, result in a damage award up to the limit of the Seller's insurance coverage. Sellers who receive a Certification from DHS for their products and/or services receive these same protections, plus one significant additional level of tort protection -- claims against such Sellers arising out of acts of terrorism are subject to presumptive dismissal unless fraud or willful misconduct in the application process is established by clear and convincing evidence.

SAFETY Act rules recently issued by DHS make it clear that Sellers of integrated systems and services are eligible for SAFETY Act coverage. Plants that are conducting vulnerability assessments, systematically auditing and upgrading their physical and cyber security measures, and coordinating emergency response planning with their local communities are providing integrated ATT systems and services.

Clearly, plants that are "covered facilities" under the new regulations are eligible for SAFETY Act coverage. Accordingly, the proposal and adoption of these interim final rules underscores both the eligibility for and value of SAFETY Act coverage for covered facilities.

For additional details on the SAFETY Act, see prior SAFETY Act Alerts at:

<http://www.mckennalong.com/alerts-SAFETYAct>

require a warehouse to complete the Top-Screen. This is particularly problematic because many of the STQs are set at “Any Amount,” while in other instances the storage of materials with small concentrations of an Appendix A substance can exceed many of the low threshold STQs (e.g., 2000 lbs.). As a result, large numbers of facilities will be required to submit the Top-Screen.

Companies should quickly review Appendix A, including the STQs, and determine which of its facilities and operations will be required to complete Top-Screen. Unfortunately, many companies may conclude that the effect of adding Appendix A is that facilities that arguably were not among those intended to be covered by the federal law adopted to secure high risk chemical facilities will nevertheless be required to engage in this burdensome regulatory process. Companies in this position should consider submitting comments to DHS by the May 9 deadline. We would be pleased to assist in that process.

- **Designation as Covered Facility:** The ultimate decision as to whether a facility becomes a Covered Facility lies within the discretion of DHS, based on information the facility submits. A facility can be compelled to submit relevant information if either: (a) DHS contacts the facility directly or if the facility meets certain criteria DHS may set forth in a Federal Register notice; or (b) if the facility possesses Appendix A substances in amounts equaling or exceeding the STQ for that substance.
- **Top-Screen:** Facilities required to submit information to DHS must use the Top-Screen process to be developed by DHS. The information provided through Top-Screen will be one of several factors used by DHS to determine whether a facility is high risk, and therefore a Covered Facility.
- **Tiering:** In addition to using the information obtained through Top-Screen to make the Covered Facility determination, DHS will also use it to place each Covered Facility into one of four preliminary risk-based tiers. Final tiering decisions will be made by DHS after it reviews the SVAs submitted by Covered Facilities. DHS will use the tiers (Tier 1 facilities present the most significant risks, Tier 4 the least) to determine the types and intensity of security measures a facility must implement.
- **Schedule:** Facilities that possess any Appendix A substance in excess of its STQ must submit the Top-Screen within 60 days of the effective date of Appendix A. Following review of the Top-Screen information, DHS will notify the facility, which will then have 90 days to submit its SVA. Following review of the SVA and yet another DHS notice, the facility must submit its SSP within 120 days. Tier 1 and 2 facilities must resubmit their Top-Screen, SVAs and SSPs within two years, Tiers 3 and 4 within three years.
- **SVAs:** Covered Facilities must submit SVAs, utilizing the Chemical Security Assessment Tool (“CSAT”) developed by DHS. The SVAs must include Asset Characterization, Threat Assessment, Security Vulnerability Analysis, Risk Assessment and Countermeasures Analysis.
- **SSPs:** Similarly, Covered Facilities must submit SSPs, again utilizing CSAT. The SSP must address each vulnerability identified in the SVA and must describe how each risk-based performance standard will be met or exceeded.
- **Risk-Based Performance Standards:** The Final rule identifies numerous performance standards that must be met (e.g., secure perimeter access, secure site assets, deter cyber sabotage, develop and implement an emergency response plan, etc.). DHS intends to issue guidance on the application of these standards to the four tiers, noting that “the acceptable layering of measures used to meet these standards will vary by risk-based tier.”
- **Alternative Security Program (“ASP”):** In limited circumstances, Covered Facilities can submit ASPs that will achieve equivalent levels of security in lieu of the SVAs and SSPs required by DHS under CSAT. Tier 4 facilities may submit an ASP for either the SVA or SSP. Tier 1, 2 and 3 facilities, however, may submit an ASP only for their SSP; they may not do so for their SVAs.
- **DHS Review/Approval:** SVAs and SSPs will be subject to DHS review and approval. Following SVA approval, SSP approval proceeds in two phases. First, DHS will review the documentation and, if it preliminarily approves, it will issue a Letter of Authorization. Second, DHS will inspect the facility and, where appropriate, issue a Letter of Approval. The facility will thereafter implement the approved SSP.

- **Preemption:** DHS has tried to further articulate and support its position with respect to the preemptive effects of the Final Rule. First, in the Preamble, DHS argues that the underlying legislation creates “conflict preemption” but not “field preemption.” The legal significance of this position, if correct, is that the Final Rule does not so fully occupy the field (of chemical site security) so as to preempt any state law touching on the subject. Instead, state laws are preempted only to the extent that they would conflict with, interfere with, hinder or frustrate the Final Rule. Second, the Final Rule provides that a Covered Facility may seek review by DHS of a state law provision to determine if it is preempted. DHS may then issue an opinion on the preemption question.

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