

New Homeland Security Regulations for High-Risk Chemical Facilities Cast Broad Regulatory Net

by Steven Siros

In April 2007, the Department of Homeland Security ("DHS") released an interim final rule (effective June 8, 2007) that imposes comprehensive security regulations on high-risk chemical facilities. These new regulations will require high-risk chemical facilities to prepare and submit Security Vulnerability Assessments and Site Security Plans, and then to update those plans on a periodic basis. The new regulations provide the DHS with the ability to impose civil penalties of \$25,000 per day and to shut down non-compliant facilities.

As a preliminary matter, however, in order for DHS to make its determination whether a facility constitutes a "high-risk chemical facility," the new regulations impose reporting obligations on many facilities that are unlikely to view themselves as "high-risk chemical facilities," or chemical facilities at all, for that matter. More specifically, these new regulations provide that any facility that possesses, at any one time, any of the DHS "Chemicals of Interest" in a quantity at or above a "Screened Threshold Quantity" ("STQs") is deemed to be a "covered facility" that must submit what is referred to

in the regulations as a "Top Screen" assessment. The Top Screen assessment will require covered facilities to respond to a series of questions concerning the specific chemical(s) manufactured, processed, used, stored at, or distributed by the facility.

The DHS will then review the Top Screen assessment to determine whether the facility is a "high-risk chemical facility" and if so, what specific risk tier the facility will fall into. Per the comments in the interim rule, the specific factors that will be relied upon by the DHS to make these risk determinations are deemed to be sensitive, anti-terrorism information, and therefore, will not be made publicly available.

The specific Chemicals of Interest and STQs are forth in the draft Appendix A to the interim final rule. However, Appendix A is not final, and comments on the chemicals listed in the appendix and the proposed STQs are being accepted by the DHS through May 9, 2007. It is expected that by June 8, 2007 or shortly thereafter, Appendix A will be finalized. At that time, any facility that possesses one or more of the chemicals listed in the Appendix at

or about the STQ will have 60 days to complete and submit the Top Screen assessment. There are currently more than 300 chemicals listed in the draft Appendix A, and some of these chemicals have very low STQs (for example, the STQ for nitric oxide and phosphorus is "any amount"). As such, it is anticipated that many facilities will be required to submit a Top Screen assessment. Detailed directions for accessing and completing the Top Screen assessment are available on the DHS website.

In conclusion, the only obligation currently imposed by the new regulations is that upon finalization of Appendix A, facilities will need to review the list of chemicals and STQs to determine if they are "covered facilities" and therefore obligated to submit a Top Screen assessment. If so, the covered facilities will have 60 days to complete and submit that assessment. The DHS will then review the submission and notify individual facilities if they are designated "high-risk chemical facilities." That notification will then trigger the obligation to prepare and submit the Site Security Plan and Vulnerability Assessment.

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