

Department of Homeland Security Revises Chemicals of Interest in Chemical Facility Regulation

On April 9, 2007, the Department of Homeland Security (“DHS” or “the Department”) issued an interim final rule implementing its statutory mandate to regulate the security of high risk chemical facilities.¹ The regulation set forth a tiered process for chemical facilities to address potential terrorist threats based upon the perceived level of risk. The rule included a proposed table of Chemicals of Interest (Appendix A). Companies possessing chemicals on this list in excess of specified thresholds will be affected by the rule. On November 20, 2007, DHS published a rule finalizing the list in Appendix A.² Facilities that possess or store chemicals of interest in excess of the thresholds will have until January 19, 2008 to submit a “Top Screen” questionnaire from which DHS will assign each facility a risk category.

Because, in many cases, the Appendix A chemicals have relatively low thresholds, many facilities which use or store modest amounts of these chemicals may be regulated as “chemical facilities” under this rule, including many retail establishments, storage facilities, manufacturing facilities, and educational and medical institutions. Certainly, chemical facilities and petrochemical operations will trigger application of the rule.

STRUCTURE OF THE CHEMICAL FACILITY ANTI-TERRORISM STANDARDS

The regulatory program is designed to lower risks posed by certain chemical facilities. In that regard, it uses a

¹ 72 Fed. Reg. 17688 (Apr. 9, 2007).

² 72 Fed. Reg. 65396

process referred to as the Chemical Security Assessment Tool (“CSAT”). The CSAT process includes: (1) a user registration; (2) a screening report referred to as “Top Screen;” (3) a Security Vulnerability Assessment; and, (4) a Site Security Plan.

Entry into the process begins with the facility review of the listed chemicals of interest on Appendix A. Any facility that possesses or plans to possess the quantity of a listed chemical substance in excess of the Screening Threshold Quantity (“STQ”) must proceed through the CSAT process by submitting a Top Screen analysis. The Top Screen analysis must contain information from the chemical facility addressing potential consequences of, or vulnerabilities to, a terrorist attack or incident.

Specifically, the Top Screen seeks information relating to: (1) the specific nature of the business or activities conducted at the facility; (2) the names, nature, and conditions of storage of chemicals; (3) quantities, volumes, properties, major uses, and other pertinent information about specific chemicals; (4) information concerning facility security, safety, and emergency response practices; and, (5) information pertaining to incidents, history, funding, or other matters bearing on the effectiveness of security, safety and emergency response programs. Failure to submit a Top Screen analysis will result in a facility being classified as a presumptively high risk facility.

Following submission of the Top Screen analysis, the Department will place individual facilities in various tiers of risk running from Tier 1 (highest risk) through Tier

4 (lowest risk). The Top Screen analysis is due January 19, 2008 or 60 days after a facility acquires any Appendix A chemical in excess of its applicable STQ. Following notification by the Department of a facility's status (Tier), the facility must then submit its Security Vulnerability Assessment ("SVA") within 90 days, and its Site Security Plan within 120 days. Facilities included within Tiers 1 or 2 must complete a new Top Screen analysis within two years following Department approval of the Site Security Plan. Facilities in Tiers 3 or 4 must submit a new Top Screen Analysis within three years following Department approval of the Site Security Plan. In addition, new analyses are required any time a facility materially modifies its operations or its site.

A. Security Vulnerability Assessment

The SVA submission must address five specific areas:

1. **Asset Characterization:** This includes a review of the critical assets at the facility, identification of hazards and consequences of concern for the facility and the surrounding assets related to an incident. The Asset Characterization also must include a summary of the infrastructure and the layers of protection provided by the facility.
2. **Threat Assessment:** The SVA must include a review of internal and external threats and internally-assisted threats.
3. **Security Vulnerability Analysis:** This analysis reviews the specific vulnerability of the facility to identified potential threats, the availability of countermeasures and the level of effectiveness of the countermeasures in reducing the

vulnerabilities and for meeting the applicable risk-based performance standards.

4. **Risk Assessment:** The risk assessment includes an analysis of the likelihood of the success of a terrorist attack and the effect of such an attack on critical assets at the facility.
5. **Countermeasures Analysis:** This analysis reviews strategies to reduce probability of a successful attack, strategies to enhance risk reductions and the reliability and feasibility of countermeasures and mitigation measures.

B. Site Security Plans

Following notification by the Department, facilities may be required to submit individual Site Security Plans to address specific risk-based performance standards. The performance standards will vary by Tier. Site Security Plans must address each vulnerability identified in the Security Vulnerability Analysis with appropriate security measures. The plans must also identify and explain the security measures appropriate to address each risk-based performance standard and each potential mode of terrorist attack (land, water, air). In addition, the SSP must contain any additional information requested by the Department.

C. Risk-Based Performance Standards

The regulation contemplates that DHS will issue specific guidance for each applicable Tier of facility risk in the form of Risk-Based Performance Standards. There are a number of standards that are described in the regulation. These include:

1. Restrictions for area perimeter (security and monitoring)

2. Securing site assets
3. Screening and controlling access of individuals and vehicles (including identification checks)
4. Deter, detect and delay. This includes ensuring visible security, barriers and barricades, hardening applicable targets, conducting counter-surveillance, screening of targets and coordination of response planning
5. Shipping receipt and storage
6. Theft and diversion
7. Sabotage
8. Cyber security
9. Response planning
10. Monitoring effectiveness of communications and warning systems
11. Training of personnel
12. Personnel surety including background checks and appropriate credentials
13. Elevated threat procedures. This includes stepping up measures when the risk threat level has been elevated
14. Site-specific threats
15. Reporting of incidents
16. Organizational controls
17. Recordkeeping

The regulation provides flexibility for facilities to submit an Alternative Security Program (“ASP”), subject to review by the Department. Facilities in Tier 4 may use

the ASP in lieu of the SVA *and* the SSP. Facilities in Tiers 1, 2 and 3 may use an ASP in lieu of the SSP, but must submit the SVA.

DHS will review all Security Vulnerability Assessments and will provide a list of deficiencies and a date for resubmittal. Similarly, the Department will review each Site Security Plan through a two-step process. Step I includes review of the paper submission. If the paper submission is deemed adequate, a Letter of Authorization will follow. Facilities that are required to submit a Site Security Plan but fail to have such a plan authorized by the Department are subject to financial penalties and other sanctions. Step II is a physical inspection of each facility to ensure that the appropriate control measures are in place.

IMPLEMENTATION

The Assistant Secretary of DHS is authorized to issue orders as necessary to carry out his responsibilities under the regulation. Notably, the statute grants considerable discretion to the Assistant Secretary and limits review of his actions. Specifically, there is no right to appeal determinations as to the characterization of a facility as a “high risk” facility. However, the regulations create a process for neutral adjudications of orders or findings made by the Assistant Secretary. There is no further right of appeal from the findings of the adjudicator.

D. Final Appendix A

The interim final rule listed several chemicals with Screening Threshold Quantities (“STQs”) of “any amount.” Under this approach, *de minimis* amounts of a chemical, which would pose no reasonable national security threat, could cause a facility to be classified as a “chemical facility” subject to the provisions of the regulation. Due, in part, to comments submitted by Kelley Drye & Warren and other

industry commenters, DHS recognized that the Department's hasty drafting of the interim final rule would produce a definition of a "chemical facility" which would encompass such a wide universe of facilities that it would place an unnecessary burden on many businesses while putting a tremendous resources demand on DHS. Consistent with industry's comments, DHS eliminated all STQs of "any amount." Along with eliminating each of the "any amount" STQs, DHS, in response to comments, also increased the STQs for several chemicals which are prevalent at various Kelley Drye client industries, including:

1. Acetylene – Assigned an STQ of 7,500 pounds in the interim final rule and was raised to 10,000 pounds
2. Propane – Assigned an STQ of 7,500 pounds in the interim final rule and was raised to 60,000 pounds
3. Chlorine – Assigned an STQ of 1,875 pounds in the interim final rule and was raised to 2,500 pounds for releasable quantities and 500 pounds for containers of chlorine (of 9.77 percent concentration or higher) capable of theft or transport³
4. Hydrogen – Assigned an STQ of 7,500 pounds in the interim final rule and was raised to 10,000 pounds
5. Hydrogen Peroxide – Solutions of 30 percent or greater were assigned an STQ of 2,000 pounds in the interim final rule. The final rule raised the concentration level to 35 percent but lowered the STQ to 400 for containers capable of theft or transport

Those chemicals which have separate STQs for theft/diversion only count toward the STQ if the chemicals are in "transportation packaging." A transportation package is defined as a receptacle and any other components or

³ Each chemical in Appendix A presents at least one security issue (release, theft/diversion, or sabotage/contamination). Where there are multiple issues with a chemical, a facility must complete a Top-Screen if it meets or exceeds an STQ for any of the applicable security issues.

materials necessary for the receptacle to perform its containment function in conformance with the minimum packing requirements of the Department of Transportation's hazardous materials regulations. These include cylinders, bulk bags, bottles inside or outside of a box, cargo tanks, and tank cars. The packages do not count toward the STQ if they are "in transportation." In order to be classified as "in transportation," the transportation package must be attached to its means of motive power (locomotive engine or truck).

DHS addressed concerns raised by Kelley Drye that regulating mixtures that contain small amounts of a chemical would increase compliance burdens, but present little risk in the hands of a terrorist. For many chemicals, the final rule provides a concentration threshold. Only mixtures which equal or exceed the concentration threshold would be counted toward the STQ, and only that portion of that mixture which is the chemical of concern should be counted toward the STQ.

To address the industry's comments regarding the burden of having small amounts of laboratory chemicals trigger the Top Screen analysis, the Department subcategorized each chemical of concern by identifying one or more security issues associated with that chemical. The subcategories are: (1) Release – Toxic; (2) Release – Flammables; (3) Release – Explosives; (4) Theft – Chemical Weapon/Chemical Weapon Precursor; (5) Theft – Weapon of Mass Effect; (6) Theft – Explosives/Improvised Explosives Device Precursor; and, (7) Sabotage/Contamination. Facilities are not required to count Appendix A chemicals used in a laboratory if they are classified as "release-toxic," "release-explosive," or "release-flammable" and if they are supervised by a "technically qualified person" as defined in 40 C.F.R. § 720.3.

CONCLUSION

Even with DHS's revisions to the Appendix A list, the new regulation will likely require a significant number of industrial facilities to submit a Top Screen. Because many of these facilities present relatively low levels of risk, many facilities may not be subject to requirements beyond the Top Screen submissions. Other higher-risk facilities will be subject to the full reach of the DHS regulations.

We would be happy to provide an analysis of a client facility's chemical inventory to determine how the final rule will impact the facility, and further, work with your company to prepare the requisite reports.

KELLEY DRYE COLLIER SHANNON

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activities by federal regulatory agencies, including the U.S. Environmental Protection Agency, the Occupational Safety and Health Administration, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

FOR MORE INFORMATION

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